

No. 79068-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY DAVIS, PETITIONER

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE JEROME J. LEVEQUE

---

SUPPLEMENTAL BRIEF OF RESPONDENT

---

STEVEN J. TUCKER  
Prosecuting Attorney

Kevin M. Korsmo  
Deputy Prosecuting Attorney  
Attorneys for Respondent

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

RECEIVED  
SUPERIOR COURT  
STATE OF WASHINGTON  
07 MAY -7 AM 8:07  
BY RONALD R. CARPENTER  
CLERK

**INDEX**

INTRODUCTION .....1

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....1

ARGUMENT.....3

    A.    THE TRIAL COURT HAD STATUTORY  
          AUTHORITY TO SUBMIT THE SPECIAL  
          INTERROGATORY TO THE JURY .....3

    B.    ANY ERROR IN SUBMITTING THE  
          INTERROGATORY WAS HARMLESS  
          IN LIGHT OF THE NEWLY ENACTED  
          CHAPTER 205, LAWS OF 2007.....9

CONCLUSION.....12

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

ABAD V. COZZA, 128 Wn.2d 575,  
911 P.2d 376 (1996)..... 6

IN RE LEE, 95 Wn.2d 357,  
623 P.2d 687 (1980)..... 7

ROGOSKI V. HAMMOND, 9 Wn. App. 500,  
513 P.2d 285 (1973)..... 6

STATE V. BECKER, 132 Wn.2d 54,  
935 P.2d 1321 (1997)..... 7

STATE V. COURSER, 199 Wash. 559,  
92 P.2d 264 (1939)..... 6

STATE V. DAVIS, 133 Wn. App. 415,  
138 P.3d 132 (2006)..... 2

STATE V. FOWLER, 187 Wash. 450,  
60 P.2d 83 (1936)..... 6

STATE V. FREDERICK, 100 Wn.2d 550,  
674 P.2d 136 (1983)..... 7

STATE V. FURTH, 5 Wn.2d 1,  
104 P.2d 925 (1940)..... 7

STATE V. HUGHES, 154 Wn.2d 118,  
110 P.3d 192 (2005)..... 3, 4, 5, 9

STATE V. JOHNSON, 104 Wn.2d 338,  
705 P.2d 773 (1985)..... 7

STATE V. MANUEL, 94 Wn.2d 695,  
619 P.2d 977 (1980)..... 8

STATE V. PILLATOS, 159 Wn.2d 469,  
150 P.3d 1130 (2007)..... 3, 4, 5, 9, 10, 11

STATE V. RIVERS, 129 Wn.2d 697, 921 P.2d 495 (1996).....	7
STATE V. ROBERTS, 142 Wn.2d 471, 14 P.3d 713 (2000).....	8
STATE V. SMITH, 150 Wn.2d 135, 75 P.3d 934 (2003).....	6

**SUPREME COURT CASES**

BLAKELY V. WASHINGTON, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004).....	3
--	---

**CONSTITUTIONAL PROVISIONS**

SIXTH AMENDMENT.....	8
----------------------	---

**STATUTES**

LAWS OF 1903, c. 86 .....	6
LAWS OF 1909, c. 249 .....	6
LAWS OF 2005, c.68 .....	4, 8
LAWS OF 2007, c. 205 .....	1, 10, 11
RCW 2.28.150 .....	1, 2, 5, 6, 9
RCW 9.92.030 .....	6
RCW 69.50.435 .....	7

**COURT RULES**

CrR 6.16(b) .....	2, 8
RAP 13.7(d).....	1

I.

INTRODUCTION

Respondent, State of Washington, respectfully submits this supplemental brief as permitted by RAP 13.7(d) to address the issue presented by the petition for review.

II.

ISSUES PRESENTED

- (1) Does RCW 2.28.150 permit a court to ask a jury to answer an interrogatory?
- (2) Does Laws of 2007, c. 205, render any sentencing error harmless?

III.

STATEMENT OF THE CASE

Petitioner/defendant Anthony Davis was convicted by a jury in the Spokane County Superior Court of harassment, unlawful imprisonment, two counts of fourth degree assault, and violation of a domestic violence protection order. CP 45-53. One of the instructions given was an interrogatory that asked jurors, if they found the defendant guilty of unlawful imprisonment, to answer a question: beyond a

reasonable doubt, did the jury unanimously find that defendant knew the child victim was particularly vulnerable and incapable of resistance due to extreme youth? The jury answered “Yes.” CP 55. The trial court used that finding to impose an exceptional sentence of 12 months on the unlawful imprisonment count to be served concurrently with the other felony charges. CP 56-68.

Defendant appealed to the Court of Appeals, which affirmed the convictions and the exceptional sentence on the unlawful imprisonment count. State v. Davis, 133 Wn. App. 415, 138 P.3d 132 (2006). As to the exceptional sentence, the Court of Appeals rejected appellant’s argument that the trial court lacked authority to submit the special interrogatory to the jury. The Court reasoned that the trial court had statutory authority under both RCW 2.28.150 and authority under CrR 6.16(b) to act as it did. Id. at 426-428. Defendant then sought review from this court on several theories. Review was granted solely on the issue of the propriety of submitting the special interrogatory to the jury.

#### IV.

#### ARGUMENT

##### A. THE TRIAL COURT HAD STATUTORY AUTHORITY TO SUBMIT THE SPECIAL INTERROGATORY TO THE JURY.

Defendant argued below that the trial court lacked inherent and statutory authority to submit the interrogatory to the jury. While the recent decision in State v. Pillatos, 159 Wn.2d 469, 150 P.3d 1130 (2007), supports defendant's inherent authority argument, it does not answer the Court of Appeals' reasoning here. There is a difference between asking a question of a jury that has already been impaneled and impaneling a jury to ask it a question. Pillatos said that the latter was improper. It did not address the former situation presented in this case – a practice that has been utilized on many occasions under both the Sentencing Reform Act (SRA) and predecessor criminal procedure statutes.

State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), was the first occasion on which this court addressed the impact of Blakely v. Washington, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), on exceptional sentences under Washington's Sentence Reform Act (SRA). The court determined that exceptional sentences were still possible under the act. Id. at 132-134. The court reversed the exceptional sentences in the cases before it on the basis that no jury had found the

aggravating factors relied upon by the sentencing judges. Id. at 137-142. The court also ruled that Blakely error could never be harmless. Id. at 142-148. The court then turned to the remedy. Given the absence of any legislatively created mechanism for juries to find aggravating factors, the court stated: “we refuse to imply such a procedure on remand.” Id. at 150. In reaching that decision, however, the court carefully circumscribed its ruling:

We are presented only with the question of the appropriate remedy on *remand* – we do not decide here whether juries may be given special verdict forms or interrogatories to determine aggravating factors at trial.

Id. at 149.

This case falls squarely into the Hughes exclusion. That court expressly declined to answer the question presented by this case – whether a trial court could in fact give the jury interrogatories concerning aggravating factors. The only case since Hughes that came close to addressing the question was State v. Pillatos, supra.

The day after the Hughes opinion was released, the Governor signed Laws of 2005, c.68 into law. There the Legislature stated that juries were to make findings concerning a large number of potential aggravating factors. The Hughes court did not have the benefit

of the new legislation when it made its remand decision. That legislation became the focus of the decision in Pillatos.

Pillatos decided two items of import to this case. First, it ruled that the Laws of 2005, c. 68, did not apply to cases in which trials or guilty pleas were accepted prior to the effective date of the new legislation. *See Pillatos*, 159 Wn.2d at 470. Since this case was tried before that date, the new legislation does not apply to it. Second, the court ruled that trial courts did not have inherent authority to empanel juries to resolve sentencing questions. *Id.* at 469-470. The majority did not address the issue of the application of RCW 2.28.150.<sup>1</sup>

The Pillatos court also expressly noted that Hughes left open the issue of whether or not an interrogatory could be submitted to a jury hearing a criminal trial. *Id.* at 474. The court then went on to find that they could be submitted in some circumstances, such as cases to which the new statute applied. *Id.* The court did not find that the new legislation was the *only* circumstance in which a trial court could submit an interrogatory to the jury.

This case requires resolution of the issue of whether the trial court had authority under RCW 2.28.150 to submit the interrogatory. It did. Nothing in Hughes or Pillatos prohibits such action.

---

<sup>1</sup> The concurring opinion of Justice Chambers did discuss the statute.

RCW 2.28.150 provides that “if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.” Courts have used this statute in the past to create procedures. *E.g.*, Abad v. Cozza, 128 Wn.2d 575, 588, 911 P.2d 376 (1996) [district court had authority to enact local rules to implement deferred prosecution statute]; Rogoski v. Hammond, 9 Wn. App. 500, 513 P.2d 285 (1973) [trial court had authority and duty to hold a show cause procedure before it could order prejudgment attachment].

Washington trial courts have a long history of impaneling juries to consider sentence enhancements regardless of whether the right to jury has been incorporated into a statute. For example, although Washington’s habitual offender statute, RCW 9.92.030, was amended in 1909 to delete the requirement that a jury decide the defendant’s habitual offender status, trial courts regularly impaneled juries to make such determinations for over seventy years.<sup>2</sup> *See* State v. Smith, 150 Wn.2d 135, 144, 75 P.3d 934 (2003); State v. Courser, 199 Wash. 559, 560, 92 P.2d 264 (1939); State v. Fowler, 187 Wash. 450, 60 P.2d 83 (1936). The

---

<sup>2</sup> When the habitual offender statute was first enacted in 1903, it specifically provided that the court should impanel a jury to decide whether the defendant was a habitual offender. Laws of 1903, c. 86, §§ 1 and 2. Six years later, the Legislature amended the statute and deleted all references to a right to jury. Laws of 1909, c. 249, §§ 3 and 4.

statute was still not amended after the Supreme Court held in 1940 that there was a constitutional right to a jury in habitual offender proceedings. State v. Furth, 5 Wn.2d 1, 104 P.2d 925 (1940). Yet Washington courts continued to recognize that they had the power to impanel juries for habitual offender proceedings even without the statute. See State v. Johnson, 104 Wn.2d 338, 705 P.2d 773 (1985); State v. Frederick, 100 Wn.2d 550, 553, 674 P.2d 136 (1983); In re Lee, 95 Wn.2d 357, 359-360, 623 P.2d 687 (1980). Indeed, King County followed this practice in giving sentencing juries to “three strikes” cases under the persistent offender section of the SRA. See State v. Rivers, 129 Wn.2d 697, 703, 921 P.2d 495 (1996).

Similarly, the school zone and bus stop sentencing enhancements set forth in RCW 69.50.435 make no specific provision for impaneling a jury to decide whether the facts support the enhancement. Yet there has been no doubt that Washington courts have the authority to instruct the jury and provide special verdict forms concerning the enhancement. State v. Becker, 132 Wn.2d 54, 61, 935 P.2d 1321 (1997). Certainly, the trial court has the power to submit instructions concerning exceptional sentence aggravating factors to the jury.

Court rules are to the same effect. The criminal rules provide the trial court with authority to request special findings from the jury. CrR 6.16(b) provides:

Special Findings. The court may submit to the jury forms for such special findings which may be required or authorized by law. The court shall give such instruction as may be necessary to enable the jury both to make these special findings or verdicts and to render a general verdict.

Indeed, previous appellate court decisions have required the trial court to submit special findings to the jury in a variety of contexts though no specific statutory authority requires them to do so.<sup>3</sup> Blakely now requires the court to do so before an exceptional sentence may be imposed under certain circumstances. The trial court did not err in submitting the interrogatories to the jury.

Finally, it should be noted that the trial court's decision here is consistent with the policy of this state set forth by the Legislature in its original Blakely-fix, Laws of 2005, c.68. As noted previously, there the Legislature stated that juries were to make findings concerning a large number of potential aggravating factors. The public policy of this state is to honor a defendant's Sixth Amendment right and have a jury answer

---

<sup>3</sup> See State v. Roberts, 142 Wn.2d 471, 509 n.12, 14 P.3d 713 (2000) (in death penalty case involving accomplice liability issues, jury should be presented with special interrogatories concerning the defendant's level of involvement); State v. Manuel, 94 Wn.2d 695, 700, 619 P.2d 977 (1980) (when defendant seeks reimbursement for self-defense, special interrogatories should be submitted to jury).

questions concerning potential aggravating factors. The trial court's action here was consistent with this public policy and was not the least bit inconsistent with the Hughes decision.

The trial court did not err in submitting the interrogatory concerning the aggravating factor in order to comply with the dictates of Blakely v. Washington. At the time this case was tried, the exceptional sentence policy still existed in the statute even though the legislatively declared process of judicial fact-finding had been struck down. There no longer being a "course of proceeding" that had been "specifically pointed out by statute," the trial court was free to apply RCW 2.28.150 and provide an appropriate procedure. The Court of Appeals correctly recognized that the trial court could do as it did. The sentence should be affirmed.

B. ANY ERROR IN SUBMITTING THE INTERROGATORY WAS HARMLESS IN LIGHT OF THE NEWLY ENACTED CHAPTER 205, LAWS OF 2007.

This court should affirm even if it decides that the trial court lacked authority under Hughes and Pillatos to submit the interrogatory. Recently enacted legislation, effective April 27, 2007, expressly grants such authority in cases like this. It would be a waste of time to send the case back for another jury determination of the same facts

using the same process the trial court already followed. Any error was harmless.

Laws of 2007, chapter 205, carried an emergency clause and took effect when the Governor signed it into law on April 27, 2007.<sup>4</sup> Id., §4. Section One of the legislation notes the decision in Pillatos and expressed the intent that “superior courts shall have the authority to impanel juries to find aggravating circumstances in all cases that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing.” Id., §1.

Section Two specifies that whenever a new sentencing proceeding is required in a case where an exceptional sentence had previously been imposed, “ the superior court may impanel a jury to consider any alleged aggravating factors listed in RCW 9.94A.535(3), that were relied upon by the superior court in posing the previous sentence, at the new sentencing hearing.” Id., §2. In essence, the new legislation extends the original “Blakely-fix” to all exceptional sentence cases that were upended by that decision.

The Pillatos court has already determined that the original “Blakely-fix” statute was procedural in nature and could be applied to cases that were pending trial when the statute took effect. Pillatos, 159

---

<sup>4</sup> A copy of the legislation is attached as Appendix A.

Wn.2d at 470-471. Remedial statutes typically are “enforced as soon as they are effective, even if they relate to transactions predating their enactment.” Id. at 473. The same results should be reached with the new statute. It is simply an amendment to the one this court already approved in Pillatos. The Legislature’s “trigger” mechanism is equally clear – the amendment applies to any exceptional sentence case that has to be re-sentenced. Laws of 2007, c. 205, §2.

If this court was to agree with defendant and reverse the exceptional sentence, the new statute would become applicable to this case. However, defendant already received the benefits of the jury fact-finding process at his original trial due to the foresight of the trial judge. It would border on the absurd for a remand to follow a process that was already flawlessly followed in the original trial.<sup>5</sup> Having already received his Blakely jury finding right, there is no need for a new sentencing procedure. Any error in the trial was rendered harmless by the new legislation.

Application of that new statute to this case essentially moots out defendant’s claim for relief. If there was error, it was harmless under the facts of this case. For that reason, too, the sentence should be affirmed.

---

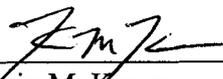
<sup>5</sup> The defendant has already served his sentence. He would thus have nothing to gain, and potentially something to lose, by being re-sentenced.

V.

CONCLUSION

For the reasons stated, the convictions and sentence should  
be affirmed.

Respectfully submitted this 3<sup>rd</sup> day of May, 2007.

  
Kevin M. Korsmo #12934  
Deputy Prosecuting Attorney

Attorney for Respondent

# APPENDIX A

CERTIFICATION OF ENROLLMENT

**ENGROSSED HOUSE BILL 2070**

60th Legislature  
2007 Regular Session

Passed by the House April 18, 2007  
Yeas 97 Nays 0

---

**Speaker of the House of Representatives**

Passed by the Senate April 17, 2007  
Yeas 47 Nays 0

---

**President of the Senate**

Approved

---

**Governor of the State of Washington**

CERTIFICATE

I, Richard Nafziger, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED HOUSE BILL 2070** as passed by the House of Representatives and the Senate on the dates hereon set forth.

---

**Chief Clerk**

FILED

**Secretary of State  
State of Washington**

---

ENGROSSED HOUSE BILL 2070

---

AS AMENDED BY THE SENATE

Passed Legislature - 2007 Regular Session

State of Washington                      60th Legislature                      2007 Regular Session

By Representatives O'Brien, Goodman and Pearson

Read first time 02/07/2007. Referred to Committee on Public Safety & Emergency Preparedness.

1            AN ACT Relating to exceptional sentences; amending RCW 9.94A.537;  
2            creating a new section; and declaring an emergency.

3            BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4            NEW SECTION.    **Sec. 1.**    In *State v. Pillatos*, 150 P.3d 1130 (2007),  
5            the Washington supreme court held that the changes made to the  
6            sentencing reform act concerning exceptional sentences in chapter 68,  
7            Laws of 2005 do not apply to cases where the trials had already begun  
8            or guilty pleas had already been entered prior to the effective date of  
9            the act on April 15, 2005. The legislature intends that the superior  
10           courts shall have the authority to impanel juries to find aggravating  
11           circumstances in all cases that come before the courts for trial or  
12           sentencing, regardless of the date of the original trial or sentencing.

13           **Sec. 2.**    RCW 9.94A.537 and 2005 c 68 s 4 are each amended to read  
14           as follows:

15           (1) At any time prior to trial or entry of the guilty plea if  
16           substantial rights of the defendant are not prejudiced, the state may  
17           give notice that it is seeking a sentence above the standard sentencing

1 range. The notice shall state aggravating circumstances upon which the  
2 requested sentence will be based.

3 (2) In any case where an exceptional sentence above the standard  
4 range was imposed and where a new sentencing hearing is required, the  
5 superior court may impanel a jury to consider any alleged aggravating  
6 circumstances listed in RCW 9.94A.535(3), that were relied upon by the  
7 superior court in imposing the previous sentence, at the new sentencing  
8 hearing.

9 (3) The facts supporting aggravating circumstances shall be proved  
10 to a jury beyond a reasonable doubt. The jury's verdict on the  
11 aggravating factor must be unanimous, and by special interrogatory. If  
12 a jury is waived, proof shall be to the court beyond a reasonable  
13 doubt, unless the defendant stipulates to the aggravating facts.

14 ~~((+3+))~~ (4) Evidence regarding any facts supporting aggravating  
15 circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented  
16 to the jury during the trial of the alleged crime, unless the jury has  
17 been impaneled solely for resentencing, or unless the state alleges the  
18 aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i),  
19 (o), or (t). If one of these aggravating circumstances is alleged, the  
20 trial court may conduct a separate proceeding if the evidence  
21 supporting the aggravating fact is not part of the res geste of the  
22 charged crime, if the evidence is not otherwise admissible in trial of  
23 the charged crime, and if the court finds that the probative value of  
24 the evidence to the aggravated fact is substantially outweighed by its  
25 prejudicial effect on the jury's ability to determine guilt or  
26 innocence for the underlying crime.

27 ~~((+4+))~~ (5) If the superior court conducts a separate proceeding to  
28 determine the existence of aggravating circumstances listed in RCW  
29 9.94A.535(3) (e)(iv), (h)(i), (o), or (t), the proceeding shall  
30 immediately follow the trial on the underlying conviction, if possible.  
31 If any person who served on the jury is unable to continue, the court  
32 shall substitute an alternate juror.

33 ~~((+5+))~~ (6) If the jury finds, unanimously and beyond a reasonable  
34 doubt, one or more of the facts alleged by the state in support of an  
35 aggravated sentence, the court may sentence the offender pursuant to  
36 RCW 9.94A.535 to a term of confinement up to the maximum allowed under  
37 RCW 9A.20.021 for the underlying conviction if it finds, considering

1 the purposes of this chapter, that the facts found are substantial and  
2 compelling reasons justifying an exceptional sentence.

3 NEW SECTION. **Sec. 3.** This act is necessary for the immediate  
4 preservation of the public peace, health, or safety, or support of the  
5 state government and its existing public institutions, and takes effect  
6 immediately.

--- END ---