

No. 75800-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition  
of  
RONALD A. HALL,  
Petitioner.

PETITION FOR RELIEF FROM PERSONAL RESTRAINT IMPOSED  
PURSUANT TO JUDGMENT AND SENTENCE ENTERED IN THE SUPERIOR  
COURT OF THE STATE OF WASHINGTON IN AND FOR PIERCE COUNTY

Superior Court Cause No. 96-1-00042-8

The Honorable Bruce W. Cohoe, Judge

PETITIONER'S OPENING BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES . . . . .	.ii
I. GROUND FOR RELIEF . . . . .	1
II. ISSUES PERTAINING TO GROUND FOR RELIEF . . . . .	1
III. STATEMENT OF THE CASE . . . . .	3
IV. STANDARD OF REVIEW . . . . .	6
V. ARGUMENT . . . . .	7
A. PETITIONER'S AGGRAVATED EXCEPTIONAL SENTENCE VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. . . . .	.7
B. <u>BLAKELY</u> APPLIES RETROACTIVELY TO PETITIONER'S SENTENCE BECAUSE HIS CASE WAS NOT FINAL ON THE DAY THAT DECISION WAS PUBLISHED. . . . .	.13
C. THIS PERSONAL RESTRAINT PETITION IS NOT IMPERMISSIBLY SUCCESSIVE AND MAY BE CONSIDERED ON ITS MERITS. . . . .	.15
D. PETITIONER'S EXCEPTIONAL SENTENCE MUST BE VACATED AND HIS CASE REMANDED FOR RESENTENCING WITHIN THE STANDARD RANGE. . . . .	17
VI. CONCLUSION . . . . .	20
APPENDIX A: Judgment and Sentence and Findings of Fact and Conclusions of Law for Exceptional Sentence.	
APPENDIX B: Unpublished Opinions and Orders from Direct Appeals.	
APPENDIX C: Unpublished Orders from Previous Personal Restraint Petitions.	

TABLE OF AUTHORITIES

Page

**Cases**

Apprendi v. New Jersey,  
530 U.S. 466, 120 S.Ct. 2348,  
147 L.Ed.2d 435 (2000) . . . . .passim

Blakely v. Washington,  
542 U.S. ---, 124 S.Ct. ---, 158 L.Ed.2d ---,  
Slip Op. No. 02-1632 (June 24, 2004) . . . . .passim

City of Redmond v. Moore,  
--- Wn.2d ---, 91 P.3d 875 (2004) . . . . .9

Griffith v. Kentucky,  
479 U.S. 314, 107 S.Ct. 708,  
93 L.Ed.2d 649 (1987) . . . . .13-15

Harris v. United States,  
536 U.S. 545, 122 S.Ct. 2406,  
153 L.Ed.2d 524 (2002) . . . . .9-10

In re Goodwin,  
146 Wn.2d 861, 50 P.3d 618 (2002) . . . . .17

In re Grasso,  
151 Wn.2d 1, 84 P.3d 859 (2004) . . . . .7

In re Greening,  
141 Wn.2d 687, 9 P.3d 206 (2000) . . . . .16-17

In re Johnson,  
131 Wn.2d 558, 933 P.2d 1019 (1997) . . . . .16-17

In re Perkins,  
143 Wn.2d 261, 19 P.3d 1027 (2001) . . . . .15

In re St. Pierre,  
118 Wn.2d 321, 823 P.2d 492 (1992) . . . . .13-14

McMillan v. Pennsylvania,  
477 U.S. 79, 106 S.Ct. 2411,  
91 L.Ed.2d 67 (1986) . . . . .11

O'Dell v. Netherland,  
521 U.S. 151, 117 S.Ct. 1969,  
138 L.Ed.2d 351 (1997) . . . . .14

Ring v. Arizona,  
536 U.S. 584, 122 S.Ct. 2428,  
153 L.Ed.2d 556 (2002) . . . . .passim

TABLE OF AUTHORITIES (CONT'D)

Page

Cases (Cont'd)

Sattazahn v. Pennsylvania,  
537 U.S. 101, 123 S.Ct. 732,  
154 L.Ed.2d 588 (2003) . . . . . 10

Schriro v. Summerlin,  
542 U.S. ---, 124 S.Ct. ---, 158 L.Ed.2d ---,  
Slip Op. No. 03-526 (June 24, 2004) . . . . . 14

State v. Ammons,  
105 Wn.2d 175, 713 P.2d 719,  
718 P.2d 796 (1986) . . . . . 19

State v. Barnett,  
139 Wn.2d 462, 987 P.2d 626 (1999) . . . . . 19

State v. Gore,  
143 Wn.2d 288, 21 P.3d 262 (2001) . . . . . passim

State v. Gould,  
23 P.3d 801 (Kan. 2001) . . . . . 9, 17

State v. Hanson,  
--- Wn.2d ---, 91 P.3d 888 (2004) . . . . . 14

State v. Kessler,  
73 P.3d 761 (Kan. 2003) . . . . . 17-19

State v. Kitchen,  
110 Wn.2d 403, 756 P.2d 105 (1988) . . . . . 7, 17

State v. Monday,  
85 Wn.2d 906, 540 P.2d 416 (1975) . . . . . 19

State v. Pruitt,  
60 P.3d 931 (Kan. 2003) . . . . . 18

State v. Sanchez,  
69 Wn. App. 195, 848 P.2d 735,  
rev. denied, 121 Wn.2d 1031 (1993) . . . . . 8

State v. Santos-Garza,  
72 P.3d 560 (Kan. 2003) . . . . . 18

State v. Thomas,  
150 Wn.2d 821, 83 P.3d 970 (2004) . . . . . 17

**TABLE OF AUTHORITIES (CONT'D)**

**Page**

**Cases (Cont'd)**

Stogner v. California,  
 539 U.S. 607, 123 S.Ct. 2446,  
 156 L.Ed.2d 544 (2003) . . . . . 19

Williams v. New York,  
 337 U.S. 241, 69 S.Ct. 1079,  
 93 L.Ed. 1337 (1949) . . . . . 11

**Constitutional Provisions**

U.S. Const. amend. 6 . . . . . 1, 7, 9, 12

U.S. Const. amend. 14 . . . . . 1, 7, 9, 12

**Statutes**

Laws of 2000, ch. 28, §§ 1-47 . . . . . 7

Laws of 2001, ch. 10, § 1 . . . . . 7

Laws of 2001, ch. 10, § 6 . . . . . 7

RCW 9.94A.015 . . . . . 7

RCW 9.94A.505(2)(a)(i) . . . . . 7

RCW 9.94A.505(5) . . . . . 8

RCW 9.94A.530(1) . . . . . 7

RCW 9.94A.530(2) . . . . . 8

RCW 9.94A.535 . . . . . 8

RCW 9.94A.535(2)(a)-(m) . . . . . 8

RCW 9A.36.011(1)(a) and (c) . . . . . 13

RCW 10.73.140 . . . . . 15

**Court Rules**

RAP 16.4(d) . . . . . 2, 15-16

RAP 16.5 . . . . . 15

## I. GROUND FOR RELIEF

Petitioner Ronald A. Hall's aggravated exceptional sentence violates the Sixth and Fourteenth Amendments to the United States Constitution because the facts supporting that sentence were not found by a jury beyond a reasonable doubt.

## II. ISSUES PERTAINING TO GROUND FOR RELIEF

1. In Blakely v. Washington, infra, the United States Supreme Court determined that the provisions of the Sentencing Reform Act of 1981 (chapter 9.94A RCW) which authorizes a judge to find facts by a preponderance of the evidence to support an exceptional sentence above the standard sentencing range for the offense of conviction violate the Sixth and Fourteenth Amendments to the United States Constitution. The Court held that such facts must be found by a jury beyond a reasonable doubt. Does petitioner's aggravated exceptional sentence violate the federal constitution because it was imposed under the statutory provisions at issue in Blakely?

2. New rules of criminal procedure based in the federal constitution always apply retroactively to cases on direct appeal or not yet final at the time of the decision. Petitioner's direct appeal of his exceptional sentence did not become final until the time for filing a petition for writ of certiorari expired on August 2, 2004. Blakely was decided on June 24, 2004. Does the Blakely decision apply retroactively to petitioner's sentence because

his case was not final at the time that decision was published?

3. RAP 16.4(d) prohibits the filing of successive personal restraint petitions raising the same ground for relief as a prior application unless the petitioner can show good cause why the ground should be reconsidered. A change in controlling law constitutes a showing of good cause under RAP 16.4(d). Petitioner previously filed a personal restraint petition challenging his sentence on the same ground raised herein. The petition was denied as meritless under this court's decision in State v. Gore, infra. Blakely overruled Gore. Does that material, intervening change in the law constitute good cause for consideration of this successive petition under RAP 16.4(d)?

4. In Washington, trial courts may impose only those sentences authorized by statute. The statutory procedure for the imposition of aggravated exceptional sentences is unconstitutional and therefore unenforcable because it permits judges to find the facts in support of such sentences by a preponderance of the evidence. Washington law did not authorize trial courts to impanel juries to find the facts in support of such sentences at the time of petitioner's offense. Must petitioner's exceptional sentence be vacated and his case remanded for resentencing within the standard range, since that is the only lawful sentence authorized by statute at the time his crime was committed?

### III. STATEMENT OF THE CASE

The factual and procedural history of this case is somewhat complex. The Court of Appeals neatly summarized the relevant facts from the trial, sentencing hearings, and direct appeals as follows:

In 1996, a jury convicted Hall of first degree assault while armed with a deadly weapon. The court imposed an exceptional sentence of 390 months in prison based on the presence of three aggravating factors: deliberate cruelty, multiple injuries, and severity of the injuries. State v. Hall, noted at 96 Wn. App. 1051, slip op. at 4 (1999), review denied, 139 Wn.2d 1019 (2000). The trial court determined that Hall's offender score was 4 with a standard range of 129 to 171 months. Clerk's Papers (CP) at 3; State v. Hall, noted at 111 Wn. App. 1041, slip op. at 1 (2002). We affirmed the conviction, determined that one of Hall's prior convictions washed out, struck the aggravating factor of especially severe injuries, and struck the deadly weapon enhancement. Hall, 96 Wn. App. 1051 (1999). We then remanded for a hearing to determine Hall's correct offender score and to resentence him using the correct standard range, the remaining two aggravating factors, and no deadly weapon enhancement. As our opinion stated, "We must remand for resentencing in accordance with the law, leaving the length of the sentence to the trial court's discretion." Hall, slip op. at 12 (1999).

At the resentencing hearing on August 4, 2000, the trial court agreed with the parties that Hall's offender score was 2, resulting in a standard range of 111 to 147 months. CP at 4, Hall, slip op. at 2 (2002). The court imposed the same exceptional sentence of 366 months (original sentence without the deadly weapon enhancement). CP at 4, Hall, slip op. at 2 (2002). The trial court cited the aggravating factors of deliberate cruelty and multiple injuries in imposing the exceptional sentence, but added in a separate finding that "[b]ased on the defendant's conduct in this case and his criminal history, the appropriate length sentence for the defendant is 366 months in prison." CP at 6, Hall, slip op. at 4 (2002).

On appeal, we determined that Hall's offender score was zero and again remanded because we could not determine whether the trial court would have imposed the same sentence regardless of the miscalculated offender score. CP at 3, Hall, 111 Wn. App. 1041 (2002). "Because the trial court included both the aggravating factors and Hall's criminal history (i.e., his offender score) in its findings, we cannot tell whether the trial court imposed the exceptional sentence, at least in part, on its determination of the offender score. Therefore, the appropriate remedy is vacation of the sentence and remand for re-sentencing using the correct offender score." CP at 6, Hall, slip op. at 4 (2002). In so ruling, we rejected Hall's contention that an automatic reduction of his exceptional sentence was required by the reduction of his offender score and standard range sentence. CP at 7-8, Hall, slip op. at 5-6 (2002).

At the second resentencing hearing on September 13, 2002, the trial court imposed the same exceptional sentence of 366 months based on the aggravating factors of deliberate cruelty and multiple injuries, noting that we had upheld both factors on appeal. The trial court observed that it did not intend to base Hall's sentence in any particular way on his offender score.

Appendix B, Unpub. Opinion at 1-3, State v. Hall, No. 29384-6-II (Sept. 16, 2003) (emphasis in original).<sup>1</sup>

The Court of Appeals affirmed Hall's exceptional sentence following the third sentencing hearing, holding that the trial court had not abused its discretion or violated due process by imposing the same sentence on remand. Hall, No. 29384-6-II, Unpub. Op. at 4-7. The court also

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1. All of the relevant opinions and court orders from Hall's three direct appeals are attached hereto as Appendix B and are arranged in chronological order by case number. Hall's current Judgment and Sentence and the trial court's Findings of Fact and Conclusions of Law for Exceptional Sentence are attached hereto as Appendix A.

refused to consider Hall's challenges to the legal and factual sufficiency of the aggravating factors relied upon by the trial court. Id. at 7-8. This court denied discretionary review of the decision on May 4, 2004. Appendix B, Order, Hall, No. 74623-1 (May 4, 2004). The Court of Appeals issued a mandate on May 19, 2004. Appendix B, Mandate, Hall, No. 29384-6-II (May 19, 2004).

In addition to the appeals discussed above, Hall has previously filed three personal restraint petitions. See Appendix C.<sup>2</sup> Hall's first petition asserted ineffective assistance of trial and appellate counsel and prosecutorial misconduct claims. The petition was dismissed on February 14, 2002. Appendix C, Order Dismissing Petition, In re Hall, No. 27794-8-II (Feb. 14, 2002). The Supreme Court Commissioner denied discretionary review on May 21, 2002. Appendix C, Ruling Denying Review, Hall, 72306-1 (May 21, 2002). Hall's motion to modify that ruling was denied on September 4, 2002. Appendix C, Order, Hall, No. 72306-1 (Sept. 4, 2002).

Hall's second petition challenged both his conviction and sentence on various grounds, none of which are raised in the present petition. The petition was dismissed on January 23, 2004. Appendix C, Order Dismissing Petition,

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2. All of the relevant court orders from Hall's three previous personal restraint petitions are attached hereto as Appendix C and are arranged in chronological order by case number.

In re Hall, No. 30871-1-II (Jan. 23, 2004). The Supreme Court Commissioner denied discretionary review on April 20, 2004. Appendix C, Ruling Denying Review, Hall, No. 75140-4 (April 20, 2004). Hall's motion to modify that ruling was denied on June 2, 2004. Appendix C, Order, Hall, No. 75140-4 (June 2, 2004).

Hall's third petition, filed on his behalf by attorney Jean Schiedler-Brown, raised the same ground for relief as the present application.<sup>3</sup> Citing this court's decision in State v. Gore, 143 Wn.2d 288, 21 P.3d 262 (2001), the Court of Appeals dismissed the petition on March 26, 2004. Appendix C, Order Dismissing Petition, In re Hall, et al., No. 28197-0-II (March 26, 2004). Although a motion for discretionary review of that decision was filed on Hall's behalf, he subsequently filed a motion to withdraw it so he could proceed pro se in the instant petition. That motion has yet to be ruled on at the writing of this brief. Appendix C, Clerk's Letter, Hall, No. 75401-2 (July 30, 2004).

#### IV. STANDARD OF REVIEW

In order to obtain relief via a personal restraint petition, the petitioner "must first overcome statutory

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3. The petition is technically Hall's second petition, based on the date on which it was filed. Consideration of the petition was stayed pending disposition of a related Division I case and, thus, it was not ruled on until after Hall's other petitions were dismissed by the Court of Appeals. Because the petition was the last to be dismissed, it will be referred to as Hall's "third" petition throughout this brief.

and rule based procedural bars." In re Grasso, 151 Wn.2d 1, 10, 84 P.3d 859 (2004) (citing RCW 10.73.090, .140; RAP 16.4(d)). "Then, in order to successfully argue a claim . . . [the petitioner] must demonstrate by a preponderance of the evidence either a constitutional error that worked to his actual and substantial prejudice, or a non-constitutional error that constitutes a fundamental defect inherently resulting in a complete miscarriage of justice." Grasso, 151 Wn.2d at 10 (citations omitted). However, "[t]hose types of constitutional errors which can never be considered harmless error on direct appeal will also be presumed prejudicial for purposes of personal restraint petitions." State v. Kitchen, 110 Wn.2d 403, 413, 756 P.2d 105 (1988) (citations omitted).

## V. ARGUMENT

### A. PETITIONER'S AGGRAVATED EXCEPTIONAL SENTENCE VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

When a defendant is convicted of a felony in Washington State, the Sentencing Reform Act of 1981 ("SRA") presumes that the court will impose a standard range sentence. RCW 9.94A.505(2)(a)(i); see also RCW 9.94A.530(1) (defining method for calculating standard sentencing range).<sup>4</sup> However, "[t]he court may impose a sentence outside the standard

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4. The SRA was amended by Laws of 2000, ch. 28, §§ 1-47, and recodified by Laws of 2001, ch. 10, § 6. These amendments and recodifications did not work a substantive change on the SRA. See RCW 9.94A.015; Laws of 2001, ch. 10, § 1. This brief therefore cites to the current version of the SRA.

range for an offense if it finds . . . that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535; Gore, 143 Wn.2d at 315. The court may not, under any circumstance, impose a sentence that exceeds the statutory maximum sentence for the crime of conviction. RCW 9.94A.505(5); Gore, 143 Wn.2d at 314.

The SRA lists "aggravating factors" that the court may consider in determining whether substantial and compelling reasons exist for the imposition of an exceptional sentence above the standard range. See RCW 9.94A.535(2)(a)-(m). These factors are "illustrative only and are not intended to be exclusive reasons for exceptional sentences." RCW 9.94A.535. Nevertheless, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense." Gore, 143 Wn.2d at 315-16 (citations omitted). "[A]ggravating circumstances need only be established by [a] preponderance of the evidence." State v. Sanchez, 69 Wn. App. 195, 203, 848 P.2d 735, rev. denied, 121 Wn.2d 1031 (1993); see also RCW 9.94A.530(2).

In light of the United States Supreme Court's recent decisions in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and Blakely v. Washington, 542 U.S. ---, 124 S.Ct. ---, 158 L.Ed.2d ---, Slip Op. No. 02-1632 (June 24, 2004), it is beyond

peradventure that the SRA procedure for the imposition of exceptional sentences above the standard sentencing range violates the Sixth and Fourteenth Amendments to the United States Constitution. The statutory provisions which authorize that procedure must therefore be declared facially unconstitutional and unenforceable. Cf. State v. Gould, 23 P.3d 801, 809-14 (Kan. 2001) (declaring Kansas exceptional sentencing scheme similar to SRA's unconstitutional on its face and unenforceable under Apprendi); see also City of Redmond v. Moore, --- Wn.2d ---, 91 P.3d 875, 878 (2004) ("The remedy for holding a statute facially unconstitutional is to render the statute totally inoperative." (citation omitted)).

In Apprendi v. New Jersey, the Supreme Court held that the due process and jury trial guarantees of the federal constitution dictate that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. This holding conforms to "what the Framers had in mind when they spoke of 'crimes' and 'criminal prosecutions' in the Fifth and Sixth Amendments[.]" Harris v. United States, 536 U.S. 545, 563, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002). Thus, "'[a]ny fact that . . . exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone' . . . would have been, under

prevailing historical practice, an element of an aggravated offense." Harris, 536 U.S. at 563 (citing Apprendi, 530 U.S. at 479-81, 483). Such elements, of course, must be submitted to a jury and proved beyond a reasonable doubt. See Apprendi, 530 U.S. at 483-84, 490.

The Court reaffirmed its commitment to Apprendi in Ring v. Arizona, in which it invalidated Arizona's method of finding "aggravating factors" for imposition of a death sentence because those factors were found by a judge, rather than by a jury. The Court made clear that any fact, other than a prior conviction, that a state deems necessary to increase a defendant's punishment beyond the "maximum he would receive if punished according to the facts reflected in the jury verdict alone" must be submitted to a jury and proved beyond a reasonable doubt. Ring, 536 U.S. at 589 (quoting Apprendi, 530 U.S. at 483).

The Court also made clear that the label attached to the factual finding is irrelevant. Rather,

The dispositive question [under Apprendi] "is one not of form, but of effect." If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt.

Ring, 536 U.S. at 602 (quoting Apprendi, 530 U.S. at 494); see also Sattazahn v. Pennsylvania, 537 U.S. 101, 111, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003) ("Put simply, if the existence of any fact (other than a prior conviction) increases the punishment that may be imposed on a defendant, that fact--no matter how the State labels it--constitutes

an element, and must be found by a jury beyond a reasonable doubt." (citation omitted)).

In Blakely v. Washington, the Court reviewed the SRA procedure for the imposition of aggravated exceptional sentences and, based on Apprendi and Ring, declared that procedure unconstitutional. Blakely, Slip Op. at 1-18. Although this court had upheld upward departures under the SRA because those sentences never exceed the statutory maximum for the offense of conviction (Gore, 143 Wn.2d at 314), the Supreme Court rejected this approach. As explained by the Court, both Apprendi and Ring held that "the defendants' constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding." Blakely, Slip Op. at 6-7 (citations omitted). Thus, "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id. at 7 (emphasis omitted).

The Court also distinguished McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), the mandatory minimum case, and Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed.2d 1337 (1949), which involved an indeterminate sentencing regime that allowed but did not compel a judge to rely on facts outside the trial record in deciding whether to impose the death penalty, explaining that "neither case involved a sentence greater than what

state law authorized on the basis of the verdict alone." Blakely, Slip Op. at 8. Lastly, the Court found immaterial the distinction that in Apprendi and Ring the statutory grounds for departure were exclusive, whereas under the SRA scheme the grounds are illustrative, because in all those systems the "verdict alone does not authorize the sentence." Id. at 9.

The Court therefore declared the SRA procedure for the imposition of aggravated exceptional sentences a violation of the Sixth and Fourteenth Amendments, reasoning:

Our commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary . . . Apprendi carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

Blakely, Slip Op. at 9-10 (citations omitted). The SRA's provisions for the imposition of exceptional sentences beyond the standard range violates these fundamental tenets of constitutional law because they do not afford every defendant "the right to insist that the prosecutor prove [beyond a reasonable doubt] to a jury all facts essential to the punishment." Id. at 17.

Like the defendant in Blakely, Hall received an exceptional sentence based on the trial judge's factual findings, made under a preponderance of the evidence

standard, that he manifested deliberate cruelty toward and inflicted multiple injuries upon the victim. See Appendix A, Findings of Fact and Conclusions of Law for Exceptional Sentence at 3-4. These findings, of course, were not encompassed within the jury's guilty verdict. See RCW 9A.36.011(1)(a) and (c) (setting forth elements jury had to find to convict Hall of first degree assault). "When a judge inflicts punishment that the jury's verdict alone does not allow, . . . the judge exceeds his proper authority." Blakely, Slip Op. at 7 (citation omitted). Thus, Hall's exceptional sentence must be vacated and the case remanded for resentencing within the standard range. See Section V(D), infra.

**B. BLAKELY APPLIES RETROACTIVELY TO PETITIONER'S SENTENCE BECAUSE HIS CASE WAS NOT FINAL ON THE DAY THAT DECISION WAS PUBLISHED.**

Although "[r]etroactivity analysis has been marked by erratic development since the United States Supreme Court announced the doctrine in 1965[,]" this court has nonetheless "attempted from the outset to stay in step with federal retroactivity analysis." In re St. Pierre, 118 Wn.2d 321, 324, 823 P.2d 492 (1992) (citations omitted). The retroactivity doctrine currently in effect may be "neatly summarized" as follows:

1. A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break from the past. [Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)].

2. A new rule will not be given retroactive application to cases on collateral review except where either : (a) the new rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe, or (b) the rule requires the observance of procedures implicit in the concept of ordered liberty. [Teague v. Lane, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion)].

St. Pierre, 118 Wn.2d at 326; see also Schriro v. Summerlin, 542 U.S. ---, 124 S.Ct. ---, 158 L.Ed.2d ---, Slip Op. No. 03-526 at 3-4 (June 24, 2004); State v. Hanson, --- Wn.2d ---, 91 P.3d 888, 891 (2004).

"The critical issue in apply the current retroactivity analysis is whether the case was final when the new rule was announced." St. Pierre, 118 Wn.2d at 327; see also O'Dell v. Netherland, 521 U.S. 151, 156, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997) (court conducting retroactivity analysis must first determine "date on which defendant's conviction became final"). A case becomes final when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." St. Pierre, 118 Wn.2d at 327 (quoting Griffith, 479 U.S. at 321 n.6) (emphasis added).

This court denied Hall's Petition for Review of the Court of Appeals decision affirming his exceptional sentence on May 4, 2004. See Appendix B, Order, Hall, No. 74623-1. Hall had 90 days to seek certiorari review in the United States Supreme Court, or until August 2, 2004. See United States Supreme Court Rule 13.1. Blakely was decided on June

24, 2004, 39 days before Hall's exceptional sentence became final. See Blakely, Slip Op. at 1. That decision therefore applies retroactively to him. Griffith, 479 U.S. at 328.

**C. THIS PERSONAL RESTRAINT PETITION IS NOT IMPERMISSIBLY SUCCESSIVE AND MAY BE CONSIDERED ON ITS MERITS.**

This is Hall's fourth personal restraint petition. Hall's first two petitions raised grounds different than the ground presented herein, but his third petition raised the identical ground for relief as the instant petition. See Appendix C. These previous petitions raise the question of whether this fourth petition is impermissibly successive. See RCW 10.73.140; RAP 16.4(d). For the reasons below, that question should be answered in the negative.

RCW 10.73.140 provides in pertinent part: "If a person has perviously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition." See also In re Perkins, 143 Wn.2d 261, 264, 19 P.3d 1027 (2001). While this statute may prevent the Court of Appeals from considering Hall's successive petition, "RCW 10.73.140 does not apply to the Supreme Court." Perkins, 143 Wn.2d at 265 (citations omitted).<sup>5</sup> RCW 10.73.140

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5. Because RCW 10.73.140 deprives the Court of Appeals of jurisdiction to consider this successive petition, it may not be transferred to that court under RAP 16.5. See Perkins, 143 Wn.2d at 266.

therefore does not bar consideration of this petition. Cf. In re Greening, 141 Wn.2d 687, 698, 9 P.3d 206 (2000).

RAP 16.4(d) provides in pertinent part that "[n]o more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown." See also In re Johnson, 131 Wn.2d 558, 564, 933 P.2d 1019 (1997). "[T]he phrase 'similar relief' relates to the grounds for the relief, rather than the type of relief sought." Johnson, 131 Wn.2d at 564 (citations omitted). "Thus, RAP 16.4(d) will ordinarily bar a petitioner from filing successive petitions seeking similar relief on the same grounds, in the absence of a showing of good cause." Id. at 567.

Hall's first two petitions did not raise the same ground as the present petition, and therefore do not implicate RAP 16.4(d). Hall's third petition, however, did raise the same ground for relief as the present application. See Appendix C. This petition is nevertheless exempt from RAP 16.4(d) because Hall can establish good cause.

A material, intervening change in the law constitutes good cause for consideration of a successive petition under RAP 16.4(d). See Johnson, 131 Wn.2d at 567 (citations omitted). Hall's previous challenge to his exceptional sentence was denied based on this court's decision in State v. Gore, 143 Wn.2d 288. See Appendix C, Order Dismissing Petitions at 5, Hall, et al., No. 28197-0-II. The Blakely decision "effectively overturned" Gore and therefore

constitutes a material, intervening change in the law. Greening, 141 Wn.2d at 697. This change in the law constitutes a showing of good cause for reconsideration of Hall's constitutional challenge to his exceptional sentence in this successive petition. Johnson, 131 Wn.2d at 567.

**D. PETITIONER'S EXCEPTIONAL SENTENCE MUST BE VACATED AND HIS CASE REMANDED FOR RESENTENCING WITHIN THE STANDARD RANGE.**

Apprendi-type errors, such as the one in this case, are not subject to harmless error review on direct appeal. See State v. Thomas, 150 Wn.2d 821, 847-50, 83 P.3d 970 (2004); Gould, 23 P.3d at 814. Such errors must likewise be presumed prejudicial on collateral review. Kitchen, 110 Wn.2d at 413; see also In re Goodwin, 146 Wn.2d 861, 868-69, 50 P.3d 618 (2002) (illegal sentence always entitles petitioner to relief on collateral review). This court must therefore vacate Hall's exceptional sentence and remand for resentencing. For the reasons below, the court should order Hall resentenced within the standard range.

In Gould, 23 P.3d at 809-14, responding to the United States Supreme Court's decision in Apprendi, the Kansas Supreme Court held that the Kansas statutory scheme for imposing exceptional sentences was unconstitutional on its face. Following the Gould decision, Gregory L. Kessler was found guilty of two counts of aggravated indecent liberties. See State v. Kessler, 73 P.3d 761, 765 (Kan. 2003). Following the verdict, the trial court crafted a procedure for the

imposition of an exceptional sentence. The court instructed the jury to consider whether the offense involved a fiduciary relationship between Kessler and the victim. Id. at 771. The court further instructed the jury that its verdict on this question must be unanimous, that the state had the burden of proof beyond a reasonable doubt, and also defined the meaning of fiduciary relationship. Id. The jury answered the question "yes," and the court imposed an exceptional sentence on one of the two indecent liberties counts. Id. at 765.

On appeal, Kessler contended that the trial court erred in imposing an exceptional sentence because it lacked statutory authority to do so under Gould. Kessler, 73 P.3d at 771. The state countered that the sentence should be upheld because the procedure used to impose it complied with Apprendi and Gould. Id. at 772. The Kansas Supreme Court flatly rejected this argument, holding as follows:

A [trial] court's authority to impose sentence is controlled by statute. Thus, where the statutory procedure for imposing [exceptional] sentences has been found unconstitutional, the [trial] court has no authority to impose such a sentence. This case is remanded to the [trial] court for resentencing on count one in accordance with this opinion.

Kessler, 73 P.3d at 772; see also State v. Pruitt, 60 P.3d 931, 933 (Kan. 2003) (vacating exceptional sentence and remanding for resentencing within standard range); State v. Santos-Garza, 72 P.3d 560, 564 (Kan. 2003) (same).

The holding in Kessler is consistent with this court's recognition that "[a] trial court may impose only a sentence which is authorized by statute." State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999) (citation omitted); see also State v. Ammons, 105 Wn.2d 175, 180-81, 713 P.2d 719, 718 P.2d 796 (1986) (establishing punishments for crimes is within the province of the Legislature, not the courts). Here, as in Kessler, there is no statutory mechanism in place that permits a trial court to impanel a jury to find facts in support of an exceptional sentence, and it would violate the constitutional doctrine of separation of powers to permit a trial court to craft such a procedure on remand. See State v. Monday, 85 Wn.2d 906, 909-10, 540 P.2d 416 (1975) ("[I]t is the function of the legislature and not of the judiciary to alter the sentencing process.").<sup>6</sup> Since the only statutorily authorized method for imposing exceptional sentences has been declared unconstitutional, Washington trial courts currently lack statutory authority to impose such sentences, meaning that Hall's case must be remanded for resentencing within the standard range. Kessler, 73 P.3d at 772.

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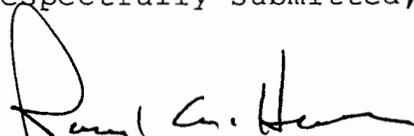
6. Should the Legislature amend the SRA to comply with the Supreme Court's holding in Blakely while this petition is pending, retroactive application of that amendment to Hall would likely violate the ex post facto clause of the federal constitution. See Stogner v. California, 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003) (holding that retroactive application of legislation extending statute of limitations for child sex abuse crimes violated ex post facto clause).

VI. CONCLUSION

Based upon the foregoing, Hall's personal restraint petition should be granted, his exceptional sentence should be vacated, and this case should be remanded for resentencing within the standard range.

DATED this   4   day of August, 2004.

Respectfully submitted,



\_\_\_\_\_  
RONALD A. HALL  
Petitioner, Pro Se

**APPENDIX A**

**Judgment and Sentence and  
Findings of Fact and Conclusions of Law  
for Exceptional Sentence**

**APPENDIX A**

**Judgment and Sentence and  
Findings of Fact and Conclusions of Law  
for Exceptional Sentence**

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8 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
9 IN AND FOR THE COUNTY OF PIERCE

10 STATE OF WASHINGTON,

11 Plaintiff,

12 vs.

13 RONALD ARMON HALL,

14 Defendant.

CAUSE NO.96-1-00042-8

JUDGMENT AND SENTENCE (JS)

Prison

15 DOB: 08/11/1947  
16 SID NO.: WA10014543

17 I. HEARING

18 1.1 A sentencing hearing in this case was originally held on July 8,  
19 1996. After remand from the Court of Appeals, a second sentencing  
20 hearing was held on August 4, 2000. After another remand from the Court  
21 of Appeals, this third sentencing hearing was held on

22 Sept. 13, 2002. The State was represented by John M. Neeb,  
23 Deputy Prosecuting Attorney, and the defendant was present and  
24 represented by his lawyer, Leslie Tolzin.

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27  
28 JUDGMENT AND SENTENCE (JS)  
(Felony)(6/2000)

1 of 10

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty by jury verdict entered May 7, 1996, of

Count No.: I  
 Crime: ASSAULT IN THE FIRST DEGREE, Charge Code: (E23/E24)  
 RCW: 9A.36.011(1)(a) and 9A.36.011(1)(c)  
 Date of Crime: January 1, 1996  
 Incident No.: 96-002-0046

A special verdict for use of a firearm was returned on Count I. THE COURT OF APPEALS REVERSED THAT PORTION OF THE JURY VERDICT.

The crime charged in Count(s) \_\_\_\_\_ involve(s) domestic violence.

Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400): NONE

Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): NONE

2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

Crime	Date of Sentence	Sentencing Court (County & State)	Date of Crime	Adult or Juv	Crime Type
TMVOP	08/16/65	LEWIS CO / WA	05/19/65	ADULT	NV
UPCS	01/29/79	LEWIS CO / WA	08/02/78	ADULT	NV
EXTORTION 1 (2x) <del>ADULT</del>	<u>09/22/81</u>	<u>LEWIS CO / WA</u>	<u>04/02/81</u>		
DISPLAY WEAPON	Unknown		12/17/89	ADULT	M
ASSAULT 4	Unknown		09/24/91	ADULT	GM
ASSAULT 4	Unknown		05/12/92	ADULT	GM

the court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW

JUDGMENT AND SENTENCE (JS)  
 (Felony)(6/2000)

9.94A.360): UPCS (1979) and EXTORTION 1 (2x) (1981) - BOTH SENTENCES WERE SERVED CONCURRENTLY PRIOR TO 1986

## 2.3 SENTENCING DATA:

Count	Offender Score	Serious Level	Standard Range (w/o enhancement)	Plus Enhancement*	Total Standard Range	Maximum Term
I	0	XII	93 - 123	N/A	93 - 123	LIFE/50,000

2.4 ~~XXX~~ EXCEPTIONAL SENTENCE: Substantial and compelling reasons exist which justify an exceptional sentence above the standard range for Count I. Findings of Fact and Conclusions of Law are filed separately. The Prosecuting Attorney recommended a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. 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 ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.142.

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [ ] as follows: NONE

## III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2 [ ] The Court DISMISSES Count(s) \_\_\_\_\_. [ ] The defendant is found NOT GUILTY of Count(s) \_\_\_\_\_.

JUDGMENT AND SENTENCE (JS)  
(Felony)(6/2000)

3 of 10

## IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court  
(Pierce County Clerk, 930 Tacoma Ave #110, Tacoma, WA  
98402):

\$ 9,012.14 Restitution to: DSHS - MEDICAL CASUALTY UNIT RE:  
KI120259 KRAPP  
P. O. BOX 45561  
OLYMPIA WA 98504-5561

\$ 100.00 Victim assessment RCW 7.68.035

\$ WAIVED Court costs

\$ 9,112.14 TOTAL RCW 9.94A.145

The Department of Corrections (DOC) may immediately issue a  
Notice of Payroll Deduction. RCW 9.94A.200010.

All payments shall be made in accordance with the policies of the  
clerk and on a schedule established by DOC, commencing  
immediately, unless the court specifically sets forth the rate  
here: Not less than \$ \_\_\_\_\_ per month commencing  
\_\_\_\_\_. RCW 9.94A.145.

In addition to the other costs imposed herein, the Court finds  
that the defendant has the means to pay for the cost of  
incarceration and is ordered to pay such costs at the statutory  
rate. RCW 9.94A.145.

The defendant shall pay the costs of services to collect unpaid  
legal financial obligations. RCW 36.18.190.

The financial obligations imposed in this judgment shall bear  
interest from the date of the judgment until payment in full, at  
the rate applicable to civil judgments. RCW 10.82.090. An award  
of costs on appeal against the defendant may be added to the  
total legal financial obligations. RCW 10.73.

4.2  HIV TESTING. The health Department or designee shall  
test and counsel the defendant for HIV as soon as  
possible and the defendant shall fully cooperate in the  
testing. RCW 70.24.340.

DNA TESTING. The defendant shall have a blood sample  
drawn for purposes of DNA identification analysis and  
the defendant shall fully cooperate in the testing.  
The appropriate agency, the county or DOC, shall be  
responsible for obtaining the sample prior to the  
defendant's release from confinement. RCW 43.43.754.

SEPARATE ORDER ATTACHED

JUDGMENT AND SENTENCE (JS)  
(Felony)(6/2000)

4 of 10

4.3 The defendant shall not have contact with \_\_\_\_\_ (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for \_\_\_\_\_ years (not to exceed the maximum statutory sentence).

[ ] Domestic Violence Protection Order or Antiharassment Order is filed with this Judgment and Sentence.

4.4 OTHER: \_\_\_\_\_

4.4(a) Bond is hereby exonerated.

4.5 CONFINEMENT OVER ONE YEAR: The defendant is sentenced as follows:

(a) CONFINEMENT: RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

366 months on Count No. I

Actual number of months of total confinement ordered is 366.

(b) CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.400. The sentence herein shall run consecutively to all felony sentences in other cause numbers for which the defendant is currently serving time.

Confinement shall commence immediately

(c) The defendant shall receive credit for 2430 days served (Date of arrest through September 12, 2002).

4.6 [XX] COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows:

24 MONTHS ON COUNT I

or for the period of earned release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.120 for community placement -- serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense.

While on community placement, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled

JUDGMENT AND SENTENCE (JS)  
(Felony)(6/2000)

substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement.

The defendant shall not consume any alcohol.

Defendant shall have no contact with: \_\_\_\_\_

Defendant shall remain  within  outside of a specified geographical boundary, to-wit: \_\_\_\_\_

The defendant shall participate in the following crime-related treatment or counseling services: \_\_\_\_\_

The defendant shall undergo an evaluation for treatment for  domestic violence  substance abuse  mental health  anger management and fully comply with all recommended treatment.

The defendant shall comply with crime-related prohibitions AS SET BY DEPARTMENT OF CORRECTIONS COMMUNITY CORRECTIONS OFFICER

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: \_\_\_\_\_

4.7  WORK ETHIC CAMP. DOES NOT APPLY.

4.8 OFF LIMITS ORDER (known drug trafficker) DOES NOT APPLY

V. NOTICES AND SIGNATURES

5.1. COLLATERAL ATTACK ON JUDGMENT. Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 LENGTH OF SUPERVISION. For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless

JUDGMENT AND SENTENCE (JS)  
(Felony)(6/2000)

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3 the court extends the criminal judgment an additional 10 years. For an  
4 offense committed on or after July 1, 2000, the court shall retain  
5 jurisdiction over the offender, for the purposes of the offender's  
6 compliance with payment of the legal financial obligations, until the  
7 obligation is completely satisfied, regardless of the statutory maximum  
8 for the crime. RCW 9.94A.145 and RCW 9.94A.120(13).

9 **5.3 NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered  
10 an immediate notice of payroll deduction in Section 4.1, you are  
11 notified that the Department of Corrections may issue a notice of  
12 payroll deduction without notice to you if you are more than 30 days  
13 past due in monthly payments in an amount equal to or greater than the  
14 amount payable for one month. RCW 9.94A.200010. Other income-  
15 withholding action under RCW 9.94A may be taken without further notice.  
16 RCW 9.94A.200030.

17 **5.4. RESTITUTION HEARING. ALREADY ADDRESSED ABOVE**

18 **5.5** Any violation of this Judgment and Sentence is punishable by up to  
19 60 days of confinement per violation. RCW 9.94A.200.

20 **5.6 FIREARMS.** You must immediately surrender any concealed pistol  
21 license and you may not own, use or possess any firearm unless your  
22 right to do so is restored by a court of record. (The court clerk  
23 shall forward a copy of the defendant's driver's license, identicard,  
24 or comparable identification to the Department of Licensing along with  
25 the date of conviction or commitment). RCW 9.41.040, 9.41.047.

26 **5.7 SEX AND KIDNAPPING OFFENDER REGISTRATION. DOES NOT APPLY**

27  
28 **JUDGMENT AND SENTENCE (JS)**  
**(Felony)(6/2000)**

7 of 10

5.8 OTHER: \_\_\_\_\_

JUDGMENT AND SENTENCE ENTERED AND SIGNED IN OPEN COURT IN THE PRESENCE OF THE DEFENDANT THIS DATE: Sept. 13, 2002

9-13-02

*Bruce W. Cohoe*  
JUDGE BRUCE W. COHOE

*John M. Neeb*  
JOHN M. NEEB  
Deputy Prosecuting Attorney  
WSB # 21322

*Leslie Tolzin*  
LESLIE TOLZIN  
Attorney for Defendant  
WSB# 20111

*Ronald Armon Hall*  
RONALD ARMON HALL  
Defendant

JUDGMENT AND SENTENCE (JS)  
(Felony)(6/2000)

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3 **CERTIFICATE OF INTERPRETER**

4 Interpreter signature/Print name: \_\_\_\_\_  
5 I am a certified interpreter of, or the court has found me otherwise  
6 qualified to interpret, the \_\_\_\_\_ language, which  
7 the defendant understands. I translated this Judgment and Sentence for  
8 the defendant into that language.

8 **CERTIFICATE OF CLERK**

9 CAUSE NUMBER of this case: 96-1-00042-8

10 I, Bob San Soucie, Clerk of this Court, certify that the foregoing is a  
11 full, true and correct copy of the judgment and sentence in the above-  
12 entitled action now on record in this office.

12 WITNESS my hand and seal of the said Superior Court affixed on this  
13 date: \_\_\_\_\_

14 Clerk of said County and State, by: \_\_\_\_\_, Deputy  
15 Clerk

16 **IDENTIFICATION OF DEFENDANT**

17 SID No.: WA10014543 Date of Birth: 08/11/1947  
18 (If no SID take fingerprint card for WSP)

19 FBI No. 600159FA1 Local ID No. \_\_\_\_\_

20 PCN No. \_\_\_\_\_ Other \_\_\_\_\_

21 Alias name, SSN, DOB: \_\_\_\_\_

22 Race: Ethnicity: Sex:

23  Asian/Pacific Islander  Hispanic  Male  
24  Black/African-American  Non-Hispanic  Female  
25  Caucasian  
26  Native American  
27  Other: \_\_\_\_\_

26 jmn

28 JUDGMENT AND SENTENCE (JS)  
(Felony)(6/2000)

FINGERPRINTS

Right four fingers taken simultaneously

RIGHT THUMB.

Left four fingers taken simultaneously

Left thumb

I attest that I saw the same defendant who appeared in Court on this Document affix his or her fingerprints and signature thereto. Clerk of the Court, BOB SAN SOUCIE:

[Signature], Deputy Clerk.

Dated: Sept. 13, 2002

DEFENDANT'S SIGNATURE: \_\_\_\_\_

RONALD ARMON HALL

DEFENDANT'S ADDRESS: \_\_\_\_\_

DEFENDANT'S PHONE#: \_\_\_\_\_

FINGERPRINTS

The defendant having been sentenced to the Department of Corrections for a:

- sex offense
- serious violent offense *Assault 1°*
- assault in the second degree
- any crime where the defendant or an accomplice was armed with a deadly weapon
- any felony under 69.50 and 69.52 committed after July 1, 1988 is also sentenced to one (1) year term of community placement on these conditions:

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions:

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC:

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

- (I) The offender shall remain within, or outside of, a specified geographical boundary:  
\_\_\_\_\_
- (II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals:  
\_\_\_\_\_
- (III) The offender shall participate in crime-related treatment or counseling services;
- (IV) The offender shall not consume alcohol;
- (V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or
- (VI) The offender shall comply with any crime-related prohibitions. *Set by CCO.*
- (VII) Other: \_\_\_\_\_

96-1-00042-8

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

CAUSE NO. 96-1-00042-8

Plaintiff,

ORDER FOR BIOLOGICAL

vs.

SAMPLE FOR DNA

IDENTIFICATION ANALYSIS

RONALD ARMON HALL,

Defendant.

THIS MATTER having come on regularly before the undersigned Judge for sentencing following defendant's conviction for:

A violent offense, which occurred after July 1, 1990, as defined by RCW 9A.030(38), to

wit:

ASSAULT IN THE FIRST DEGREE

Pursuant to RCW 43.43.754, therefore, it is hereby ordered that the defendant provide a biological sample to be used for DNA identification analysis as follows:

(In-Custody DOC) Provide a biological sample as requested by the Department of Corrections.

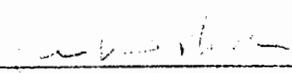
Defendant has an ongoing obligation to provide a biological sample until it has been properly obtained by the responsible agency. This obligation is not waived by the release of defendant prior to the sample being obtained. Any defendant who receives a notification that he/she should appear to provide a sample shall comply with the terms of that notification. Any failure to provide a biological sample as directed in the notification will result in a warrant being issued for your arrest.

ORDER FOR BIOLOGICAL  
SAMPLE -

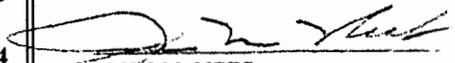
Office of Prosecuting Attorney  
946 County-City Building  
Tacoma, Washington 98402-2171  
Telephone: (253) 798-7400

DEFENDANT NEED NOT SUBMIT ANOTHER SAMPLE OF HIS DNA IF A SAMPLE HAS ALREADY BEEN OBTAINED UNDER THIS CAUSE NUMBER.

DONE IN OPEN COURT this 13<sup>th</sup> day of September, 2002.

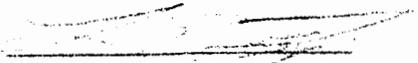
  
BRUCE W. COHOE, JUDGE

Presented by:



JOHN M. NEEB  
Deputy Prosecuting Attorney  
WSB# 21322

Approved as to form:



LESLIE TOLZIN  
Attorney for Defendant  
WSB# 21322

ORDER FOR BIOLOGICAL  
SAMPLE -

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

CAUSE NO. 96-1-00042-8

Plaintiff,

vs.

ADVICE OF RIGHT TO  
APPEAL AND COLLATERAL  
ATTACK TIME LIMITS

RONALD ARMON HALL,

Defendant.

**RIGHT TO APPEAL**

Judgment and Sentence having been entered, you are now advised that:

1.1 You have the right to appeal:

~~(XX)~~ a sentencing determination relating to offender score, sentencing range, and/or exceptional sentence.

~~(XX)~~ other post conviction motions listed in Rules of Appellate Procedure 2.2.

1.2 Unless a notice of appeal is filed with the clerk of the court within thirty (30) days from the entry of judgment or the order appealed from, you have irrevocably waived your right of appeal.

1.3 The clerk of the Superior court will, if requested by you, file a notice of appeal on your behalf.

1.4 If you cannot afford the cost of an appeal, you have the right to have a lawyer appointed to represent you on appeal and to have such parts of the trial record as are necessary for review of errors assigned transcribed for you, both at public expense.

**COLLATERAL ATTACK**

ADVICE OF RIGHT TO APPEAL AND COLLATERAL  
ATTACK TIME LIMITS - 1

Pursuant to RCW 10.73.110, you are hereby advised of the following time limit regarding collateral attack:

**RCW 10.73.090:**

- (1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.
- (2) For the purposes of this section, "collateral attack" means any form of post conviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.
- (3) For the purposes of this section, a judgment becomes final on the last of the following dates:
  - (a) The date it is filed with the clerk of the trial court;
  - (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or
  - (c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

**RCW 10.73.100:**

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

- (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
- (2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;

ADVICE OF RIGHT TO APPEAL AND COLLATERAL  
ATTACK TIME LIMITS - 2

- (3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, Section 9 of the State Constitution;
- (4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;
- (5) The sentence imposed was in excess of the court's jurisdiction; or
- (6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

I have been advised of the above time limit regarding collateral attack pursuant to statutes.

**ACKNOWLEDGMENT:**

Regarding the foregoing advice of my "Right to Appeal" and advice on "Collateral Attack":

- 1. I understand these rights; and
- 2. I waive formal reading of these rights; and
- 3. I acknowledge receipt of a true copy of these rights.

DATE: 9-13-02 DEFENDANT: *Ronald L. Hall*  
 RONALD ARMON HALL

DEFENDANT'S ATTORNEY: \_\_\_\_\_

DATE: Sept 13 2002 JUDGE: *[Signature]*

Return to Mc-NOL Island C.C.  
As soon as possible.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

RONALD ARMON HALL,

Defendant.

CAUSE NO. 96-1-00042-8

WARRANT OF COMMITMENT

[XX] Dept. of Corrections

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF  
PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[ ] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

[XX] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

[ ] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

By direction of the Honorable

Dated: Sept. 13, 2002

[Signature]  
J U D G E

\_\_\_\_\_  
I N T E R I M C L E R K

By: \_\_\_\_\_  
D E U T Y C L E R K

CERTIFIED COPY DELIVERED TO SHERIFF

Date \_\_\_\_\_ By \_\_\_\_\_ Deputy

STATE OF WASHINGTON, )  
County of Pierce ) ss:

I, Bob San Soucie, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.

IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court.

DATED: \_\_\_\_\_

BOB SAN SOUCIE, Clerk  
By: \_\_\_\_\_ Deputy

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,  
  
Plaintiff,  
  
vs.  
  
RONALD ARMON HALL,  
  
Defendant.

CAUSE NO. 96-1-00042-8  
  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW FOR  
EXCEPTIONAL SENTENCE

In 1996, this defendant was convicted by a jury of one count of Assault in the First Degree, while armed with a deadly weapon. The court imposed an exceptional sentence of 390 months in prison, 366 months plus 24 months for a deadly weapon sentence enhancement. On appeal, the Court of Appeals, Division II, affirmed the conviction, determined that one of the defendant's prior convictions washed out, struck one of the aggravating factors, affirmed the other two aggravating factors as a basis for an exceptional sentence, and struck the deadly weapon sentence enhancement. The Court of Appeals then remanded for a hearing to determine the defendant's correct offender score and to re-sentence him using the correct standard range, the remaining two aggravating factors, and no deadly weapon enhancement.

On August 4, 2000, this matter came on for a re-sentencing hearing before the Honorable Bruce W. Cohoe, Judge of the above entitled court. At that hearing, the court determined the defendant's

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
EXCEPTIONAL SENTENCE - 1

1  
2 offender score was 2 and imposed 366 months. On appeal, the Court of Appeals determined the  
3 defendant's offender score was incorrect and should have been 0 and remanded again.  
4

5 Therefore, on September 13, 2002, this matter came on for another re-sentencing hearing. The  
6 State was represented by Deputy Prosecuting Attorney John M. Neeb, and the defendant, RONALD  
7 ARMON HALL, was present and represented by his attorney, Leslie Tolzin. The court heard arguments  
8 of counsel regarding the appropriate sentence sentence and heard allocution from the defendant.  
9

10 Now, deeming itself fully advised in this matter, the court makes the following Findings of Fact  
11 and Conclusions of Law.

## 12 FINDINGS OF FACT

### 13 I.

14 In 1996, a jury found the defendant guilty of one count of Assault in the First Degree. Assault in  
15 the First Degree is a serious violent offense classified as a Level XII offense under the SRA. The jury  
16 also returned a special verdict that the defendant was armed with a deadly weapon at the time of the  
17 offense. The Court of Appeals affirmed the defendant's conviction but ruled that the special verdict  
18 could not stand.  
19

### 20 II.

21 The State has previously filed certified copies of the defendant's three prior felony convictions,  
22 all from Lewis County: TMVOP (1965), UPCS (1979), and two counts of Extortion in the First Degree  
23 (1981). The defendant also has three prior misdemeanor convictions, all from Pierce County: Display  
24 Weapon (1989), Assault 4 (1991), and Assault 4 (1992).  
25  
26

27 FINDINGS OF FACT AND CONCLUSIONS OF LAW  
28 EXCEPTIONAL SENTENCE - 2

## III.

Under the washout provision of the SRA, the defendant's 1965 TMVOP, his 1979 UPCS, and his 1981 Extortion 1 (2 counts) all wash out. (See RCW 9.94A.360(2); State v. Smith, 144 Wn.2d 665 (2001).) Therefore, the defendant has an offender score of zero (0) and a standard range of 93 to 123 months imprisonment. (See State v. Hall, 2002 Wash. App. LEXIS 1063).

## IV.

The court finds that there are two aggravating factors in this case that justify an exceptional sentence above the standard range; those factors are set out in Findings of Fact V, and VI. Both of these aggravating factors were upheld by the Court of Appeals during the defendant's direct appeal.

## V.

The defendant manifested deliberate cruelty to his victim. The court has never seen a beating this cruel in over thirty years of practice, including ten on the bench. But for the remarkable skill of the medical personnel, the victim would have died. The defendant's cruelty is evidenced by the duration of the assault (thirty minutes), the multiplicity of the injuries and their locations (head, face, ribs, lower back, buttocks), the severity of the injuries that the defendant inflicted, and the fact that the defendant made his victim clean herself up and wait for almost thirty more minutes before being taken for medical attention.

## VI.

The defendant inflicted multiple injuries on his victim. During this assault, the defendant hit his victim multiple times in her face and head with his fist, his feet (wearing boots), and the butt of a rifle. Both her eyes were swollen shut. Parts of her face were literally broken free from her skull. The

1  
2 defendant kicked his victim in the ribs, breaking several ribs and causing a punctured lung that had to be  
3 surgically reinflated. The defendant also kicked his victim in the lower back and buttocks region  
4 multiple times, causing extensive bruising. During the assault, the defendant used these kicks to make  
5 his victim stay on the ground in front of him so he could continue the assault.  
6

7 VII.

8 Each of the above two aggravating factors, if standing alone, supports the imposition of an  
9 exceptional sentence.  
10

11 VIII.

12 Based on the defendant's conduct in this case, the appropriate length sentence for the defendant is  
13 366 months in prison.  
14

15 IX.

16 This court would impose the same length sentence irrespective of the defendant's criminal  
17 history or offender score. This court would impose the same sentence if only one of the above  
18 aggravating circumstances existed. The sentence of 366 months is the appropriate length sentence for  
19 what the defendant did to his victim in this case.  
20

21 From the foregoing Findings of Fact, the court hereby makes the following Conclusions of Law:  
22

23 CONCLUSIONS OF LAW

24 I.

25 There are substantial and compelling reasons justifying an exceptional sentence above the  
26 standard range.  
27

II.

The defendant RONALD ARMON HALL, should be incarcerated in the Department of Corrections for a determinate period of 366 months, with credit for \_\_\_\_\_ days served as of September 12, 2002.

DONE IN OPEN COURT this \_\_\_\_\_ day of September, 2002.

\_\_\_\_\_  
BRUCE W. COHOE, JUDGE

Presented by:

Approved as to form:

\_\_\_\_\_  
JOHN M. NEEB  
Deputy Prosecuting Attorney  
WSB # 21322

\_\_\_\_\_  
LESLIE TOLZIN  
Attorney for Defendant  
WSB #

**APPENDIX B**

**Unpublished Opinions and Orders  
from Direct Appeals**

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD ARMON HALL,

Appellant.

No. 20934-9-II

consolidated with:

No. 22194-2-II

UNPUBLISHED OPINION

JUL 23 1999

Filed:

HOUGHTON, J.-- Ronald Armon Hall appeals his conviction for assault in the first degree while armed with a deadly weapon, arguing: (1) that the evidence was insufficient to support one of the alternatives included in the jury instructions as well as the deadly weapon special verdict; (2) that the trial court imposed an excessive exceptional sentence based upon an uncharged sentence enhancement, improper aggravating factors, and an incorrect offender score; (3) that he received ineffective



20934-9-II  
22194-2-II

broken ribs. Further injuries included bruising and lacerations along her neck and down her back to the base of her spine.

Emergency room personnel surgically reinflated Krapf's lung, but her facial injuries required extensive reconstructive surgery at Harborview Hospital. Doctors repositioned her eyes because her right eye had sunken into her face, corrected her facial fractures, and removed two of her teeth. The doctors also inserted permanent plates and screws underneath Krapf's right eye, along her cheek, at the corner of her eye, and in her upper jaw. Krapf has permanent scars on her scalp and face, and her eyes are permanently misaligned.

Soon after the assault, Krapf gave a statement to police in which she identified Hall as her assailant. In her statement, she said that Hall beat her with a rifle, as well as his hands and feet, and that he threatened her and Aaron with a pistol. The State filed an information charging Hall with one count of assault in the first degree while armed with a firearm or by any force or means likely to produce great bodily harm or death. The State later amended the information to charge assault in the first degree committed with a firearm or deadly weapon or by any force or means likely to produce great bodily harm or death, or assault resulting in the infliction of great bodily harm.

Shortly after his arrest, Hall wrote Krapf three letters of a romantic nature. Krapf testified at his trial only after the court issued a material witness warrant that resulted in her arrest. Her testimony contradicted much of what she told police directly after the assault.



20934-9-II  
22194-2-II

The State responded with an affidavit from Krapf's mother stating that Hall called and wrote Krapf repeatedly after his sentencing. The sample letter she attached documented Hall's romantic feelings toward Krapf.

The trial court denied the motion because the information was repetitive of much of Krapf's trial testimony and because it stemmed from a suspect recantation. This court consolidated Hall's appeal of that denial with the appeal of his conviction.

## ANALYSIS

### *I. Sufficiency of the Evidence*

Hall first contends that there was insufficient evidence to support the "deadly weapon" means of first degree assault and the deadly weapon special verdict, and also argues that the trial court erred in instructing the jury regarding the need to be unanimous as to the means of assault proven. The court instructed the jury that it could find Hall guilty of assault in the first degree if it found that he committed the assault with a firearm or with a deadly weapon or by a force or means likely to produce great bodily harm or death, or if it found that the assault resulted in the infliction of great bodily harm. The court added that the jury did not need to be unanimous as to which means was proved.

Washington law requires unanimous jury verdicts in criminal cases. *State v. Hupe*, 50 Wn. App. 277, 282, 748 P.2d 263, review denied, 110 Wn.2d 1019 (1988). When the crime charged can be established by alternative means, jury unanimity as to the means is not necessary so long as substantial evidence supports each alternative. *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988); *State v. Gallo*, 20 Wn. App. 717,

20934-9-II  
22194-2-II

730, 582 P.2d 558, *review denied*, 91 Wn.2d 1008 (1978). The jury cannot be instructed on an alternative means that is not supported by substantial evidence, as it may then base its finding of guilt on an invalid ground. *Hupe*, 50 Wn. App. at 282. This requirement of sufficient evidence embodies constitutional considerations of due process. *State v. Martin*, 69 Wn. App. 686, 688, 849 P.2d 1289 (1993). Thus, the trial court properly instructed the jury that it did not need to be unanimous as to which means was proved as long as substantial evidence supported each means charged.

The evidence produced at trial to establish that Hall committed the assault with a deadly weapon is as follows. A deputy testified that he found two weapons at Hall's home when he searched it. Krapf told the police that Hall threatened her and Aaron with a pistol during the assault. She also told the police that, during the beating, Hall hit her in the face with the butt of a rifle. She said she could tell the difference between being struck with fists, a boot, or something else, and said that at least one blow to her face was something harder than a fist or a boot. A photograph of her face after the assault showed a vertical line on her cheek consistent with a blow from a rifle butt.

At trial, Krapf contradicted much of what she said in her statement. She said she did not know if Hall had a gun, and could not remember telling the deputy that he had a gun. She added, however, that when she gave her statement she did her best to tell the truth.

The State elicited the statements Krapf made to the police to impeach her testimony at trial. Hall now complains that her out-of-court statements about his use of a

20934-9-II  
22194-2-II

gun cannot support the deadly weapon alternative because an impeaching statement is not substantive evidence of matters asserted in that statement. *See State v. Johnson*, 40 Wn. App. 371, 377, 699 P.2d 221 (1985) (impeachment evidence affects a witness' credibility and is not proof of the substantive facts encompassed in such evidence.) Because Hall made no objection to this evidence and because no limiting instruction was sought, the jury properly considered Krapf's prior statements as substantive evidence. *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).

After the defense rested, it argued that there was insufficient evidence to support the theory that Hall committed the assault while armed with a deadly weapon. The court disagreed, finding that there was evidence in the record from which the jury could conclude that a weapon was involved in the assault. The defense did not object to Instruction 11, which defined a deadly weapon as "any firearm, whether loaded or unloaded, any weapon, device, instrument, or article, which under the circumstances in which it is used or threatened to be used, is readily capable of causing death or substantial bodily injury."

During its deliberations, the jury sent a note to the court asking whether hands and feet or shoes or boots, if worn, could be a deadly weapon. The court responded by telling the jury to reread Instruction 11. The jury returned a verdict finding Hall guilty of assault in the first degree while armed with a deadly weapon.

Hall argues that the jury's uncertainty regarding whether the deadly weapon he used was a firearm, shows that there was insufficient evidence to support that alternative

20934-9-II

22194-2-II

means. As stated earlier, however, the jury does not need to be unanimous as to the means employed if it is unanimous as to guilt for the underlying offense. The jurors' question does not show that there was insufficient evidence to establish that Hall committed the assault with a deadly weapon. This conclusion is bolstered by the trial court's denial of Hall's motion for arrest of judgment following the verdict.

The defense filed its motion pursuant to CrR 7.4(a), which provides that judgment may be arrested on a defendant's motion because of insufficient proof of a material element of the crime. The defense argued, in part, that there was no proof of the material element of a deadly weapon. Defense counsel maintained that because Instruction 11 did not include a body part within the definition of a deadly weapon, there was no credible evidence that Hall used a deadly weapon. The court disagreed, observing first that Krapf's testimony on the witness stand was not very believable. "She was obviously trying to protect Mr. Hall." The court decided that the jury accepted the version of the assault that Krapf gave the police.

If the jury believes what she told the police, and not what she said on the witness stand, judging her demeanor and her attitude and the testimony and the manner in which it was given, then they are left with the fact that he used a pistol and a rifle to accomplish his purposes. I think that can rise to the level of beyond a reasonable doubt; that is, at least a reasonable trier of fact can believe that. Accordingly, I will deny the motion for arrest of judgment as it relates . . . to the armed with a deadly weapon aspect.

The trial court did not err in concluding that there was sufficient proof to support the deadly weapon alternative as well as the special verdict.

20934-9-II  
22194-2-II

## *II. Jury Instructions*

In a related argument, Hall contends that Instruction 9 is erroneous because it instructed the jury on an uncharged alternative. In his pro se brief, Hall contends that the information limited him to committing the assault with a firearm, thus precluding the State from instructing the jury on the alternative means of committing assault with a deadly weapon. Hall also argues that the error was compounded by Instruction 11, which defined a deadly weapon to include objects other than a firearm.

The amended information stated that Hall

did unlawfully and feloniously with intent to inflict great bodily harm, assault KIM KRAPF with a firearm or deadly weapon or by any force or means likely to produce great bodily harm or death, contrary to RCW 9A.36.011(1)(a), and in the commission thereof, or in immediate flight the defendant was armed with a firearm, to-wit: A GUN, that being a firearm as defined in RCW 9.41.010, . . . .

First degree assault is committed when a person, acting with intent to inflict great bodily harm, either (a) assaults another with a deadly weapon or by force or means likely to produce great bodily harm; (b) causes another to take poison, the human immune deficiency virus, or any other destructive or noxious substance; or (c) assaults another and inflicts great bodily harm. RCW 9A.36.011; 13A SETH A. FINE, ET AL., WASHINGTON PRACTICE, CRIMINAL LAW, § 301 at 37 (1998). Instruction 9 accurately set forth the elements of alternatives (a) and (c), which were the alternatives charged in the amended information.

20934-9-II  
22194-2-II

This is not a case in which the jury was instructed on uncharged alternatives. *See State v. Nicholas*, 55 Wn. App. 261, 272-73, 776 P.2d 1385, review denied, 113 Wn.2d 1030 (1989) (when the information alleges only one alternative, it is error to instruct the jury on uncharged alternatives). Moreover, Hall never objected to the wording of the information or requested a bill of particulars to clarify it. *See State v. Leach*, 113 Wn.2d 679, 687, 782 P.2d 552 (1989) (defendant may not challenge a charging document for vagueness on appeal if no bill of particulars was requested at trial). We conclude that the “to-convict” instruction properly informed the jury of the alternative means of committing assault with which the amended information charged Hall. With regard to Instruction 11, we note that because Hall never objected to the instruction or its wording, he may not raise such an objection now. *Nicholas*, 55 Wn. App. at 273.

Hall also contends that the jury should have been instructed on the elements of second degree assault and its definition of substantial bodily harm, and he argues that it should have been given a special verdict form applicable to second degree assault because a deadly weapon is an element of that crime. The court did instruct the jury on the elements of assault in the second degree and on the corresponding definition of substantial bodily harm. A deadly weapon enhancement is not an element of a crime. Because Hall never argued below that the court erred in failing to give the jury a special verdict form applicable to the second degree assault charge, he cannot make this argument now. RAP 2.5(a).

20934-9-II  
22194-2-II

Hall raises the issue of second degree assault because of his belief that there was no evidence to support the first degree element of intent to cause great bodily harm. The court instructed the jury that “[g]reat bodily harm means bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.”

There is ample evidence to support the jury’s conclusion that Hall intended to cause great bodily harm. He kicked and hit Hall for approximately 30 minutes, and he inflicted injuries to her lung and to her face that doctors described as potentially life threatening. Krapf has permanent scars from the assault, and her eyes are permanently misaligned. Her injuries would have been far more disfiguring without extensive reconstructive surgery.

The evidence was sufficient to support the jury’s conclusion that Hall committed assault in the first degree while armed with a deadly weapon.

### **III. Sentencing**

Although we affirm the conviction, we agree with Hall that the deadly weapon enhancement must be stricken. Hall correctly observes that the amended information charged him only with the firearm enhancement set forth in RCW 9.94A.310(3), and did not refer to the deadly weapon enhancement set forth in RCW 9.94A.310(4). Because the amended information contained no notice that the State sought penalties under RCW 9.94A.310(4) and no allegations supporting a non-firearm enhancement, the trial court



20934-9-II  
 22194-2-II

given are supported by the evidence in the record; (2) under the question of law standard, whether the reasons justify a departure from the standard range; and (3) under the abuse of discretion standard, whether the sentence clearly is too excessive or too lenient. *State v. Allert*, 117 Wn.2d 156, 163, 815 P.2d 752 (1991).

The trial court found that three aggravating factors justified an exceptional sentence of 390 months:

The defendant manifested deliberate cruelty to his victim. The court has never seen a beating this cruel in over thirty years of practice, including ten on the bench. But for the remarkable skill of the medical personnel, the victim would have died. The defendant's cruelty is evidenced by the duration of the assault (thirty minutes), the multiplicity of the injuries and their locations (head, face, ribs, lower back, buttocks), the severity of the injuries that the defendant inflicted, and the fact that the defendant made his victim clean herself up and wait for almost thirty more minutes before being taken for medical attention.

The defendant inflicted multiple injuries on his victim. During this assault, the defendant hit his victim multiple times in her face and head with his fist, his feet (wearing boots), and the butt of a rifle. Both her eyes were swollen shut. Parts of her face were literally broken free from her skull. The defendant kicked his victim in the ribs, breaking several ribs and causing a punctured lung that had to be surgically reinflated. The defendant also kicked his victim in the lower back and buttocks region multiple times, causing extensive bruising. During the assault, the defendant used these kicks to make his victim stay on the ground in front of him so he could continue the assault.

The defendant inflicted injuries that were more severe than the "normal" first degree assault. Either the punctured lung from the broken ribs or the facial injuries are sufficient for an assault one. Several of the facial injuries could each have been found to be great bodily harm. The injuries to the victim's buttocks, while not sufficient alone for an assault one, are extensive and painful.

The court added that each of the above three aggravating factors, standing alone, would support the imposition of an exceptional sentence.

20934-9-II  
22194-2-II

Hall argues that the court's finding of deliberate cruelty does not justify an exceptional sentence under *State v. Payne*, 45 Wn. App. 528, 531, 726 P.2d 997 (1986). There, the trial court imposed an exceptional sentence based, in part, on its finding that the defendant's conduct manifested deliberate cruelty to his victim. The Court of Appeals found this finding insufficiently specific to enable it to determine whether the cruelty was "of a kind not usually associated with the commission of the offense in question." *Payne*, 45 Wn. App. at 531 (quoting *State v. Schantzen*, 308 N.W.2d 484, 487 (Minn. 1981)).

For this court to assume facts in the record which could support a finding of deliberate cruelty would require impermissible speculation as to the trial court's reasoning. As the conclusory finding of deliberate cruelty simply does not permit us to carry out our responsibility of evaluating the sentencing decision, we must hold that it is an improper basis for an exceptional sentence.

*Payne*, 45 Wn. App. at 531-32 (footnote omitted).

There is no such flaw in the court's finding of deliberate cruelty here. The court carefully set forth the facts supporting its finding, and it expressly found that the cruelty demonstrated was not the kind usually associated with assault in the first degree. The record supports the finding of deliberate cruelty, and the finding was properly used to justify the exceptional sentence.

Hall next argues that the court erred in finding that the severity of Krapf's injuries justified an exceptional sentence. The severity of a victim's injuries cannot be used to impose an exceptional sentence where the extent of the injuries is an element of the

20934-9-II  
22194-2-II

crime. *State v. Cardenas*, 129 Wn.2d 1, 7, 914 P.2d 57 (1996). Although particularly severe injuries may be used to justify an exceptional sentence, the injury must be greater than that contemplated by the Legislature in setting the standard range. *Cardenas*, 129 Wn.2d at 6. Cardenas was convicted of vehicular assault, which contained the element of serious bodily injury, defined as “bodily injury which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body.” *Cardenas*, 129 Wn.2d at 6 (quoting RCW 46.61.522(1), (2)). The victim’s injuries, although severe, were evidently the type envisioned by the Legislature in setting the standard range. The court thus held that the severity of injuries suffered could not justify an exceptional sentence. *Cardenas*, 129 Wn.2d at 7.

In so holding, the court distinguished *State v. George*, 67 Wn. App. 217, 834 P.2d 664 (1992), *review denied*, 120 Wn.2d 1023 (1993), *overruled on other grounds*, *State v. Ritchie*, 126 Wn.2d 388, 894 P.2d 1308 (1995). In *George*, the court upheld an exceptional sentence on an assault conviction based, in part, upon the severity of the victim’s injuries despite the fact that great bodily injury was an element of the crime. Although the *Cardenas* court agreed that the sentencing judge in *George* properly imposed an exceptional sentence based upon the defendant’s deliberate and gratuitous violence, to the extent *George* suggested that an exceptional sentence could be imposed merely because of the severity of the injury, where this is an element of the crime, the *Cardenas* court disapproved of its reasoning. *Cardenas*, 129 Wn.2d at 7.

20934-9-II  
22194-2-II

Here, as in *George*, great bodily injury was an element of the crime. The trial court justified its severity finding by observing that either the punctured lung from the broken ribs or the facial injuries were sufficient for an assault one. That reasoning better supports the court's finding regarding multiple injuries. The infliction of multiple injuries can support an exceptional sentence where the infliction of multiple injuries was caused by multiple acts. *Cardenas*, 129 Wn.2d at 7. Although the court improperly cited the severity of the injuries as an aggravating factor, we find that error harmless. We agree with the trial court that either of the other aggravating factors justifies an exceptional sentence. *See Cardenas*, 129 Wn.2d at 12.

Hall also argues that the trial court erred in calculating his offender score and thus his standard range sentence. A sentencing court must correctly determine the standard range before it can depart therefrom. *State v. Parker*, 132 Wn.2d 182, 188, 937 P.2d 575 (1997).

The trial court concluded, after extensive discussion, that Hall had an offender score of 4 with a standard range of 129 to 171 months, with 24 months added for the deadly weapon enhancement. The State now concedes that this offender score is incorrect. Hall's 1965 felony conviction washes out because he was released from confinement in 1971 and remained crime-free for the requisite 5 years. RCW 9.94A.360(2). Therefore, we must remand so the trial court can resentence using the correct offender score.

20934-9-II  
 22194-2-II

Finally, Hall contends that the exceptional sentence imposed is excessive. As stated, the question of whether a sentence is clearly excessive is reviewed under an abuse of discretion standard. *State v. Oxborrow*, 106 Wn.2d 525, 530, 723 P.2d 1123 (1986). Discretion is abused when it is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). There is no such abuse of discretion here.

Although the record supports the court's imposition of an exceptional sentence, we must remand for resentencing because of the improper sentence enhancement and incorrect offender score.

***IV. Ineffective Assistance of Counsel***

Hall next contends that he received ineffective assistance of counsel because his attorney (a) did not request a limiting instruction concerning the proper use of Krapf's prior statements, (b) did not object to the prosecutor's misconduct in stating that jurors could consider Krapf's prior statements as proof of the deadly weapon means and as support for the deadly weapon enhancement, and in stating that jurors did not need to be unanimous as to the means of first degree assault, and (c) did not object to the instruction that allowed the jury to convict him of the uncharged deadly weapon enhancement.

To prove a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Scrutiny of

20934-9-II  
22194-2-II

counsel's performance is highly deferential, and there is a strong presumption of reasonableness. *State v. Day*, 51 Wn. App. 544, 553, 754 P.2d 1021, review denied, 111 Wn.2d 1016 (1988). If counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim of ineffective assistance. *Day*, 51 Wn. App. at 553. The court should make every effort "to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992).

Although Hall contends that counsel's failure to request a limiting instruction regarding Krapf's prior statements cannot be characterized as a tactical decision, the State points out that Krapf was primarily a defense witness. She professed her love for Hall in front of the jury, testified that the assault was her fault because she started it, and told the jury to believe her trial testimony and not what she said in prior statements because in the hospital "I didn't even know where I was at." During closing argument, the defense urged the jury to believe Krapf's trial testimony: "Kim Krapf is the best evidence that shows that there is no intention upon this defendant to hurt her. There is no evidence that shows that she is not competent to evaluate and take care and in charge of her own life. She has a clear memory."

The State argues that the defense had a vested interest in presenting Krapf as a credible person, and it reasons that a jury instruction addressing her prior contradictory statements might have worked against this interest by emphasizing that she gave

20934-9-II  
 22194-2-II

conflicting versions of the attack. We agree that under the circumstances presented, the defense may have decided not to undermine Krapf as a witness by requesting a limiting instruction. *See State v. Barber*, 38 Wn. App. 758, 771 n.4, 689 P.2d 1099 (1984), *review denied*, 103 Wn.2d 1013 (1985) (not unusual for able trial counsel to not request a limiting instruction regarding evidence that counsel believes is damaging to the client).

Although Hall argues further that defense counsel failed to object to the prosecutor's misconduct, no such misconduct is apparent. There was none in arguing that the jury could consider Krapf's prior statements as evidence, given the absence of a limiting instruction, and the prosecutor properly argued that the jury did not need to be unanimous as to the means by which the assault occurred so long as it was unanimous that the assault did occur.

Finally, Hall contends that his attorney rendered ineffective assistance by failing to object to the special verdict instruction that allowed the jury to convict him of an uncharged enhancement. Although defense counsel did not object to the special verdict instruction on this basis, he did object to that instruction and to all additional references to a deadly weapon. The court declined to change or withdraw any of its instructions, as it undoubtedly would have had the defense objected on the basis that the sentencing enhancement was improperly charged. (The court and the State agreed before trial that the information included the deadly weapon enhancement.) Hall's attorney was not deficient in failing to object to the special verdict instruction on this basis.

20934-9-II  
22194-2-II

#### *V. Motion for Relief from Judgment*

Finally, Hall contends that the trial court erred in denying his motion for relief from judgment brought under CrR 7.8. The basis for his motion was an affidavit from Krapf stating that she started the fight, that her blows made Hall act abnormally, and that she lied in her testimony at trial.

CrR 7.8(b)(2) provides that a court may relieve a party from a final judgment because of newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial under rule 7.6. (CrR 7.6(b) requires a motion for new trial to be served and filed within 10 days after the verdict or decision.) A new trial will not be granted on the basis of newly discovered evidence unless the moving party demonstrates that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981). The absence of any one of these factors is grounds for denial of a new trial. *Williams*, 96 Wn.2d at 223. The trial court's refusal to grant a new trial on the basis of newly discovered evidence is reviewed under an abuse of discretion standard. *State v. Savaria*, 82 Wn. App. 832, 838, 919 P.2d 1263 (1996).

Additional factors must be considered when newly discovered evidence is in the nature of testimonial recantation. *State v. Macon*, 128 Wn.2d 784, 804, 911 P.2d 1004

20934-9-II  
22194-2-II

(1996). When a key prosecution witness later recants, the trial court must first determine whether the recantation is reliable before considering a defendant's motion for new trial based on the recantation. *Macon*, 128 Wn.2d at 804. If the recantation is not credible, then it is not material, and an essential factor that would support a new trial is missing. *State v. Ieng*, 87 Wn. App. 873, 875, 942 P.2d 1091 (1997), *review denied*, 134 Wn.2d 1014 (1998).

In *Ieng*, a material witness claimed three years after Ieng's trial that he lied while testifying. The trial court found that the witness had a motive to fabricate testimony at the recantation hearing favorable to the Ieng family because he wanted to date Ieng's sister. The Court of Appeals concluded that the trial court did not abuse its discretion by determining that the recantation was not credible and denying Ieng's motion for a new trial. *Ieng*, 87 Wn. App. at 881.

Here, Krapf's affidavit stated that she started the fight and added that when she hit Hall with an ashtray, he started acting like a zombie and fighting invisible people. She also stated that she made up the story that she gave to the police. When she tried to change it later, the prosecutor threatened her with jail. In a letter to Hall attached to her affidavit, she refers to her lies in court and to the police.

In response, the State submitted an affidavit from Krapf's mother, accompanied by telephone records and a letter Hall sent Krapf after he filed the motion for relief. The records show repeated calls from the Pierce County Jail and Clallam County Prison to Krapf's home after Hall's trial; in some cases, as many as six collect calls a day. The

20934-9-II  
22194-2-II

affidavit stated that Krapf received more than 100 letters from Hall after his sentencing. In the sample letter attached to the affidavit, Hall expresses his love and concern for Krapf.

The trial court denied Hall's request for relief from judgment, reasoning that some of the evidence presented was similar to that which Krapf gave at trial. The court also noted that part of the evidence (the letter to Hall) was available to the defense when Hall filed his first post-judgment motion for relief in June 1996. Finally, the court held that to the extent some of the information could be called newly discovered, it was an inherently suspect recantation.

Although Hall challenges that characterization of Krapf's evidence, we find the court's description accurate. The premise that Hall was out of his mind when he committed the assault apparently was one that the defense considered and rejected before trial. Krapf's description of Hall as a zombie merely expanded on her trial testimony that he was stunned after she hit him with her boots and with an ashtray. Moreover, Krapf referred to Hall acting like a zombie during sentencing on July 8, 1996, and she did not write her affidavit describing Hall as acting like a zombie and fighting imaginary people until December 13, 1996.

As in *Jeng*, Krapf's motive to fabricate is obvious. She wants to be on good terms with Hall either because she is afraid of him or because she now has romantic feelings toward him. The court described the situation in denying Hall's motion:

20934-9-II  
 22194-2-II

Ms. Krapf was a very reluctant witness and one who I thought was either in extreme fear, which certainly could have been possible given the beating that she endured, or she was a classic abused spouse who, despite the beatings, professes her love for the defendant and will do whatever is necessary to protect him. That probably is more likely than the first scenario.

In its written order, the court again recalled that “the victim was a very reluctant witness at trial.” The court added that she testified to “ostensibly the same information as that contained in her letter and affidavit, and the court has the evidence showing her extensive contacts with the defendant since the sentencing.”

The court’s conclusion that Krapf’s recantation was suspect is supported by the record. When a recantation is unreliable, a trial court does not abuse its discretion by denying a motion for a new trial. *Macon*, 128 Wn.2d at 805.

Hall contends in his pro se brief that the court erred in denying Krapf the opportunity to testify during the hearing on the motion for relief from judgment. Oral testimony is not required in deciding a CrR 7.8(b)(2) motion. The rule provides that a defendant seeking relief from judgment must file a motion supported by affidavits, and it adds that the court may deny the motion without a hearing if the facts alleged in the affidavits do not establish grounds for relief. CrR 7.8 (c) (1), (2). Krapf was present when the motion was argued, and defense counsel noted that her testimony would be necessary only if the court had any questions about the materials submitted with her affidavit. Neither the court nor the prosecutor had any questions, so Krapf did not testify. No error was claimed, nor was any error committed.

20934-9-II  
22194-2-II

Nor do we find error in the court's failure to take testimony from Krapf to evaluate her credibility. In support of his claim of error, Hall cites *State v. D.T.M.*, 78 Wn. App. 216, 896 P.2d 108 (1995), where the defendant moved to withdraw his *Alford* plea after his stepdaughter recanted her allegations that he had tried to rape her. After the trial court denied the motion to withdraw, the Court of Appeals reversed and remanded, holding that the defendant was entitled to a hearing to evaluate his stepdaughter's credibility, and that he would be allowed to withdraw his plea if his stepdaughter adhered to her recantation, while under oath in open court and subject to cross-examination. More specifically, the court held that "[u]nder the circumstances, and considering D.T.M.'s persistent assertions of innocence, we believe the court should have held a hearing to evaluate M.J.'s credibility." *D.T.M.*, 78 Wn. App. at 221 (footnote omitted).

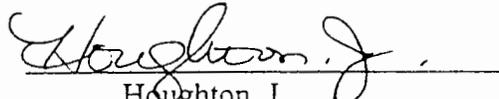
The circumstances here do not resemble those in *D.T.M.* Rather, the facts here support the court's conclusion that Krapf's recantation was suspect and that no hearing on the motion was necessary.

Hall also contends that the trial court erred in denying the motion for relief from judgment in his absence. A defendant has a right to be present at a post-trial evidentiary hearing, but he need not be present during deliberations between court and counsel or during arguments on questions of law. *State v. Walker*, 13 Wn. App. 545, 556-57, 536 P.2d 657, *review denied*, 86 Wn.2d 1005 (1975). In this case, the court denied the motion for relief from judgment without holding a hearing, as CrR 7.8(c)(2) permits. Thus, Hall's presence was not required.

20934-9-II  
22194-2-II

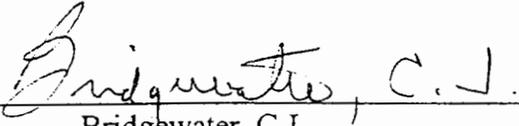
Affirmed, but remanded for resentencing consistent with this opinion.

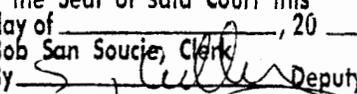
A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

  
Houghton, J.

We concur:

  
Morgan, J.

  
Bridgewater, C.J.

STATE OF WASHINGTON, County of Pierce  
ss: I, Bob San Soucie, Clerk of the above  
entitled Court, do hereby certify that this  
foregoing instrument is a true and correct  
copy of the original now on file in my office.  
IN WITNESS WHEREOF, I hereunto set my  
hand and the Seal of said Court this  
day of \_\_\_\_\_, 20\_\_\_\_  
Bob San Soucie, Clerk  
By  Deputy

NOV 15 2008

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RONALD A. HALL,

Petitioner.

NO. 68528-2

ORDER

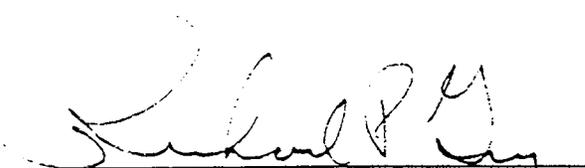
C/A NO. 20934-9-II (22194-2  
consol. w/ 20934-9-II)

Department II of the Court considered this matter at its January 5, 2000, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 5<sup>th</sup> day of January, 2000.

  
CHIEF JUSTICE

FILED  
STATE COURT OF  
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BY C. J. HERRITT  
CJFK

2005/124

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RONALD A. HALL,

Appellant.

No. 20934-9-II

MANDATE

Pierce County Cause No.  
96-1-00042-8

The State of Washington to: The Superior Court of the State of Washington  
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on July 23, 1999 became the decision terminating review of this court of the above entitled case on January 5, 2000. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs and attorney fees have been awarded in the following amount.

Judgment Creditor: State of Washington, \$21.65  
Judgment Creditor: Appellate Indigent Defense Fund, \$4,272.77  
Judgment Debtor: Ronald A. Hall, \$4,294.42



IN TESTIMONY WHEREOF, I have  
hereunto set my hand and affixed the  
seal of said Court at Tacoma, this  
2nd day of March, 2000.

  
Clerk of the Court of Appeals,  
State of Washington, Div. II

FILED  
COURT OF APPEALS  
DIVISION II  
02 MAY 17 AM 11:37  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

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

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
RONALD ARMON HALL,  
  
Appellant.

No. 26358-1-II

UNPUBLISHED OPINION

HOUGHTON, J. -- Ronald Armon Hall appeals the imposition of an exceptional sentence on various grounds. Because we agree that his offender score was incorrectly calculated, we vacate the sentence and remand for re-sentencing.

**FACTS**

A jury convicted Hall of first degree assault and found by special verdict that he was armed with a deadly weapon. The trial court imposed an exceptional sentence of 366 months and an additional 24-month deadly weapon enhancement for a total of 390 months confinement. The trial court erroneously calculated Hall's offender score as 4 with a standard range of 129 to 171 months.<sup>1</sup> Hall appealed and in an unpublished opinion, *State v. Hall*, 96 Wn. App. 1051 (1999), *review denied*, 139 Wn.2d 1019 (2000), we affirmed the conviction. We also vacated the

<sup>1</sup> Hall's criminal history includes three felony convictions out of Lewis County: TMVWOP (1965), UPCS (1979), and two counts of first degree extortion (1981); plus three misdemeanor convictions out of Pierce County: display of a weapon (1989), fourth degree assault (1991), and fourth degree assault (1992). First degree extortion is a class B felony. RCW 9A.56.120(2).

sentence based on an erroneously imposed deadly weapon enhancement and a miscalculated offender score. We then remanded the matter to the trial court for re-sentencing.

At re-sentencing, Hall and the prosecutor calculated an offender score of 2, resulting in a standard range sentence of 111 to 147 months. The trial court agreed. Hall argued for a sentence at the high end of the standard range of 147 months, and the prosecutor argued for an exceptional sentence of 390 months. The trial court then imposed the same exceptional sentence of 366 months (original sentence without a deadly weapon enhancement). The trial court found that there were two aggravating factors for imposing an exceptional sentence: deliberate cruelty to the victim (finding of fact V) and infliction of multiple injuries to the victim (finding of fact VI).

Hall appeals his sentence.

## ANALYSIS

### Pro Se Issues

#### *1. Offender Score Calculation*

Hall raises two issues pro se. One of them is persuasive.

Hall first contends that the trial court miscalculated his offender score. He asserts that his prior felony convictions should have washed out under RCW 9.94A.360(2)<sup>2</sup> and our state Supreme Court's interpretation of that provision in *State v. Cruz*, 139 Wn.2d 186, 985 P.2d 384

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<sup>2</sup> The 1995 (and current) version of RCW 9.94A.360(2) provides in pertinent part:  
Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

No. 26358-1-II

(1999). He claims that his offender score was zero with a standard range of 93 to 123 months, and as such, his 366-month exceptional sentence was clearly excessive.<sup>3</sup>

The State concedes that Hall's offender score was incorrectly calculated.<sup>4</sup> Our Supreme Court's recent holding in *State v. Smith*, 144 Wn.2d 665, 674-75, 30 P.3d 1245, 39 P.3d 294 (2001) leads us to agree. In *Smith*, the court held that the sentencing court cannot revive an offender's previously washed-out juvenile adjudications in calculating his offender score. *Smith*, 144 Wn.2d at 674-75. Hall is similarly situated.

Here, Hall was convicted of first degree extortion, a class B felony, in 1981, and was released from prison in May 1985. He was convicted of the offense at issue here in 1996. Before July 1995, RCW 9.94A.360(2) provided that class B felony convictions do not count in a defendant's offender score if the defendant has not committed a *felony* for 10 consecutive years after release from confinement. Thus, if the trial court had applied the pre-1995 amendment as

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<sup>3</sup> A trial court may impose an exceptional sentence outside the standard range if it finds substantial and compelling reasons to support it, and it enters written findings and conclusions to that effect. RCW 9.94A.120(2), (3); *State v. Gore*, 143 Wn.2d 288, 315, 21 P.3d 262 (2001). We will only reverse the trial court's imposition of an exceptional sentence when (1) there is insufficient evidence in the record to support the reasons for imposing the exceptional sentence, under a clearly erroneous standard; (2) an exceptional sentence is not justified by the reasons as a matter of law; or (3) an exceptional sentence is clearly excessive under an abuse of discretion standard. RCW 9.94A.210(4); *Gore*, 143 Wn.2d at 315.

<sup>4</sup> At oral argument, for the first time, the State argued that Hall waived his right to assign error to the offender score calculation because he agreed that it was 2. The State cites *In re the Personal Restraint Petition of Connick*, 144 Wn.2d 442, 28 P.3d 729 (2001), and *State v. Nitsch*, 100 Wn. App. 512, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030 (2000), as support. These cases hold that a defendant may waive assigning error to an agreed upon incorrect calculation. But neither *Connick* nor *Nitsch* involved a calculation that was correct at the time of sentencing based on case law that was later overruled. Thus, these cases are distinguishable and we decline to find waiver here.

No. 26358-1-II

*Smith* required,<sup>5</sup> all of Hall's previous felony convictions would have washed out because there were more than 10 consecutive years between Hall's release (May 1985) and his current felonious offense (January 1996). Using the correct calculation leads to Hall's offender score being counted as zero.

The remedy when a trial court miscalculates the defendant's offender score before imposing an exceptional sentence is remand to the trial court for a correct calculation and re-sentencing. That is, we will remand a case for a correct calculation of the offender score and re-sentencing unless the record clearly indicates that the trial court would have imposed the same sentence, regardless of the miscalculated offender score. *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). We cannot conclude so here.

At re-sentencing, the trial court found that: "Based on the defendant's conduct in this case *and his criminal history*, the appropriate length sentence for the defendant is 366 months in prison." Clerk's Papers at 55 (emphasis added) (finding of fact VIII). Because the trial court included both the aggravating factors and Hall's criminal history (i.e., his offender score) in its finding, we cannot tell whether the trial court imposed the exceptional sentence, at least in part, on its determination of the offender score. Therefore, the appropriate remedy is vacation of the sentence and remand for re-sentencing using the correct offender score.<sup>6</sup>

## ***2. Mitigation Evidence***

Hall further contends pro se that the trial court erred in not allowing him to present mitigation evidence regarding the finding of deliberate cruelty. Hall's argument fails.

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<sup>5</sup> We recognize that when the trial court re-sentenced Hall, it did not have the benefit of the Court's analysis in *Smith*. Instead, the trial court followed our opinion in *State v. Hendricks*, 103 Wn. App. 728, 14 P.3d 811 (2000), which *Smith* overruled. *Smith*, 144 Wn.2d at 675.

<sup>6</sup> Because we vacate the sentence, we address only those issues pertinent on remand.

We previously reviewed this contention in Hall's first appeal and held that substantial evidence supports the trial court's decision to impose an exceptional sentence based on deliberate cruelty. (Hall beat the victim for approximately 30 minutes; hit the victim numerous times in the face and head with his fist; kicked her in the head, face, body, and buttocks with his boots; forced the victim to stay on the ground in front of him so he could continue the beating; and made the victim clean herself up and waited an additional 30 minutes before allowing her to seek medical help).

Hall asserts that the trial court denied him the opportunity to introduce mitigating evidence to counter by finding deliberate cruelty by having the victim present at the re-sentencing.<sup>7</sup> The trial court noted the victim's absence, but declined to allow Hall to require her presence. The trial court correctly decided that Hall did not have a right to demand the victim's presence at the re-sentencing. WASH. CONST. art. I, § 35 (amend. 84); *State v. Stenson*, 132 Wn.2d 668, 749, 940 P.2d 1239 (1997) (the right to make a victim impact statement at sentencing belongs to the victim, not the defendant), *cert. denied*, 523 U.S. 1008 (1998).

#### **Lowered Offender Score**

Hall further contends, through counsel, that when a trial court errs in calculating an offender score and imposes an exceptional sentence, on remand, the court must automatically reduce the exceptional sentence. He asserts that the automatic reduction would be the difference

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<sup>7</sup> It is doubtful whether the victim's presence would have made a difference, or whether she would be willing to provide any assistance to Hall. At trial, to help Hall, she contradicted much of what she initially told the police. The trial court doubted that her presence at the re-sentencing would have any favorable effect on Hall's sentence. Report of Proceedings at 37 ("I don't think she would come here today and say anything less than she said before."). In addition, the prosecutor indicated that the last time he spoke with the victim, she was only interested in the return of her boots, which had been admitted as evidence. Finally, unlike the situation at trial, by the time of the re-sentencing, the relationship between Hall and the victim was long over, as evidenced by the fact that Hall was engaged to be married to another woman.

No. 26358-1-II

between the high end of the standard range associated with the incorrect offender score and the high end of the standard range associated with the correct offender score. He argues that to do otherwise indicates that the trial court impermissibly disagreed with the standard range for the crime the Legislature set. We disagree.

The Sentencing Reform Act of 1981 (SRA) and later case law grant the trial court the discretion to impose an exceptional sentence in some circumstances. RCW 9.94A.120(2), (3); *State v. Gore*, 143 Wn.2d 288, 315, 21 P.3d 262 (2001). Neither the SRA nor case law supports Hall's claim.

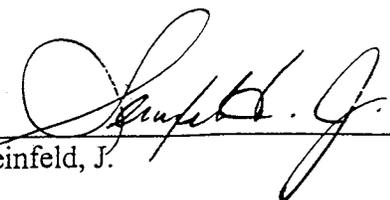
The sentence is vacated and the matter is remanded for resentencing in accordance with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

  
Houghton, J.

We concur:

  
Morgan, P.J.

  
Seinfeld, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,  
Respondent,

v.

RONALD ARMON HALL,  
Appellant.

No. 26358-1-II

MANDATE

Pierce County Cause No.  
96-1-00042-8

The State of Washington to: The Superior Court of the State of Washington  
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on May 17, 2002 became the decision terminating review of this court of the above entitled case on June 18, 2002. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.



IN TESTIMONY WHEREOF, I have hereunto set  
my hand and affixed the seal of said Court at  
Tacoma, this 2nd day of July, 2002.

  
Clerk of the Court of Appeals,  
State of Washington, Div. II

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY PLU  
DEPUTY

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

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
RONALD ARMON HALL,  
  
Appellant.

No. 29384-6-II

UNPUBLISHED OPINION

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HOUGHTON, J. – Ronald Armon Hall appeals the trial court’s decision at his second resentencing to again impose an exceptional sentence of 366 months despite the elimination of a factor used to justify that sentence at Hall’s first resentencing. We affirm.

Facts

In 1996, a jury convicted Hall of first degree assault while armed with a deadly weapon. The court imposed an exceptional sentence of 390 months in prison based on the presence of three aggravating factors: deliberate cruelty, multiple injuries, and severity of the injuries. *State v. Hall*, noted at 96 Wn. App. 1051, slip op. at 4 (1999), *review denied*, 139 Wn.2d 1019 (2000). The trial court determined that Hall’s offender score was 4 with a standard range of 129 to 171 months. Clerk’s Papers (CP) at 3; *State v. Hall*, noted at 111 Wn. App. 1041, slip op. at 1 (2002). We affirmed the conviction, determined that one of Hall’s prior convictions washed out, struck the aggravating factor of especially severe injuries, and struck the deadly weapon

No. 29384-6-II

enhancement. *Hall*, 96 Wn. App. 1051 (1999). We then remanded for a hearing to determine Hall's correct offender score and to resentence him using the correct standard range, the remaining two aggravating factors, and no deadly weapon enhancement. As our opinion stated, "We must remand for resentencing in accordance with the law, leaving the length of the sentence to the trial court's discretion." *Hall*, slip op. at 12 (1999).

At the resentencing hearing on August 4, 2000, the trial court agreed with the parties that Hall's offender score was 2, resulting in a standard range sentence of 111 to 147 months. CP at 4, *Hall*, slip op. at 2 (2002). The court imposed the same exceptional sentence of 366 months (original sentence without a deadly weapon enhancement). CP at 4, *Hall*, slip op. at 2 (2002). The trial court cited the aggravating factors of deliberate cruelty and multiple injuries in imposing the exceptional sentence, but added in a separate finding that "[b]ased on the defendant's conduct in this case *and his criminal history*, the appropriate length sentence for the defendant is 366 months in prison." CP at 6, *Hall*, slip op. at 4 (2002).

On appeal, we determined that Hall's offender score was zero and again remanded because we could not determine whether the trial court would have imposed the same sentence regardless of the miscalculated offender score. CP at 3, *Hall*, 111 Wn. App. 1041 (2002). "Because the trial court included both the aggravating factors and Hall's criminal history (i.e., his offender score) in its finding, we cannot tell whether the trial court imposed the exceptional sentence, at least in part, on its determination of the offender score. Therefore, the appropriate remedy is vacation of the sentence and remand for re-sentencing using the correct offender score." CP at 6, *Hall*, slip op. at 4 (2002). In so ruling, we rejected Hall's contention that an automatic reduction of his exceptional sentence was required by the reduction of his offender score and standard range sentence. CP at 7-8, *Hall*, slip op. at 5-6 (2002).

At the second resentencing hearing on September 13, 2002, the trial court imposed the same exceptional sentence of 366 months based on the aggravating factors of deliberate cruelty and multiple injuries, noting that we had upheld both factors on appeal. The trial court observed that it did not intend to base Hall's sentence in any particular way on his offender score. "This was without any question, Mr. Hall, a terrible beating. You know that and I know that. And I felt that the sentence that was imposed initially less the enhancement was the appropriate sentence then and I think that is the appropriate sentence now." Report of Proceedings at 19. The court entered the following pertinent findings of fact in support of the 366-month sentence:

V.

The defendant manifested deliberate cruelty to his victim. The court has never seen a beating this cruel in over thirty years of practice, including ten on the bench. But for the remarkable skill of the medical personnel, the victim would have died. The defendant's cruelty is evidenced by the duration of the assault (thirty minutes), the multiplicity of the injuries and their locations (head, face, ribs, lower back, buttocks), the severity of the injuries that the defendant inflicted, and the fact that the defendant made his victim clean herself up and wait for almost thirty more minutes before being taken for medical attention.

VI.

The defendant inflicted multiple injuries on his victim. During this assault, the defendant hit his victim multiple times in her face and head with his fist, his feet (wearing boots), and the butt of a rifle. Both her eyes were swollen shut. Parts of her face were literally broken free from her skull. The defendant kicked his victim in the ribs, breaking several ribs and causing a punctured lung that had to be surgically reinflated. The defendant also kicked his victim in the lower back and buttocks region multiple times, causing extensive bruising. During the assault, the defendant used these kicks to make his victim stay on the ground in front of him so he could continue the assault.

....

IX.

This court would impose the same length sentence irrespective of the defendant's criminal history or offender score. This court would impose the same sentence if only one of the above aggravating circumstances existed. The sentence of 366 months is the appropriate length sentence for what the defendant did to his victim in this case.

CP at 27-28. Hall now appeals his sentence.

ANALYSIS

I. Abuse of Discretion

Hall argues initially that the trial court abused its discretion in failing to consider his lower standard range and zero offender score on remand when it had expressly relied on his criminal history in imposing his prior sentences.

As support, he cites the following statement from *State v. Parker*, 132 Wn.2d 182, 187, 937 P.2d 575 (1997): “[W]hen imposing an exceptional sentence the court must first consider the presumptive punishment as legislatively determined for an ordinary commission of the crime before it may adjust it up or down to account for the compelling nature of the aggravating or mitigating circumstances of the particular case.” The *Parker* court added that when the sentencing court incorrectly calculates the standard range before imposing an exceptional sentence, remand is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway. 132 Wn.2d at 189.

Here, we remanded for resentencing because it was unclear whether the trial court would have imposed the same sentence regardless of its incorrect calculation of the standard range. Although the trial court relied primarily on the aggravating factors of deliberate cruelty and multiple injuries in the initial resentencing, it stated in an additional finding that Hall’s conduct and his criminal history justified the 366-month exceptional sentence.

At the second resentencing, the trial court explained that Hall’s conduct, and not his offender score, was the basis for the exceptional sentence and reaffirmed that 366-month sentence. This result was well within the parameters we outlined in ordering a remand; we ordered that remand because the court’s basis for the exceptional sentence was unclear.

Moreover, we expressly rejected Hall's contention that an automatic reduction of his exceptional sentence was required because of the reduction of his standard range sentence.

It is well established that a trial court can impose the same exceptional sentence on remand even after some of the original aggravating factors have failed to withstand review. *See State v. Smith*, 123 Wn.2d 51, 58, 864 P.2d 1371 (1993) (remanding to see whether trial court would impose same exceptional sentence after two of four aggravating factors found invalid).

We see little difference between such a situation and the circumstances presented here.

Moreover, we have already affirmed the two aggravating factors cited as the primary support for the 366-month sentence. We see no abuse of discretion in the trial court's clarification, on remand, that it imposed the 366-month exceptional sentence because of Hall's deliberate cruelty and the multiple injuries he inflicted.<sup>1</sup>

## II. Due Process

Hall also contends that the trial court's decision to impose the same exceptional sentence on remand was vindictive and violated his due process rights.

The federal due process clause prohibits increased sentences motivated by a judge's vindictive retaliation after reconviction following a successful appeal. *State v. Franklin*, 56 Wn. App. 915, 920, 786 P.2d 795 (1989) (citing *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969)), *review denied*, 114 Wn.2d 1004 (1990). A more severe sentence under such circumstances establishes a rebuttable presumption of vindictiveness. *Franklin*, 56 Wn. App. at 920.

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<sup>1</sup> Hall disputes the State's contention that a defendant's prior history of unscored convictions can support an exceptional sentence. *See State v. Ratliff*, 46 Wn. App. 325, 332, 730 P.2d 716 (1986), *review denied*, 108 Wn.2d 1002 (1987). Because the trial court did not rely on such support in resentencing Hall, we do not reach address this contention.

The *Franklin* court found no such presumption because the defendant's sentence was not increased following his reconviction. In *Franklin*, the trial court originally imposed concurrent sentences at the high end of the standard ranges for the defendant's robbery and attempted murder convictions: 144 months for the robbery and 411 months for the attempted murder. 56 Wn. App. at 917. On appeal, the convictions were affirmed but the case was remanded for resentencing because of a miscalculated offender score. Upon remand, the standard range for the attempted murder was adjusted downward by approximately 90 months. The court reimposed the original sentence for the robbery and imposed an exceptional sentence of 411 months for the attempted murder, citing the aggravating factors of deliberate cruelty and multiple injuries to the victim. *Franklin*, 56 Wn. App. at 918.

Division Three rejected the defendant's argument that the trial court violated his due process rights by using previously rejected aggravating factors to impose an exceptional sentence on remand. The court found it apparent that the trial court regarded the multiple stabbings to be the significant factor in fixing and maintaining the sentence at 411 months. *Franklin*, 56 Wn. App. at 920.

Similarly, Division One failed to find vindictiveness in the court's reimposition of the same sentence despite a change in the offender score in *State v. Barberio*, 66 Wn. App. 902, 833 P.2d 459 (1992), *affirmed*, 121 Wn.2d 48 (1993). In *Barberio*, the trial court originally sentenced the defendant to exceptional concurrent sentences of 72 months for second degree rape and 28 months for third degree rape. 66 Wn. App. at 904. Although the court used a mathematical formula to determine the exceptional sentence for the third degree rape, it did not use such a formula to determine the second degree rape sentence, instead imposing a sentence close to the statutory maximum because of several aggravating factors. *Barberio*, 66 Wn. App.

No. 29384-6-II

at 904. After Division One reversed the third degree rape conviction, the case was returned to the trial court for resentencing on the remaining conviction. Despite the reduction in the offender score and standard range resulting from the reversed conviction, the trial court imposed the same exceptional sentence of 72 months. *Barberio*, 66 Wn. App. at 905.

Division One cited *Franklin* in upholding that sentence, observing that while evidence of vindictiveness might be present where the trial court refused to follow a mathematical formula used in the first sentencing, no such formula had been employed in sentencing the defendant on the second degree rape charge. *Barberio*, 66 Wn. App. at 907-08. “[A]n appellate court will not find an abuse of discretion simply because a trial court, after consideration of valid aggravating factors, reimposes the same sentence after a change in the offender score.” *Barberio*, 66 Wn. App. at 908.

We are not aware of how the trial court initially arrived at the 366-month figure; it was not twice the high end of the standard range. *See Barberio*, 66 Wn. App. at 907 (formula used where sentence was two times the upper end of the standard range). It is clear, however, that the trial court did not rely on any such formula in adhering to the 366-month figure at Hall’s first resentencing. Rather, it reimposed that sentence based on the aggravating factors that survived appellate review. When the court once again imposed an exceptional sentence of 366 months at Hall’s second resentencing, it did not abandon a previous formula but adhered to those aggravating factors. We see no evidence of vindictiveness in the trial court’s imposition of the same exceptional sentence based on valid aggravating factors.

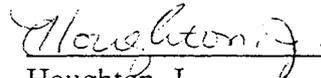
We note in this regard that Hall has filed a pro se brief challenging the factual and legal underpinnings of those aggravating factors. We analyzed these factors in Hall’s initial appeal, and our decision that they are valid is now the law of the case and no longer subject to review.

No. 29384-6-II

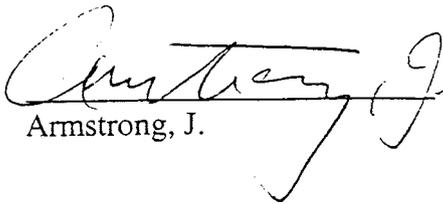
*See State v. Taylor*, 111 Wn. App. 519, 527, 45 P.3d 1112 (2002) (court will not revisit findings in support of exceptional sentence that have already withstood appellate scrutiny), *review denied*, 148 Wn.2d 1005 (2003).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

  
\_\_\_\_\_  
Houghton, J.

We concur:

  
\_\_\_\_\_  
Armstrong, J.

  
\_\_\_\_\_  
Hunt, C.J.

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,  
Respondent,  
v.  
RONALD ARMON HALL,  
Petitioner.

NO. 74623-1

ORDER

C/A NO. 29384-6-II

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2004 MAY -4 P 1:30  
BY C.J. MERRITT  
CLERK

Department I of the Court, composed of Chief Justice Alexander and Justices Johnson, Sanders, Bridge and Owens, (Justice Chambers sat for Justice Owens) considered this matter at its May 4, 2004, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 4<sup>th</sup> day of May, 2004.

For the Court

Gerry L. Alexander  
CHIEF JUSTICE

455/217

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

RONALD A. HALL,

Appellant.

No. 29384-6-II

MANDATE

Pierce County Cause No.  
96-1-00042-8

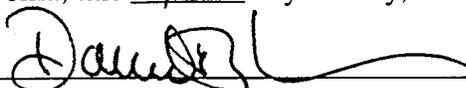
The State of Washington to: The Superior Court of the State of Washington  
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on September 16, 2003 became the decision terminating review of this court of the above entitled case on May 4, 2004. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs have been awarded in the following amount:

Judgment Creditor: State of Washington, \$-0-  
Judgment Creditor: Appellate Indigent Defense Fund, \$2, 131.50  
Judgment Debtor: Ronald A. Hall, \$2, 131.50



IN TESTIMONY WHEREOF, I have hereunto set  
my hand and affixed the seal of said Court at  
Tacoma, this 19th day of May, 2004.

  
Clerk of the Court of Appeals,  
State of Washington, Div. II

**APPENDIX C**

**Unpublished Orders from Previous  
Personal Restraint Petitions**

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

In re the  
Personal Restraint Petition of  
  
RONALD ARMON HALL,  
  
Petitioner.

No. 27794-8-II

ORDER DISMISSING PETITION

FILED  
COURT OF APPEALS  
DIVISION II  
02 FEB 14 AM 9:49  
STATE OF WASHINGTON  
BY \_\_\_\_\_

Ronald Armon Hall seeks relief from personal restraint imposed following his conviction of first degree assault. Hall argues that he received ineffective assistance of counsel when his trial attorney (1) failed to protect his right to a speedy trial; (2) failed to file an interlocutory appeal challenging the trial court's order limiting his mail, telephone, and visitation privileges; and (3) failed to fully inform him of the consequences of rejecting the State's plea offer. Hall also charges that prosecutorial misconduct occurred during closing argument. He further alleges that his appellate counsel rendered ineffective assistance by failing to raise these issues on direct appeal.

In considering that appeal, this court rejected different claims of ineffective assistance and prosecutorial misconduct. No. 20934-9-II. A claim rejected on its merits on direct appeal will not be reconsidered in a subsequent personal restraint petition unless the petitioner shows that the ends of justice would be served thereby. *In re Personal Restraint of Jeffries*, 114 Wn.2d 485, 487 (1990). The "ends of justice" burden can be met by showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument on direct appeal. *In re Gentry*, 137 Wn.2d 378,

COPY

388 (1999). Hall's only justification for failing to raise the above ineffective assistance and prosecutorial misconduct arguments on appeal is his claim that his appellate counsel was ineffective. Accordingly, the issues will be examined to determine whether the failure to raise them on appeal constituted ineffective assistance of counsel.

To establish ineffective assistance of counsel, Hall must show that counsel's performance was deficient and that the deficiency resulted in prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35 (1995). Prejudice is established if he can show that there is a reasonable probability that, but for his attorney's errors, the result of the proceeding would have been different. *State v. Lord*, 117 Wn.2d 829, 883-84 (1991). In order to prevail on an appellate ineffectiveness claim, the petitioner must show the merit of the underlying legal issues his appellate counsel failed to raise or raised improperly and then demonstrate actual prejudice. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 314 (1994).

Hall argues that he received ineffective assistance when his attorney failed to file an interlocutory appeal challenging the trial court order restricting his telephone, mail, and visitation privileges. These restrictions were imposed after Hall wrote three letters of a romantic nature to his victim after his arrest. Despite the restrictions, Hall attempted to make unauthorized telephone calls. The record shows that Hall's attorney tried several times to get the trial court to modify its order, but that the court refused each time.

Judicial policy generally disfavors interlocutory appeals, but where the trial court has committed obvious or probable error in its ruling, the case may be appropriate for discretionary review. RAP 2.3(b); RAP 5.1(c); *Hartley v. State*, 103 Wn.2d 768, 773-74 (1985). The victim's mother testified that her daughter became hysterical after reading

Hall's letters, and the record indicates that the victim testified only after her arrest on a material witness warrant. Hall does not show that the trial court committed obvious or probable error in restricting his mail, phone, and visitation privileges or that there is any likelihood that this court would have granted interlocutory review and reversed the trial court's order. Accordingly, he is unable to demonstrate prejudice as a result of appellate counsel's failure to raise this claim of ineffective assistance on direct appeal.

Hall also contends he received ineffective assistance of counsel when his attorney failed to ensure that his right to a speedy trial was protected. Hall was arraigned on January 11, 1996. On February 22, 1996, he waived his speedy trial rights to "no more than 60 days from 2-20-96." This 60-day period expired on April 20. On April 22, Hall's trial was continued until April 29.

A defendant's waiver of his speedy trial rights tolls the speedy trial clock until the waiver expires. *State v. Helms*, 72 Wn. App. 273, 276-77 (1993). When Hall's waiver expired on April 20, he had 19 days of speedy trial remaining. Therefore, the trial date of April 29 occurred within the speedy trial period, and Hall's rights were not violated.

In an order continuing the trial date to April 22, however, the court stated that Hall had waived his speedy trial rights only until April 1. The court continued the trial date from April 1 to April 22 despite Hall's objection because the defense had earlier requested the continuance to allow it to consult and interview expert witnesses and because one of the State's witnesses was unavailable on April 1. The granting of a continuance over Hall's objection so that the defense could adequately prepare did not violate Hall's speedy trial rights. *State v. Campbell*, 103 Wn.2d 1, 15 (1984). Such continuances are excluded from the speedy trial period. *State v. Selam*, 97 Wn. App. 140,

142 (1999).<sup>1</sup> Accordingly, even if Hall waived his speedy trial rights only until April 1, the continuance granted from then until April 22 meant that the actual trial date of April 29 occurred within the speedy trial period. The failure of Hall's appellate counsel to raise this claim did not constitute ineffective assistance.

Hall also claims that he received ineffective assistance when his trial counsel failed to properly advise him of the consequences of rejecting the State's plea offer. More specifically, he complains of his attorney's failure to inform him of the correct offender score and of the possibility of an exceptional sentence.

After rejecting a proposed plea bargain and receiving a fair trial, a defendant may still show prejudice if the plea bargain agreement would have resulted in a lesser sentence. *Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1985). To establish prejudice, the defendant must show that, but for counsel's advice, he would have accepted the plea. To support such a showing, the defendant must present some credible, non-conclusory evidence that he would have pleaded guilty had he been properly advised. *Engelen*, 68 F.3d at 241.

Here, the prosecutor's offer to recommend a sentence of 121.5 months is considerably lower than the exceptional sentence of 366 months that Hall eventually received. Hall states only that "there is a strong likelihood" that he would have accepted that offer if properly informed of the consequences of rejecting it.

A defendant's self-serving statement--made after trial, conviction, and sentence--that with competent advice he would have pleaded guilty, is insufficient in and of itself to

---

<sup>1</sup> The speedy trial rule also excludes competency proceedings from the speedy trial period. CrR 3.3(g)(1). Such proceedings end when the court enters a written order finding the defendant competent. Here, the court ordered a competency evaluation on March 8, and never entered a written order of competency. It is arguable, therefore, that the excluded period continued until Hall's trial began.

sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence. *In re Alvernaz*, 8 Cal. Rptr. 2d 713, 722 (1992); *see also Turner v. Tennessee*, 858 F.2d 1201, 1206 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902 (1989) (defendant's testimony that he would have accepted plea if so advised is subjective, self-serving, and insufficient to satisfy the prejudice requirement).

In *Turner*, the court found corroborating evidence of prejudice in the fact that the defendant submitted a counter-offer to the State and from the trial court's observation that he was "at all times" under the control of the attorney who advised against accepting the plea offer. *Turner*, 858 F.2d 1206. There is no evidence here of any such counter-offer, nor is there any evidence that Hall was unduly controlled by his attorney. Indeed, the evidence suggests otherwise, since the record shows that Hall's attorney advised him to accept the State's offer. Nor is there any evidence that Hall accepted responsibility for his crime. *See Engelen*, 68 F.3d at 241 (finding no evidence that defendant would have accepted plea offer where he maintained his innocence during and after trial). Hall did not testify during his trial. After his conviction, he deluged his victim with phone calls and letters expressing his love and concern. When she eventually recanted and said that her blows made Hall act abnormally, he filed a motion for relief from judgment.

Hall has not met the requirements of the prejudice prong, as he has not established that there is a reasonable probability that he would have pleaded guilty had his attorney properly calculated his offender score and warned him of the possibility of an exceptional sentence. Accordingly, appellate counsel was not ineffective for failing to raise this issue on direct appeal.

Finally, Hall claims that his appellate counsel was ineffective for failing to address two instances of prosecutorial misconduct on direct appeal. The first was the prosecutor's comment during closing argument that Hall kicked his victim in the face while wearing logging boots, and the second was the prosecutor's closing-argument statement that "we do not need [the victim's] testimony." The defense did not object to either statement.

Hall contends that the first comment was improper because there was no evidence that he kicked his victim while wearing logging boots. The record suggests otherwise. The victim testified that Hall kicked her while wearing boots or shoes and said that Hall's boots were logging boots. The trial court entered a finding in support of its exceptional sentence stating that Hall kicked his victim in the face while wearing boots. Hall did not challenge this finding on direct appeal and does not challenge it now. The prosecutor's comment was based on the evidence and was not improper.

The prosecutor's comment regarding the victim's testimony came during rebuttal argument and after the defense urged the jury to believe the victim's trial testimony. (Although called by the State, the victim was primarily a defense witness because much of her testimony discounted prior statements in which she blamed Hall for the attack.)

A prosecutor is permitted a reasonable latitude in arguing inferences from the evidence, including references to a witness's credibility. *State v. Graham*, 59 Wn. App. 418, 428 (1990). Even if improper, a prosecutor's remarks are not grounds for reversal when invited or provoked by defense counsel unless they are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective. *State v. Russell*, 125 Wn.2d 24, 86 (1994). The prosecutor's comment discounting the victim's testimony was

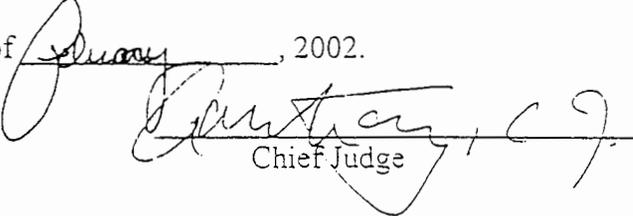
27794-8-II/7

made in response to the defense argument and was not improper. As the trial unfolded, it was clear that the State was relying on the victim's original statements and not on her trial testimony. Accordingly, there was nothing improper about either statement and no deficiency in failing to raise these claims of prosecutorial misconduct on direct appeal.

Hall does not succeed in showing that he is entitled to relief. Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 14 day of January, 2002.

  
Chief Judge

cc: Ronald Armon Hall  
Pierce County Clerk  
County Cause No. 96-1-00042-8  
John M. Neeb

# THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint  
Petition of  
  
RONALD ARMON HALL,  
  
Petitioner.

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2002 MAY 21 P 3:39  
BY C.J. MERRITT  
CLERK  
NO. 72306 -  
RULING DENYING REVIEW

Ronald Hall was charged with first-degree assault. Pending a motion to file an amended information adding a firearm or deadly weapon enhancement, the State evidently offered to accept a guilty plea to the original charge and recommend a sentence of 121.5 months. Calculating a standard sentence range of 162 to 216 months, and taking into the account the possibility of a firearm enhancement, Mr. Hall's attorney counseled him to accept the plea. Mr. Hall refused the offer, however, and went to trial on the amended information. A jury found him guilty of first-degree assault and specially found that he was armed with a deadly weapon. By the time of sentencing, Mr. Hall's standard sentence range had been calculated at 129 to 171 months with a two-year deadly weapon enhancement. The trial court imposed an exceptional sentence of 366 months plus the 24-month enhancement.

On direct appeal, Division Two of the Court of Appeals affirmed the assault conviction but reversed the deadly weapon enhancement because the State did not properly charge that enhancement. And in remanding for resentencing, the court accepted the State's concession that the standard range had been miscalculated.

On remand, the trial court calculated the correct range at 111 to 147 months. But the court again imposed an exceptional sentence of 366 months.

Mr. Hall appealed once again, but while that appeal was pending he filed a personal restraint petition in the Court of Appeals claiming ineffective assistance of trial and appellate counsel. The Chief Judge dismissed the petition. Mr. Hall now seeks this court's discretionary review. RAP 16.14(c); RAP 13.5.

Mr. Hall raised several issues in his petition, but the only argument he now makes is that his trial counsel was ineffective during the original plea negotiations in misinforming him of the correct standard range and failing to inform him of the possibility of an exceptional sentence. But to establish prejudice, Mr. Hall must show that, but for counsel's error, he would have accepted the plea offer. *Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995). This must consist of some credible, nonconclusory evidence that he would have pleaded guilty had he been properly advised.

Mr. Hall fails to make such a showing. His counsel affirmatively advised him to accept the State's offer to recommend a sentence of 121.5 months in exchange for a guilty plea to the original charge. Under counsel's miscalculated offender score, that would have been an exceptionally lenient sentence; all the more so when considering the possibility of a weapon enhancement. Under the correct sentence range, the recommended sentence would have fallen about in the middle of the range. Mr. Hall does not persuasively show why, having rejected the State's offer to recommend a sentence thought to be lenient, he would have accepted that offer had he known the recommended sentence was actually within the standard range.

As to the exceptional sentence, Mr. Hall does not establish that his counsel failed to inform him of that possibility. And even assuming that he was not

423/162

informed, he again does not convincingly show that that information would have swayed him to plea guilty. With proper advice, Mr. Hall would have known that the trial court could have impose an exceptional sentence. The letter Mr. Hall provides shows that his counsel did advise him, rightly or wrongly, that he would likely receive a mandatory weapon enhancement. Mr. Hall therefore knew when he rejected the plea that he faced a prison sentence of considerable length if he was convicted. His current self-serving statements are insufficient to establish prejudice. *State v. Cox*, 109 Wn. App. 937, 33 P.3d 371 (2002).

In sum, the Chief Judge did not err in dismissing the personal restraint petition. The motion for discretionary review is therefore denied.



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COMMISSIONER

May 21, 2002

# THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint  
Petition of

RONALD ARMON HALL,  
  
Petitioner.

## ORDER

No. 72306-1

C/A No. 27794-8-II

CLERK

2002 SEP -4 P.M. 05  
D.V. G. J. KRAVITZ  
FILED  
CLERK

Department II of the Court (composed of Chief Justice Alexander and Justices Johnson, Sanders, Bridge and Owens - Justice Bridge did not sit and Justice Ireland sat in her place) considered this matter at its September 4, 2002, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That Petitioner's Motion to Modify Commissioner's Ruling is denied.

DATED at Olympia, Washington this 4th day of September, 2002.

  
CHIEF JUSTICE

429/66

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

In re the  
Personal Restraint Petition of  
  
RONALD ARMON HALL,  
  
Petitioner.

No. 30871-1-II

ORDER DISMISSING PETITION

04 JAN 23 AM 8:56  
STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY  
COURT OF APPEALS  
DIVISION II

Ronald Armon Hall seeks relief from personal restraint imposed following his 1996 conviction of first-degree assault. He claims that his restraint is unlawful because he was denied his right to due process when (1) the trial court imposed an exceptional sentence without first determining his correct offender score; (2) he had to choose whether to accept a plea offer based on an incorrect offender score; (3) he was not informed that the court could impose an exceptional sentence; (4) he was not informed of his right to testify; and (5) he was not allowed to reconsider the plea offer after his offender score was correctly calculated.

For several procedural reasons, this court dismisses this petition without reaching the merits of these claims. As to issue (1), following Hall's second appeal, the trial court considered whether to impose an exceptional sentence knowing that Hall's offender score was 0. This court affirmed that decision in Hall's third appeal, No. 29384-6-II, filed September 16, 2003. Petitioner cannot raise previously adjudicated claims unless he shows that "the ends of justice would be served by reexamining the issue." *In re the Personal Restraint of Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999). Petitioner can

(petition raising issues that qualify as exceptions as well as some that do not is a "mixed petition" and, as such, must be dismissed).

This is an untimely, mixed petition, raising previously adjudicated claims without showing good cause or that addressing these previously adjudicated claims would serve the ends of justice. Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 23<sup>rd</sup> day of January, 2004.

Hunt, C. J.  
Chief Judge

cc: Ronald Armon Hall  
Pierce County Clerk  
County Cause No(s). 96-1-00042-8  
Kathleen Proctor

THE SUPREME COURT OF WASHINGTON

FILED  
SUPERIOR COURT  
STATE OF WASHINGTON  
2004 APR 20 AM 11:19  
BY C. S. [Signature]  
CLERK

In re the Personal Restraint  
Petition of

RONALD ARMON HALL,

Petitioner.

NO. 75140-4

RULING DENYING REVIEW

Ronald Hall was charged in 1996 with first degree assault. Pending a motion to file an amended information adding a firearm or deadly weapon enhancement, the State evidently offered to accept a guilty plea to the original charge and recommend a sentence of 121.5 months. Calculating a standard sentence range of 162 to 216 months (based on an offender score of six), and taking into account the possibility of a firearm enhancement, Mr. Hall's defense counsel advised him to accept the plea. Mr. Hall refused the offer, however, and went to trial on the amended information. A jury found him guilty of first degree assault and specially found that he was armed with a deadly weapon. By the time of sentencing, Mr. Hall's standard sentence range had been calculated at 129 to 171 months (offender score of four) with a two-year deadly weapon enhancement. The trial court imposed an exceptional sentence of 366 months plus the 24-month enhancement.

On direct appeal, Division Two of the Court of Appeals affirmed the assault conviction but reversed the deadly weapon enhancement because the State had not properly charged it. And in remanding for resentencing, the court accepted the State's concession that the standard range had been miscalculated. *State v. Hall*, noted

455/155

at 96 Wn. App. 1051 (1999). On remand, the trial court calculated the sentence range to be 111 to 147 months, based on an offender score of two. But the court again imposed an exceptional sentence of 366 months.

Mr. Hall appealed once again, but while that appeal was pending he filed a personal restraint petition in the Court of Appeals claiming ineffective assistance of trial and appellate counsel. The Chief Judge dismissed the petition, and this court denied discretionary review.

In the second appeal, the Court of Appeals again found that the trial court had miscalculated the offender score, determining that the correct score was zero. *State v. Hall*, noted at 111 Wn. App. 1041 (2002). With that score, Mr. Hall's standard range was 93 to 123 months. But on remand, the trial court once more found that an exceptional sentence of 366 months was justified. On a third appeal, the Court of Appeals affirmed. *State v. Hall*, noted at 118 Wn. App. 1041 (2003).<sup>1</sup>

Meanwhile, in September 2003, Mr. Hall filed a second personal restraint petition in the Court of Appeals, arguing that the validity of his decision to forego the State's original plea offer was undermined by the erroneous advice he received regarding the sentencing consequences. But finding that Mr. Hall's claims had either been rejected in previous review proceedings or were untimely, the Chief Judge of the Court of Appeals dismissed the petition. Mr. Hall now seeks this court's discretionary review. RAP 16.14(c); RAP 13.5.

Mr. Hall raised several claims in his petition, but he now asserts only two: that his original decision to reject the plea offer was undermined because no one told him that the trial court could impose an exceptional sentence, and that once his correct offender score was finally determined (after the second appeal), he should have been allowed to reconsider the State's plea offer. But similar claims were considered in Mr.

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<sup>1</sup>A petition for review in the third appeal is currently pending in this court. No. 74623-1.

Hall's first personal restraint petition in the context of an ineffective assistance claim. And though now Mr. Hall argues only that he was deprived of due process, not that his counsel was ineffective, he must still demonstrate that he was actually and substantially prejudiced by any constitutionally defective advice regarding the consequences of not pleading guilty. *In re Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). Specifically, to establish prejudice, Mr. Hall must show that he would have accepted the State's plea offer but for the defective advice. *Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995). This showing must consist of some credible, nonconclusory evidence. It is not enough for Mr. Hall to simply advance a self-serving claim that he would have accepted the plea offer had he known of all of the possible sentencing consequences of being convicted by trial. *State v. Cox*, 109 Wn. App. 937, 941-42, 38 P.3d 371 (2002).

As in his first petition, Mr. Hall fails to make such a showing. His counsel affirmatively advised him to accept the State's offer to recommend a 121.5-month sentence in exchange for a guilty plea to the original charge. Under counsel's miscalculated offender score, that would have been an exceptionally lenient sentence; all the more so considering the possibility of a weapon enhancement. Under the correct standard sentence range, the recommended sentence would have fallen in the upper half of the range. Mr. Hall does not persuasively show that, having rejected the State's offer to recommend a lenient sentence, he would have accepted a plea had he known the recommended sentence was actually within the standard range.

And although Mr. Hall does not establish that his counsel failed to inform him of the possibility of an exceptional sentence, he does not convincingly show that that information would have swayed him to plead guilty, either. With proper advice, Mr. Hall would have known that, even if he had pleaded guilty, the trial court would not have been bound by the State's recommendation and could have imposed an

exceptional sentence. And Mr. Hall's counsel did advise him, rightly or wrongly, that he would likely receive a mandatory five-year weapon enhancement. Mr. Hall therefore knew when he rejected the plea offer that he faced a considerable prison sentence if he was convicted.

In sum, the Chief Judge did not err in dismissing the personal restraint petition. The motion for discretionary review is therefore denied.<sup>2</sup>



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COMMISSIONER

April 20, 2004

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<sup>2</sup>The Chief Judge found some of Mr. Hall's claims untimely, taking as the date of finality of the judgment and sentence the filing of the Court of Appeals mandate after the first appeal. Arguably, subsequent appeals have reset the finality date. But since Mr. Hall fails in any event to show prejudicial error entitling him to relief, I do not address that issue.

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint )  
Petition of )  
RONALD A. HALL, )  
Petitioner. )  
\_\_\_\_\_ )

ORDER

No. 75140-4

C/A No. 30871-1-II

CLERK

BY C. J. PERMIT

2004 JUN -2 A 12:08

FILED  
SUPREME COURT  
STATE OF WASHINGTON

Department I of the Court, composed of Chief Justice Alexander and Justices Johnson, Sanders, Bridge and Owens, considered this matter at its June 2, 2004, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion to Modify the Commissioner's Ruling is denied.

DATED at Olympia, Washington this 2nd day of June, 2004.

For the Court

Gerry L. Alexander  
CHIEF JUSTICE

457/91

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

In re the  
Personal Restraint Petitions of

Charles B. Birchall,  
Lindsey Crumpton,  
Everett Kalahan,  
Ronald A. Hall,  
Joseph M. Nissensohn,  
Jerry Strabeck, Jr.,  
Mark W. Mangan,  
Thomas J. Black-Bonnet,  
Daniel Rouse,  
Donald A. Delosh,

Petitioners.

ORDER DISMISSING PETITIONS

No. 28193-7-II  
No. 28194-5-II  
No. 28195-3-II  
No. 28197-0-II  
No. 28198-8-II  
No. 28199-6-II  
No. 28200-3-II  
No. 28201-1-II  
No. 28202-0-II  
No. 28203-8-II

04 MAR 2000  
STATE OF WASHINGTON  
BY [Signature]  
DEPUTY CLERK

These petitioners seek relief from personal restraint asserting that under substantive due process, procedural due process, or their right to a jury trial, the facts underlying the imposition of their exceptional sentences must be found by a jury beyond a reasonable doubt.

### FACTS

Charles B. Birchall is confined for his 1994 first-degree rape conviction. He is serving a 180-month exceptional sentence. He has filed one prior personal restraint petition, No. 20047-3-II (Dismissed November 4, 1996). More than one year has elapsed between the finality of his judgment and sentence and the date he filed this petition.

Lindsey Crumpton is confined for his 1993 convictions of first-degree rape (5 counts) and residential burglary. He is serving a 748.5-month exceptional sentence. He has filed three prior personal restraint petitions: Nos. 17588-6-II (Dismissed April 18, 1994); 18673-0-II (Dismissed December 27, 1994); and 19217-9-II (Order rejecting superior court transfer on May 31, 1995). He has also filed three prior appeals: Nos. 17502-9-II (unpublished opinion filed June 14, 1996); No. 20206-9-II (published opinion filed March 20, 1998); and 20466-5-II (dismissed August 15, 1996). More than one year has elapsed between finality and the date he filed this petition.

Everett Kalahan is confined for his 1993 convictions of first-degree child rape, first-degree child molestation, second-degree rape, second-degree child molestation, and communicating with a minor for immoral purposes. He is serving a 360-month exceptional sentence. He has filed a prior personal restraint petition, No. 25262-7-II (dismissed December 14, 2000), and a prior appeal, No. 17828-1-II (Ruling Affirming Judgment and Sentence, filed September 12, 1995). More than one year has elapsed between finality and the date he filed this petition.

Ronald A. Hall is confined for his 1996 first-degree assault conviction. He is serving a 366-month exceptional sentence. He has filed two prior personal restraint petitions: No. 27794-8-II (dismissed February 14, 2002); and 30871-1-II (dismissed January 23, 2004). He has filed four prior appeals: Nos. 20934-9-II (unpublished opinion filed July 23, 1999); 22194-2-II (unpublished opinion filed July 23, 1999); 26358-1-II (unpublished opinion filed May 17, 2002); and 29384-6-II (unpublished opinion filed September 16, 2003).

Joseph M. Nissensohn is confined for his 1991 convictions of second-degree murder and second-degree assault. He is serving a 300-month exceptional sentence. He has filed one prior appeal, No. 15407-2-II (unpublished opinion filed October 21, 1993). More than one year has elapsed between finality and the date he filed this petition.

Jerry Strabeck, Jr. is confined for his 1995 convictions of first-degree child rape and second-degree kidnapping. He is serving a 240-month exceptional sentence. He has filed one prior appeal, No. 19750-2-II (unpublished opinion filed December 13, 1996). More than one year has elapsed between finality and the date he filed this petition.

Mark W. Mangan is confined for his 2000 conviction of conspiracy to manufacture a controlled substance, methamphetamine. He is serving a 36-month stipulated exceptional sentence. His judgment and sentence became final on March 23, 2000, when he entered his guilty plea. More than one year has elapsed between finality and the date he filed this petition.

Thomas J. Black-Bonnet is confined for his 1997 convictions of first-degree child rape (2 counts). He is serving a 280-month exceptional sentence. He has filed a prior appeal, No. 22505-1-II (Ruling Affirming Sentence filed December 1, 1998). More than one year has elapsed between finality and the date he filed this petition.

Daniel Rouse is confined for his 1995 convictions of first-degree kidnapping and second-degree assault. He is serving 130-month exceptional sentence. He has filed three prior appeals: Nos. 20378-2-II (unpublished opinion filed February 26, 1999); 20377-4-II (unpublished opinion filed February 26, 1999); and 27848-1-II (Ruling Affirming

Order filed October 21, 2002). More than one year has elapsed between finality of his judgment and sentence and the date he filed this petition. RCW 10.73.090(3)(b).

Donald A. Delosh is confined for his 1994 conviction of first-degree child rape. He is serving a 208-month exceptional sentence. He has filed a prior appeal, No. 18015-4-II (Ruling Affirming Judgment and Sentence, filed July 31, 1995). More than one year has elapsed between finality and the date he filed this petition.

These petitioners assert their claims in a brief jointly filed with six petitioners in Division One of this court. The Division One petitioners committed their offenses in two counties, whereas the Division Two petitioners committed their offenses in six different counties. Rather than requiring eight counties to respond to the joint allegations, this court stayed its decision pending Division One's consideration of the claims on the merits.

On April 18, 2003, Division One issued its decision, *In re the Personal Restraint of Charles*, 118 Wn. App. 1010 (2003). The Supreme Court denied review on December 4, 2003, and disposed of the petitions on January 14, 2004. Division One issued its mandate on January 27, 2004.

## DISCUSSION

This court has reviewed the Division One decision, agrees that none of the issues raised demonstrates an exception to the one-year time limit for collateral attacks, and, thus, dismisses nine of the petitions as untimely.<sup>1</sup>

### I. EXCEPTIONAL SENTENCE FACTS FOUND BY JUDGE

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<sup>1</sup> Petitioner Hall's petition is timely but successive. As he has shown good cause for not raising these claims in his previous petition, this court can consider his claims on the merits. RCW 10.73.140.

First, this court agrees that *State v. Gore*, 143 Wn.2d 288, 21 P.3d 262 (2001), controls in its holding that the imposition of an exceptional sentence based on facts found by a judge, not a jury beyond a reasonable doubt, is constitutional.

## II. DUE PROCESS

Second, this court agrees that petitioners' due process rights were not violated when their exceptional sentences were imposed without a *statutorily* required evidentiary hearing. Petitioners had no procedural due process right to a standard range sentence because they had only a qualified liberty interest. *State v. Owens*, 95 Wn. App. 619, 628-31, 976 P.2d 656 (1999).

## III. UNTIMELINESS

Third, because petitioners filed their petitions more than one year after their judgments and sentences became final, the petitions are untimely unless they can show that (A) their judgments and sentences are invalid on their faces, RCW 10.73.090; or (B) an exception in RCW 10.73.100 allows their collateral attacks to go forward.

As to (A), *Gore, supra*, resolved the issues arising from *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct 2348, 147 L. Ed. 2d 435 (2000). That a judge, not a jury, found the facts supporting their exceptional sentences does not show facial invalidity; on the contrary, this procedure is constitutional. As Division One noted, *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and *Harris v. United States*, 536 U.S. 545, 122 S. Ct. 2406, 153 L.Ed.2d 524 (2002), are immaterial because none of the petitioners here shows any increase in his mandatory minimum sentence.

As to (B), petitioners assert that RCW 10.73.100(2) and (6) apply.<sup>2</sup> Section (2) does not apply because petitioners have not shown that any statute under which they were convicted was unconstitutional on its face or as applied to their conduct. Section (6) does not apply because, as noted above, *Apprendi*, *Ring*, and *Harris* do not apply to these petitioners. Thus, these petitions thus must be dismissed.

#### IV. EFFECTIVE ASSISTANCE OF COUNSEL

Petitioner Mangen also claims that his guilty plea resulted from ineffective assistance of counsel. This claim, too, is time-barred and fails for lack of evidentiary support. RAP 16.7(a)(2)(i); *In re Personal Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988).<sup>3</sup>

Petitioner Hall's claims lack merit and are dismissed under RAP 16.11(b).

Petitioners fail to show unlawful restraint. Accordingly, it is hereby

ORDERED that this court's ruling staying these petitions is lifted, petitioners' motion to consolidate these petitions is granted, petitioners' motion to file an overlength

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<sup>2</sup> These statutes provide:

(2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

<sup>3</sup> He claims that he would not have pleaded guilty and stipulated to a 36-month exceptional sentence had he understood that he faced only a 0-12-month sentence. But petitioner has failed to document this claim with any competent evidence. He asserts that he originally faced a charge of manufacturing a controlled substance. Depending on that substance, his seriousness level could have been a X or an VIII, and a standard range of either 51 to 68 months or 21 to 27 months. See Former RCW 9.94A.310-.320 (2000). Petitioner's Judgment and Sentence also indicates in appendix F that this was a BTC disposition. Petitioner fails to show that counsel did not fashion an advantageous remedy or that counsel's advice was unreasonable.

consolidated brief is granted and has been accepted for filing, and petitioners' motion to rely on unauthenticated documents is granted. It is further

ORDERED that these consolidated petitions are dismissed under RAP 16.11(b).

DATED this 26 day of March, 2004.

Hunt, C.J.  
Chief Judge

cc: Charles B. Birchall  
Lewis County Cause No. 94-1-00197-8  
Lindsey Crumpton  
Kitsap County Cause No. 93-1-00265-1  
Everett Kalahan, Deceased  
Clark County Cause No. 93-1-00640-3  
Ronald A. Hall,  
Pierce County Cause No. 96-1-00042-8  
Joseph M. Nissensohn,  
Pierce County Cause No. 90-1-03609-1  
Jerry Strabeck, Jr.,  
Clark County Cause No. 94-1-01637-7  
Mark W. Mangan,  
Pierce County Cause No. 00-1-00662-6  
Thomas J. Black-Bonnet,  
Cowlitz County Cause No. 97-1-00433-8  
Daniel Rouse,  
Mason County Cause No. 95-1-00266-8  
Donald A. Delosh,  
Pierce County Cause No. 93-1-03365-8

Jean Scheidler-Brown — (206) 223-1888, 1-888-900-6923  
Lewis County Clerk  
Jeremy Randolph  
Kitsap County Clerk  
Russell Hauge  
Clark County Clerk  
Arthur Curtis  
Pierce County Clerk  
Gerald A. Horne  
Cowlitz County Clerk  
Susan I. Baur  
Mason County Clerk  
Gary Burleson