

NO. 80496-6

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TERRANCE TERRIEL POWELL, APPELLANT

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Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 97-1-02259-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Does RCW 9.94A.537 (1) require notice of the State's intent to seek an exceptional sentence in a resentencing hearing where the plain language of the statute applies only to cases that are currently set for trial, and where the statute's language provides that notice is permissive rather than mandatory?
2. Is notice of the State's intent to seek an exceptional sentence constitutionally required where aggravating sentencing factors are not elements of a crime and Apprendi and Blakely turned on the Sixth Amendment's right to a jury trial and not the Fifth Amendment's right to a grand jury indictment?
3. Does Washington law require pleading of aggravating sentencing factors in the information where the factors pertain to sentencing only and do not strip discretion from the trial judge when imposing the sentence?
4. Is double jeopardy or mandatory joinder implicated in this case where the State simply seeks to redress a procedural sentencing error, rather than retry the defendant for a greater crime?

B. STATEMENT OF THE CASE.

1. Procedure

In 2002, a jury found petitioner Terrence Powell guilty of murder in the first degree, with a firearm enhancement, following a trial presided over by the Honorable Judge Terry Sebring. CP 77, CP 112. This is the second time Powell had been convicted of this crime; the first conviction had been overturned on appeal. CP 112. At sentencing, and based upon judicial fact-finding, the court imposed an exceptional sentence upwards of 60 years in prison for the murder conviction, plus 5 years in prison for the firearm enhancement. CP 111. The court later entered findings of fact and conclusions of law to support this sentence. CP 99-108. Powell appealed his conviction and sentence and both were affirmed on appeal. CP 112.

While Powell's case was still on appeal, the United States Supreme Court decided Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004). As Blakely held that judicial fact-finding of sentencing factors used to increase the penalty beyond what the Legislature authorized by virtue of the jury's verdict violates a defendant's Sixth Amendment rights, it impacted the validity of Powell's sentence. Powell obtained relief from his sentence by way of a personal restraint petition. CP 111-112.

When Powell's case was returned to the superior court to comply with the order granting relief, the prosecutor served the defense with a written notice that he would be seeking an exceptional sentence at the sentencing hearing, and set forth several aggravating circumstances that he intended to prove. CP 122-123, Appendix A. The State asserted only aggravating circumstances that were listed in RCW 9.94A.535(3), and which had been relied upon by Judge Sebring in imposing the prior exceptional sentence. Id.

Defense counsel moved to have the court impose a standard range sentence arguing that RCW 9.94A.537,¹ as enacted on April 15, 2005, did not apply to Powell, and as a result there was no Legislatively authorized procedure applicable to Powell that allowed for the impaneling of a jury. CP 130-139. The State responded that while the Supreme Court had determined in State v. Pillatos, 159 Wn.2d 459, 477-478, 150 P.3d 1130 (2007), that the 2005 legislation's terms required that it apply only to criminal cases that were still pending a determination of guilt at the time of its effective date, there was 2007 legislation that was applicable to Powell's resentencing. CP 150-180.

The trial court ruled that the 2007 amendments to RCW 9.94A.537 are applicable to Powell's case, and that a jury may be impaneled to determine the existence of aggravating circumstances. 7/13/05, RP 3-4,

¹ See Appendix B for full text of statute.

CP 181. The court did not give a final ruling as to which of the aggravating factors listed in the prosecution's notice fell within the parameters of RCW 9.94A.537. 7/13/05, RP 4-5. The court rejected the defense argument that such a procedure placed defendant in double jeopardy, or that it violated the prohibitions against ex post facto laws. 7/13/05, RP 3-5. Powell did not raise the claim that aggravating factors had to be charged in the information in the trial court or obtain a ruling on this contention.

This Court granted discretionary review of the trial court's ruling regarding its authority to impanel a jury to determine the existence of aggravating circumstances that may be considered in imposing an exceptional sentence. CP 127.

C. ARGUMENT.

1. THE PLAIN LANGUAGE OF RCW 9.94A.537 (2) DOES NOT REQUIRE THAT THE STATE GIVE NOTICE PRIOR TO SEEKING AN EXCEPTIONAL SENTENCE IN A RESENTENCING HEARING.

The plain language of RCW 9.94A.537 (2) (hereinafter "section 2") gives trial courts the authority to impanel juries to consider aggravating factors for imposing an exceptional sentence in new sentencing proceedings – regardless of whether the case was previously resolved via trial or plea - as long as the State originally sought an

exceptional sentence. Section 2 does not contain any kind of notice provision. Conversely, the plain language of RCW 9.94A.537 (1) (hereinafter “section 1”) provides a nonmandatory notice procedure for handling initial sentencing proceedings where the case has yet to be resolved via trial or plea. Defendant now seeks to render section (2) meaningless by asking this court to find that the pretrial notice provision of section (1) qualifies the resentencing procedure as detailed in section (2). This reading of the statute perverts the plain language of each provision and in so doing renders section (2) meaningless. The plain language of RCW 9.94A.537 provides that section (1) and section (2) operate independently of each other and this court should allow the trial court to proceed with an exceptional sentencing hearing in this matter.

a. History of RCW 9.94A.537

RCW 9.94A.537 titled – “Aggravating Circumstances -- Sentences above standard range,” was drafted in 2005 to bring Washington’s procedure for imposing exceptional sentences above standard range in compliance with Blakely v. Washington. Laws of Washington 2005, ch. 68, Appendix B. As originally enacted, RCW 9.94A.537 contained a nonmandatory notice provision, which permitted, but did not require, the state to give notice of its intent to seek an exceptional sentence prior to trial or guilty plea. The remainder of RCW 9.94A.537 outlined the procedure to follow at these proceedings.

In State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007), this court examined RCW 9.94A.537, including the “prior to trial or entry of guilty plea” language in section (1) and held that the statute applied only to cases that had not yet been resolved by way of trial or plea. 159 Wn.2d at 465. The legislature responded to Pillatos by amending RCW 9.94A.537, and adding a provision detailing the procedure for resentencing matters. Laws of 2007, chapter 205 (“Pillatos fix”)(effective 4/27/07). The amendment added a new provision to RCW 9.94A.537 stating:

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

RCW 9.94A.537 (2).

Accompanying the 2007 amendment was the following intent statement:

In State v. Pillatos, 150 P.3d 1130 (2007), the Washington supreme court held that the changes made to the sentencing reform act concerning exceptional sentences in chapter 68, Laws of 2005 do not apply to cases where the trials had already begun or guilty pleas had already been entered prior to the effective date of the act on April 15, 2005. The legislature intends that the 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.

Laws of Washington 2007 c 205 § 1.

b. Law and argument

Statutory interpretation is a question of law; therefore, a court reviews a trial court's interpretation of a statute de novo. State v. Salavea, 151 Wn.2d 133, 140, 86 P.3d 125 (2004). Where statutory language is plain and unambiguous, a court will not construe the statute but will glean the legislative intent from the words of the statute itself. See Bravo v. Dolsen Cos., 125 Wn.2d 745, 752, 888 P.2d 147 (1995); Smith v. N. Pac. Ry. Co., 7 Wn.2d 652, 664, 110 P.2d 851 (1941). A statute is ambiguous only if susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). If a statute is subject to more than one reasonable interpretation, the court should construe the statute to effectuate the legislature's intent. Davis v. Dep't of Licensing, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). Only where the legislative intent is not clear from the words of a statute may the court "resort to extrinsic aids, such as legislative history." Biggs v. Vail, 119 Wn.2d 129, 134, 830 P.2d 350 (1992).

“Courts are not at liberty to speculate on legislative intent when the legislature itself has subsequently placed its own construction on prior enactments.” Anderson v. Seattle, 78 Wn.2d 201, 203, 471 P.2d 87 (1970)(citing State ex rel. Oregon R.R. & Navigation Co. v. Clausen, 63 Wash. 535, 116 P. 7 (1911); Cowiche Growers, Inc. v. Bates, 10 Wn.2d 585, 117 P.2d 624 (1941); Carpenter v. Butler, 32 Wn.2d 371, 201 P.2d 704 (1949).

Under the plain language of RCW 9.94A.537, there are two situations where the court is authorized to impanel a jury to determine the existence of aggravating circumstances. The first is set forth in subsection (1) and permits the state to give notice to the defendant prior to a determination of guilt. The second is governed by subsection (2) and applies where the case has been remanded for a new sentencing hearing, but only when an exceptional sentence upward was previously imposed. Nothing in the language of RCW 9.94A.537 requires the criteria of both subsection (1) and (2) be complied with before the court is authorized to impanel a jury. The two provisions operate independently and contrary to defendant’s argument, there is no interplay between the two sections.

The purpose behind the notice provision in section (1) was to allow defendant to be apprised of the aggravators prior to presentation of the evidence. Because the presumption is that the aggravators will be proved in the State’s case in chief (see RCW 9.94A.537 (4)) it makes sense that

the notice requirement suggests that notice be given prior to trial or entry of the plea. However, when the matter is coming for a sentencing hearing only, and the evidence is not produced in the course of a trial, the defendant is still put on notice prior to presentation of evidence of the aggravating factor the State will seek to prove. Section (2) limits the aggravating sentencing factors the State may seek to those factors previously sought and imposed. Thus, at the outset of the resentencing hearing, defendant is on notice that the State may only seek that which was previously found in the original sentencing hearing. In this case the defendant did receive notice prior to any presentation of evidence. CP 122-23.

The defendant's construction of the statute also frustrates the purpose of the 2007 amendment. See Am. Cont'l Ins. Co. v. Steen, 151 Wn.2d 512, 518, 91 P.3d 864 (2004) (The court's primary goal in construing a statute is to determine and give effect to the legislature's intent). The legislature made clear that its intent in enacting the 2007 amendment was to make sure that a court may impose an exceptional sentence in "all cases that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing." Laws of Washington 2007 c. 205 sec. 1. The legislature knew that section (1) was already on the books when they enacted section (2). Defendant's interpretation renders provision (2) of the statute meaningless. See City of Seattle v. Dep't of Labor & Indus., 136 Wn.2d 693, 698, 965 P.2d 619

(1998) (recognizing courts must interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous).

Defendant's argument may have more merit if Blakely's holding knocked down the entire exceptional sentencing scheme as unconstitutional, but this court rejected the argument that the exceptional sentencing procedures are facially unconstitutional. State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005). Defendant knows that it is impossible to apply section (1)'s notice requirement to those defendants who pled guilty or went to trial pre-Blakely. Knowing that there was no notice provision on the books at the time of sentencing proceedings in this case, defendant's argument is nothing more than a creative attempt to construe the statute in a manner that would create a legal impossibility for the State.

Defendant argues that provisions (1) and (2) must be harmonized. As argued *supra*, provisions (1) and (2) are plain on their face and this court does not need to resort to statutory interpretation tools. However, if this court were to look to such tools it first should consider the context in which the amendment was enacted. See State v. Ose, 156 Wn.2d 140, 148, 124 P.3d 635 (2005) (It is presumed that the legislature is aware of judicial interpretation of a statute). To resolve apparent conflicts between statutes, courts generally give preference to the more specific and more recently enacted statute. See In re Estate of Little, 106 Wn.2d 269, 283, 721 P.2d 950 (1986) (more specific statute) (citing cases); Morris v. Blaker, 118 Wn.2d 133, 147, 821 P.2d 482 (1992). Courts also consider

"the sequence of all statutes relating to the same subject matter."

Department of Labor & Indus. v. Estate of MacMillan, 117 Wn.2d 222, 229, 814 P.2d 194 (1991) (citation omitted).

The legislature, by its statement of intent, was aware of this court's construction of the statute, including that this court said that as drafted:

Laws of 2005, chapter 68, by its terms, applies to all pending criminal matters *where trials have not begun or pleas not yet accepted*. See Laws of 2005, ch. 68, sec. 4(1) ("At any time prior to trial or entry of the guilty plea . . .").

Pillatos, 159 Wn.2d at 470 (emphasis added). In arriving at this construction of the statute, this court relied on the legislature's use of the language "at any time prior to trial or entry of the guilty plea," as included in section (1) to point out that this language limited it to matters that were yet to be resolved. When amending the statute, the legislature did not amend section (1) of the statute. Instead, it left section (1) to apply to pending cases, and drafted section (2) to apply to cases where matters were appearing for resentencing. Thus, the notice provision simply does not apply to resentencing matters.

The defendant has not proffered to this court a reason to graft section (1)'s notice requirement onto section (2) of the statute. Standing on its own, section (2) does not require notice of aggravating factors prior to trial or plea and the trial court in this matter may proceed with an exceptional sentencing hearing.

2. NOTICE OF AN EXCEPTIONAL SENTENCE IS NOT CONSTITUTIONALLY MANDATED UNDER THE SIXTH AMENDMENT.

In this case, defendant seeks to elevate simple aggravating sentencing factors to elements of a crime. This is not the holding announced in Apprendi² and its progeny. Instead, Apprendi was very careful to note that it was not treating sentencing factors as elements for purposes of including them in an indictment or information. While the legislature is free to provide statutorily for a notice provision under the sentencing scheme, such notice is not constitutionally mandated and the sentencing factors simply remain facts that if proven to a jury, allows, but does not require, a judge to impose a higher sentence.

"A statute is presumed to be constitutional, and the party challenging its constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt." State v. Thorne, 129 Wn.2d 736, 769-70, 921 P.2d 514 (1996). To fulfill that burden, one must show that "no set of circumstances exists in which the statute, as currently written, can be constitutionally applied." City of Redmond v. Moore, 151 Wn.2d 664, at 669, 91 P.3d 875 (2004).

Defendant argues that under the Sixth Amendment³ notice of the

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

³ Defendant also cites to article I, section 22, of the Washington Constitution which provides, that "[i]n criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him [and] to have a copy thereof."

aggravating factors is required. Generally, under the Sixth Amendment, the accused shall be informed of "the nature and cause of the accusation." The concern is due process, and this concern arises only in the context of essential elements of the charge. State v. McCarty, 140 Wn.2d 420, 425, 429, 998 P.2d 296 (2000). The accused must have proper notice of the State's charges in order to be able fairly to prepare and present a defense. State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991); State v. Bergeron, 105 Wn.2d 1, 18, 711 P.2d 1000 (1985).

Defendant's Sixth Amendment argument rests on language from

Appendi:

The term [sentencing factor] appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence within the range authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, *it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.* Indeed, it fits squarely within the usual definition of an "element" of the offense. See post, at 5 (THOMAS, J., concurring) (reviewing the relevant authorities).

530 U.S. at 494 n. 19 (emphasis added).

Defendant takes this excerpt and its broad use of the term "element",

However, defendant merely cites to this provision and all argument is under the Sixth Amendment. See RAP 10.3(a)(5); State v. Olson, 126 Wn.2d 315, 321, 893 P.2d 629 (1995) (Generally, without argument and citation to authority, we will not review an assignment of error).

and concludes that under Apprendi, sentencing factors are elements not only for purposes of submitting the factors to the jury under the Sixth Amendment, but also for purposes of whether they should be included in a charging document. In drawing this conclusion, defendant overlooks an important clarification in Apprendi. In footnote three of the Apprendi opinion, the Court clarified that "[the defendant] has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. . . . We thus do not address the indictment question separately today." Subsequent United States Supreme Court decisions in Ring v. Arizona and Blakely, which applied Apprendi to aggravating factors supporting capital and noncapital sentences respectively, were based solely on the Sixth Amendment right to jury trial, without reference to the Fifth Amendment's indictment guarantee. Ring v. Arizona, 536 U.S. 584, 597, 609, 153 L.Ed.2d 556, 569, 576-77, 122 S. Ct. 2428 (2002); Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403, 415-16 (2004). The United States Supreme Court has not applied the Fifth Amendment indictment requirements to the states." State v. Ng, 104 Wn.2d 763, 774, 713 P.2d 63 (1985) (citing, Hurtado v. California, 110 U.S. 516, 4 S. Ct. 111, 4 S. Ct. 292, 28 L.Ed.232 (1884), overruled on other grounds sub silencio by, Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 84 A.L.R. 527, 77 L.Ed.158 (1932)).

To date, with the exception of one state, every other state has rejected that Blakely's right to a jury trial on aggravating factors also requires the State to allege the aggravating factor in the indictment or information.⁴ Like Washington post-Blakely, Arizona was acutely aware of its own sentencing scheme post-Ring. As the Arizona court put it:

⁴ See Stallworth v. State, 868 So. 2d 1128 (Ala. 2003), U.S. Cert. Denied, 540 U.S. 1057, 124 S. Ct. 828, 157 L.Ed.2d 711, 2003 U.S. (2003) (indicating that Ring did not change prior case law holding that aggravators do not need to be pled in an indictment); Bottoson v. Moore, 833 So. 2d 693, 695 (Fla.) (per curiam) (rejecting arguments based upon Ring), cert. denied, 537 U.S. 1070, 123 S. Ct. 662, 154 L.Ed.2d 564 (2002); State ex rel. Smith v. Conn., 209 Ariz. 195, 98 P.3d 881, 883-85 (Ariz. App. 2004); Banks v. State, 842 So.2d 788, 793 (Fla. 2003); Terrell v. State, 276 Ga. 34, 572 S.E.2d 595, 602 (Ga. 2002) (concluding in a post-Ring challenge to an indictment that the indictment need not allege aggravating circumstances); People v. Davis, 205 Ill. 2d 349, 793 N.E.2d 552, 568-570, 275 Ill. Dec. 781 (Ill. 2002); Soto v. Commonwealth, 139 S.W.3d 827, 842 (Ky. 2004); Baker v. State, 367 Md. 648, 790 A.2d 629, 650 (Md. 2002); Berry v. State, 882 So.2d 157, 171-72 (Miss. 2004); Stevens v. State, 867 So.2d 219, 227 (Miss. 2003); State v. Gilbert, 103 S.W.3d 743, 747 (Mo. 2003) holding that Ring had no effect on the court's previous rejection of the argument that indictments need to allege aggravators); Floyd v. State, 118 Nev. 156, 42 P.3d 249, 256 (Nev. 2002); State v. Everette, 172 N.C. App. 237, 616 S.E.2d 237, 242 (N.C. 2005); State v. Hunt, 357 N.C. 257, 582 S.E.2d 593, 605-06 (N.C. 2003); State v. Pender, 627 S.E.2d 343, 346 (N.C. App. 2006); Primeaux v. State, 2004 OK CR 16, 88 P.3d 893, 899-900 (Okla. Crim. App. 2004); State v. Sawatzky, 339 Ore. 689, 125 P.3d 722, 726-27 (Or. 2005); State v. Heilman, 339 Ore. 661, 125 P.3d 728, 733-34 (Or. 2005); State v. Cox, 337 Ore. 477, 98 P.3d 1103, 1115-16 (Or. 2004); State v. Oatney, 335 Ore. 276, 66 P.3d 475, 485-87 (Or. 2003) holding that Ring did not address the issue of whether aggravators needed to be pled in the indictment and, therefore, that court's prior holding that an indictment need not contain aggravators remained unchanged); State v. Berry, 141 S.W.3d 549, 558-562 (Tenn. 2004) (holding, post-Ring, that Apprendi did not apply to require the State to include aggravators in indictments); State v. Holton, 126 S.W.3d 845, 862-63 (Tenn. 2004); State v. Carter, 114 S.W.3d 895, 910 n. 4 (Tenn. 2003); State v. Dellinger, 79 S.W.3d 458, 466 (Tenn. 2002); Russeau v. State, 171 S.W.3d 871, 885-86 (Tex. Crim. App. 2005); Rayford v. State, 125 S.W.3d 521, 533 (Tex. Crim. App. 2003); Morrisette v. Warden of Sussex I State Prison, 270 Va. 188, 613 S.E.2d 551, 556 (Va. 2005).

Contra: State v. Fortin, 178 N.J. 540, 843 A.2d 974, 1027-1038 (N.J. 2004) (requiring that aggravating factors be charged in the indictment, as a matter of state law, but with prospective application only).

In the aftermath of Apprendi and Ring, many jurisdictions faced the issue we now face, namely, whether principles announced in the two cases required that statutory aggravators which may subject a criminal defendant to capital punishment be specifically alleged in the grand jury indictment or other charging document documents.

McKaney v. Arizona, 209 Ariz 268, 269, 100 P.3d 18 (2004). The Arizona court concluded that nothing in Apprendi or Ring requires the charging of the aggravators in a death penalty case because those decisions did not rest on the right to grand jury indictments as implicated under the Fifth Amendment, but the right to trial by jury under the Sixth. 209 Ariz. at 271.

Likewise in Dague,⁵ the Alaska⁶ court succinctly outlined that when the United States Supreme Court for Sixth Amendment purposes clarified that a “sentencing factor” may be deemed the “functional equivalent of an element,” it was not speaking to the Fifth Amendment and other areas where these issues may arise:

But while this characterization may be accurate enough for purposes of Sixth Amendment analysis, it is potentially misleading when applied in other contexts. As we have explained here, the decisions in Apprendi, Blakely, and Booker⁷ do not rest on the notion that some “sentencing

⁶ Alaska’s former presumptive sentencing scheme was very similar to Washington’s and was struck down under Blakely because proof of aggravating factors was submitted to a judge, not a jury, by proof of clear and convincing evidence. See Milligrock v. State, 118 P.3d 11, 15 (2005); AS 12.55.155 (f) and AS 12.55.165 (a).

⁷ United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

factors" are really "elements". Rather than trying to answer the question of whether some sentencing factors must be deemed elements, the Supreme Court cut the Gordian knot by declaring that the distinction between "elements" and "sentencing factors" was irrelevant for Sixth Amendment purposes.

Under the functional test of Apprendi, Blakely, and Booker, defendants have a right to jury trial on any issue of fact, regardless of whether it is designated as an "element" or a "sentencing factor", if proof of that fact will increase the defendant's maximum sentence. But the Supreme Court did not say that the Sixth Amendment forbids the states from employing the distinction between "elements" and "sentencing factors" for other purposes.

State v. Dague, 143 P.3d 988, 1004 (2006).

Washington precedent also lays the groundwork for joining in the conclusion that the other states have so far drawn: that Apprendi is limited to the Sixth Amendment right to a jury. Historically, this Court has treated issues which solely involve penalties, e.g. exceptional sentences, sentences under the Persistent Offender Accountability Act (POAA), and a possible death penalty sentence, as sentencing matters and not elements of a crime. The exceptional sentencing scheme, which is found in the SRA, is a sentencing procedure and does not outline separate criminal offenses.

This State has always recognized that it is within the province of the legislature to determine sentencing procedures. State v. Thorne, 129 Wn.2d 736, 778, 921 P.2d 415 (1996) (citing State v. Benn, 120 Wn.2d

631, 671, 845 P.2d 289, cert. denied, 510 U.S. 944, 126 L.2d 331, 114 S.Ct. 382 (1993)). “A legislature has substantial discretion in defining whether a fact constitutes an element of a crime or a sentencing enhancement factor.” Id. at 780 (citing, McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986)).

While notice may be the preferred method of handling a case so that a defendant may make an informed choice of whether to enter a plea, the constitution does not guarantee a right to plea bargain, and for this reason this court held that notice is not required in three strikes cases. See State v. Crawford, 159 Wn.2d 86, 96-97 (Wash. 2006) (citing Manussier, 129 Wn.2d at 681 n.118 (citing Weatherford v. Bursey, 429 U.S. 545, 97 S. Ct. 837, 51 L.Ed.2d 30 (1977)); Crawford, 128 Wn. App. at 383; See Also, Olyer v. Boles, 368 U.S. 448, 452, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962) (due process does not require the State to give defendants notice that they may be subject to an habitual offender sentence prior to trial on the substantive offenses).

Like aggravating circumstances in an aggravated murder case, aggravating factors in an exceptional sentence are not elements of a crime but may be likened to “aggravation of penalty” factors. As this court recently reiterated in State v. Yates, 161 Wn.2d 714, 168 P.3d 359 (2007):

this court has clearly “held that under the statutory scheme in Washington the aggravating factors for first degree murder are not elements of that crime but are sentence enhancers that increase the statutory maximum sentence

from life with the possibility of parole to life without the possibility of parole or the death penalty.

State v. Thomas, 150 Wn.2d 821, 848, 83 P.3d 970 (2004); State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995), vacated on other grounds sub nom. In re Pers. Restraint of Brett, 142 Wn.2d 868, 16 P.3d 601 (2001). (holding that “[a]ggravating circumstances ... are not elements of the crime, but ““aggravation of penalty”” factors” (quoting State v. Kincaid, 103 Wn.2d 304, 307, 692 P.2d 823 (1985))).

In State v. Clark, 129 Wn.2d 805, 811, 920 P.2d 187 (1996) this court quickly rejected that the notice requirement in death penalty cases was constitutionally mandated, and instead held that it is statutory only. This court reasoned that the aggravating circumstances are not elements, but “[i]nstead, the notice simply informs the accused of the penalty that may be imposed upon conviction of the crime,” and “[d]ue process in sentencing requires only adequate notice of the *possibility* of the death penalty.” 129 Wn.2d at 811, *emphasis added* (citing State v. Lei, 59 Wn.2d 1, 3, 365 P.2d 609 (1961); Lankford v. Idaho, 500 U.S. 110, 111 S. Ct. 1723, 114 L.Ed.2d 173 (1991)).

Under the structure of the SRA, defendants were always on notice of the possibility of an exceptional sentence. In rejecting pre-Apprendi, that the State is required to make specific allegations of aggravating

factors in the charging document, the court in State v. Gunther,⁸ quoted D.

Boerner, Sentencing in Washington, as follows:

The reason that a notice requirement was not included is that an exceptional sentence is a possibility in every sentencing under the Sentencing Reform Act. To require that each defendant be given notice of that ever-existent potentiality would be redundant. . . . The possibility of an exceptional sentence always exists, and notice of that fact is inherent in the statutory provisions which create the possibility.

Gunther, quoting D. Boerner, at sec. 9.19 (1985).

Contrary to defendant's assertion, Apprendi and its progeny have never been extended to charging documents. "[T]he adequacy of the charging document was not at issue in [Apprendi or Ring], rather, those decisions concerned a defendant's right to have a jury determine any facts that could increase the sentence beyond the statutory maximum for the charged crime." Yates, 161 Wn.2d 758 (citing Apprendi, 530 U.S. at 477 n. 3, 490; Ring, 536 U.S. at 597 n. 4, 609). The court in Yates also went on to distinguish State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004) (which is cited in appellant's brief at 14-15), noting that the issue in Goodman⁹ was the sufficiency of the charging document based on the use of the word "meth." 161 Wn.2d at 759.

⁸ 45 Wn. App. 755, 727 P.2d 258 (1986), pet. rev. denied, 108 Wn.2d 1013 (1987).

⁹ Also, unlike Goodman, aggravating factors do not automatically increase either the statutory maximum, or the standard range sentence; whereas in Goodman the identity of the drug did just that.

Defendant's main framework for his argument rests on a Ninth Circuit case, Gault v. Lewis,¹⁰ which analyzes the Sixth Amendment right to notice of elements of a charged crime. The State maintains that exceptional sentencing factors are not elements of a charged crime, and therefore any case law analyzing what is proper notice under the Sixth Amendment with respect to elements of a crime is inopposite.

What seems to be at the heart of defendant's argument is one of procedural due process.¹¹ The right to procedural due process is guaranteed under the Washington Constitution article I, section 3,¹² and the United States Constitution amendments V¹³ and XIV, section 1.¹⁴ The Washington Constitution provides the same scope of protection as the United States Constitution. State v. Manussier, 129 Wn.2d 652, 679, 921 P.2d 473 (1996). If procedural due process is the focus, rather than what is found in the Fifth Amendment's indictment requirement (which does

¹⁰ 489 F.3d 993 (2007). In Gault, the court looked at whether defendant was properly informed under the Sixth Amendment of charges against him when he was charged with a sentencing enhancement under one statute (section 12022.53(b) of the California Penal Code), but then received a sentence enhancement under an entirely different section of the statute (section 12022.53(d)). As a result of this error, defendant received a twenty-five-year-to-life enhancement, rather than a ten-year enhancement.

¹¹ The State, by briefing procedural due process, is not agreeing that defendant has framed the issue this way. Rather, the State wishes to point out that defendant is entitled due process and the notice in this case provided that.

¹² "No person shall be deprived of life, liberty, or property, without due process of law." Wash. Const. art. I, § 3.

¹³ "No person shall ... be deprived of life, liberty, or property, without due process of law" U.S. Const. amend. V.

¹⁴ No state shall ... deprive any person of life, liberty, or property, without due process of law" U.S. Const. amend. XIV, § 1.

not apply to the states), or the Sixth Amendment's right to notification of all essential elements (which does not apply to aggravating sentencing factors), then the defendant in this case was afforded due process.

This court examined issues of procedural due process, notice, and what type of procedure is constitutionally required under the POAA in State v. Thorne,¹⁵ and Crawford, *supra*, and the analysis in these cases can offer guidance to the court here. First the Court concluded that the POAA is a sentencing statute. This court considered that while the former habitual criminal statute did not contain procedures for handling such cases (thus requiring the court to craft notice and trial provisions) the current POAA spelled out the procedures to be followed during sentencing and that "unless these statutory procedures violate constitutional guarantees, they must be applied to the new law." Thorne, 129 Wn.2d at 778. Looking beyond what the statute required, this court asked whether constitutionally more procedure was required. With respect to charging documents, the POAA (like the exceptional sentence statute) permits, but does not mandate notification by a judge that they have been convicted of a most serious offense. Id. at 779 (citing RCW 9.94A.392). The Court concluded that while notice was preferable, it was not mandatory because

¹⁵ State v. Thorne, 129 Wn.2d 736, 921 P.2d 514 (1996).

everything about the POAA pointed to its existence as a *sentencing statute* and not a criminal statute defining the elements of a crime. 129 Wn.2d at 779, 780 (emphasis added).

Like the POAA, everything about the structure of the exceptional sentencing scheme, points to the framework of a sentencing statute and not a criminal offense statute. It is found in chapter 9.94A – the SRA. It outlines its own sentencing procedure in 9.94A.537 – including the burden of proof, when to submit questions to a jury, and whether the sentence is mandatory or discretionary. Notice is also discretionary and not mandatory for matters that are pre-disposition. RCW 9.94A.537(1).

Having established that the exceptional sentencing scheme is a legislatively authorized sentencing act, the question remains as to what type of notice defendant is entitled. As argued *supra*, by the very nature of the SRA, defendant was always on notice of the possibility of an exceptional sentence. Defendant is also put on specific notice of the particular aggravating sentencing factors alleged prior to the sentencing hearing in this case. (CP 122-23 – Appendix A). Thus the defendant was afforded due process, because he has an opportunity to understand the nature of the aggravators and what evidence the State will produce prior to the sentencing hearing taking place. This is all the due process the Constitution demands and defendant's attempt to elevate sentencing enhancements to elements is without merit.

3. STATE LAW DOES NOT REQUIRE THAT
AGGRAVATING SENTENCING FACTORS BE
INCLUDED IN THE CHARGING DOCUMENT.

A jury finding of an aggravating sentencing factor does not *require* a judge to impose an exceptional sentence, or affect the calculation of the standard range sentence. Because the trial court still retains discretion in sentencing, Washington's treatment of sentence enhancements, which are mandatory following a finding, does not apply to aggravating sentencing factors.

Only the essential elements of the crime charged must be included in the charging document. State v. Goodman, 150 Wn.2d at 784; State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). The primary purpose of the "essential elements' rule" is to inform the accused of the nature of the accusation so that he can prepare an adequate defense. Kjorsvik, 117 Wn.2d at 101.

This court has recognized that while due process¹⁶ requires that the defendant receive formal notice of criminal charges, "we do not extend such constitutional notice to the *penalty* exacted for conviction of the crime." State v. Crawford, 159 Wn.2d 86, 95, 147 P.3d 1288 (2006)(holding that the POAA is a sentencing statute and therefore no pretrial notice that one faces the possibility of being sentenced as a

¹⁶ The State incorporates by reference all procedural due process law and argument as outlined in section 2 of this brief.

persistent offender is required); State v. Clark, 129 Wn.2d 805, 811, 920 P.2d 187 (1996) (citing State v. Lei, 59 Wn.2d 1, 3, 365 P.2d 609 (1961)).

Defendant's reliance on cases analyzing certain enhancements outside the exceptional sentencing scheme is misplaced. See Opening Brief of Appellate at 13-15, citing State v. Frazier, 81 Wn.2d 628503 P.2d 1073 (1972); State v. Cosner, 85 Wn.2d 45, 530 P.2d 317 (1975); State v. Theroff, 95 Wn.2d 385, 622 P.2d 1240 (1980); State v. Goodman; *supra*. Notice requirements which may apply to current firearm and deadly weapon enhancements as found in RCW 9.94A.533 (3)¹⁷ (firearm), and RCW 9.94A.533 (4)¹⁸ (deadly weapon) do not carry over to exceptional sentences because unlike enhancement provisions, "a sentence beyond the presumptive range is not an automatic result of a conviction but is a collateral consequence." Gunther, at 45 Wn. App. 758.

Language used in Frazier underscores the mandatory nature of sentence enhancements which drives the notice requirement:

In this case we are dealing with a factual determination which, if determined adversely to the appellant, *irrevocably* forbids the court from exercising its independent judgment concerning whether the appellant is to receive a deferred or suspended sentence. The result of an adverse determination is to *compel incarceration* in the penal institutions for

¹⁷ RCW 9.94A.533 (3) provides that the "following additional times *shall* be added to the standard sentence range for felony crimes . . . if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010." (emphases added).

¹⁸ RCW 9.94A.533 (4) provides that the "following additional times *shall* be added to the standard sentence range for felony crimes . . . if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010." (emphasis added).

certain fixed minimum periods of time. This determination is all made prior to the imposition of final judgment and sentence. Procedural due process of the highest standard must, therefore, be afforded the appellant.

81 Wn.2d 628, 633 (emphasis added). The court went on to note that notice was not a “phantom” issue in this case where up until the time of sentencing neither the judge nor the defendant were aware that the provisions of the enhancement” were to be applied to remove sentencing discretion from the judge.” 81 Wn.2d at 635.

Unlike sentence enhancements, there is nothing in the structure of the exceptional sentencing scheme that “irrevocably” strips a trial court’s exercise of discretion. Also, unlike firearm enhancements, defendants are always on notice of the possibility of an enhanced sentence. (See Argument, *supra* at 22-23, discussing procedural due process). Thus, Theroff and Frazier compel a finding that notification of aggravating sentencing factors are not required in the information or elsewhere.

4. A RESENTENCING HEARING ON THE SAME CHARGES DOES NOT VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY.

Defendant brings a double jeopardy argument to this court, alleging that “because the aggravating factors are the same as elements of the crime, it would violate the prohibition against double jeopardy to try Mr. Powell for the more serious offense of first degree murder with aggravating circumstances.” (Opening Brief of Appellant at 16). In other

words, defendant's double jeopardy claims rests on the prohibition of being tried for the same crime twice, rather than punished for the same crime twice.

"The double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence." State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)(citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). "In these situations, a second attempt by the State to establish the defendant's guilt is unequivocally prohibited." Id. (citing, State v. Pascal, 108 Wn.2d 125, 132, 736 P.2d 1065 (1987).

In State v. Murawski, Division I of the Court of Appeals recently considered and rejected defendant's double jeopardy claim. In rejecting defendant's double jeopardy claim the Murawski court reasoned:

Here no judge or jury has even considered much less acquitted Murawski of the allegations on which the aggravating circumstances are based. Accordingly, there is no basis on which to prohibit a trier of fact from considering those factual allegations for the first time. Double jeopardy considerations do not apply here.

2007 Wash. App. LEXIS 3316, *9; No. 56941-4-1 (Wash. Ct. App. Dec. 24, 2007).

A resentencing hearing on aggravating circumstances is not a prosecution for a greater crime. Instead, as held in Murawski, the State is

simply seeking to use the correct procedure for determining punishment, not a retrial for the same conduct. “Remanding a case for resentencing based on a procedural error committed by the sentencing court does not violate double jeopardy.” Murawski, at *13 (citing State v. Pringle, 83 Wn.2d 188, 194, 517 P.2d 192 (1973); Bozza v. United States, 330 U.S. 160, 166, 67 S.Ct. 645, 91 L.Ed. 818 (1947)).

In State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996) this court outlined how double jeopardy law in the context of sentencing proceedings has evolved over the years and noted that there is no longer a per se bar to increasing an allegedly erroneous sentence provided that (1) the double jeopardy clause continued to prohibit increases to a correct sentence, and (2) the double jeopardy clause will prevent resentencing if the original sentencing proceeding was more like a trial than an ordinary sentencing proceeding. 129 Wn.2d at 310-311. And now, most recently in State v. Benn, 161 Wn.2d 256, 165 P.3d 1232 (2007), this court examined whether post-Ring the prosecution was barred from retrying a defendant on aggravating capital murder factors. The jury in Benn had found one aggravating factor (common scheme or plan), but left blank the space available on another aggravating factor (single act of defendant). 161 Wn.2d at 259. On retrial, the State recharged defendant with two counts of first degree murder, alleging only one aggravating factor (single act). Id. The court examined the United State Supreme Court’s rulings in

Poland v. Arizona,¹⁹ and Sattazahn v. Pennsylvania,²⁰ and concluded that had the jury in Benn's case *acquitted* him of the death penalty, the State could not pursue a capital offense on retrial without violating double jeopardy. However, because Benn's first jury sentenced him to death, the State could pursue such a penalty on retrial.

Here, neither a judge nor jury failed to find the existence of an aggravating factor in support of an exceptional sentence. Instead a judge found the existence of such a factor, that was later found invalid – not for insufficient evidence – but based on the procedure used. Thus, nothing prohibits the State from a second sentencing hearing using the correct procedure.

Nor does the principle of mandatory joinder under CrR 4.3 apply to a resentencing hearing. (See Opening Brief of Appellant at 16-17). This principle would only have merit if defendant prevailed on his underlying claim – that exceptional sentence factors are elements of a greater crime.

Even if mandatory joinder could theoretically apply in this context, the ends of justice would not be served by invocation of this rule. CrR 4.3.1(b)(3) provides:

¹⁹ 476 U.S. 147, 157, 106 S. Ct. 1749, 90 L.Ed.2d 123 (1986). (holding that the State did not violate double jeopardy in seeking the death penalty upon retrial when the defendant was not acquitted of the death penalty in the first trial).

A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses was previously denied or the right of consolidation was waived as provided in this rule. The motion ... shall be granted *unless the court determines that ... the ends of justice would be defeated if the motion were granted.*

(Emphasis added)

The ends of justice exception allows the State to file a successive charge for a related crime where (1) extraordinary circumstances exist and (2) the extraordinary circumstances are “extraneous to the action or go to the regularity of the proceedings.” State v. Ramos, 124 Wn. App. 334, 341, 101 P.3d 872 (2004), review granted, (No. 77347-5).

Ramos lends guidance in this case. In Ramos, the court concluded that extraordinary circumstances exist in cases affected by the Andress²¹ decision. As the court in Ramos explained, the State “relied on nearly three decades of cases interpreting the statutes defining murder when death occurs in the course of a felony” when it sought a conviction for felony-murder with second degree assault as the predicate crime. Ramos, 124 Wn. App. at 341. Not until Andress, did the Washington Supreme Court conclude that “the legislature did not intend assault to serve as the predicate felony for murder.” Ramos, 124 Wn. App. at 342. The decision

²⁰ 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003).

²¹ In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002) (the Supreme Court held that under the felony murder statutes, assault cannot serve as the predicate crime for felony murder.

to abandon an unbroken line of precedent was “highly unusual, and the decision to do so was certainly extraneous to the” case at hand. Ramos, 124 Wn. App. at 342. Likewise Blakely, *supra*, broke with a long line of precedent affirming the exceptional sentencing scheme in Washington. The ends of justice would not be served by preventing the State from proceeding with its pursuit of an exceptional sentence where the State could not have foreseen the procedural somersaults flowing from Blakely.

D. CONCLUSION.

Neither the statute in question, nor constitutional provisions, require notice of the State’s intent to sentence defendant under the SRA’s aggravating sentencing statute. Because the defendant received notice in this case of the State’s intent to seek an exceptional sentence, the defendant also fails to show a denial of due process. This court should affirm the trial court’s decision and allow the State to proceed with a sentencing hearing on aggravating factors.

DATED: February 15, 2008.

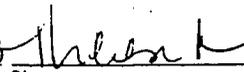
GERALD A. HORNE
Pierce County
Prosecuting Attorney



MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088

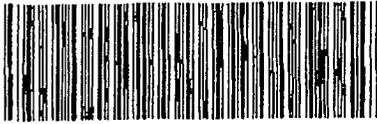
Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2.15.08 
Date Signature

APPENDIX "A"

State's Notice of Intent to Seek Exceptional Sentence



97-1-02259-4 27933750 NT 07-26-07

FILED
IN COUNTY CLERK'S OFFICE

A.M. JUL 25 2007 P.M.

PIERCE COUNTY CLERK WASHINGTON
KEVIN STOCK, COUNTY CLERK
BY _____ DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 97-1-02259-4

vs.

TERRANCE POWELL,

NOTICE TO DEFENSE OF
AGGRAVATING CIRCUMSTANCES
UPON WHICH STATE INTENDS TO
SEEK EXCEPTIONAL SENTENCE

Defendant.

The State of Washington, by and through Pierce County Deputy Prosecuting Attorneys Terry Lane and Diane Clarkson, do hereby again give notice to Defendant Terrance Powell and his attorneys, John Cain and Erik Bauer, that the State will be seeking an exceptional sentence above the standard sentencing range. Such request for an exceptional sentence will be based upon one or more of the following aggravating circumstances, all of which are included both in RCW 9.94A.535(3) and in Judge Sebring's Conclusions of Law:

- 1) defendant exhibited deliberate cruelty to the victims (RCW 9.94A.535(3)(a));
- 2) defendant knew or should have known that the victims were particularly vulnerable or incapable of resistance (RCW 9.94A.535(3)(b));
- 3) the current offense was a series of offenses, so identified by a consideration of the current offense involving multiple victims or incidents per victim (RCW 9.94A.535(3)(d)(i));
- 4) the offense involved a destructive and foreseeable impact on persons other than the victim (RCW 9.94A.535(3)(f));
- 5) the defendant committed the offense to obtain or maintain his membership or to advance his position in the hierarchy of an organization, association, or identifiable group (RCW 9.94A.535(3)(s)); and

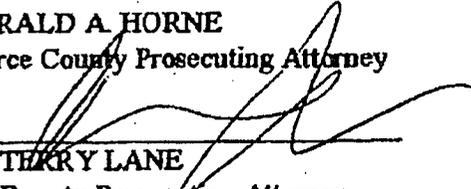
NOTICE TO DEFENSE OF AGGRAVATING CIRCUMSTANCES UPON WHICH STATE INTENDS TO SEEK EXCEPTIONAL SENTENCE - 1

Office of Prosecuting Attorney
930 Tacoma Avenue S, Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

6) the victims' injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense (RCW 9.94A.535(3)(y)).

DATED this 25 day of July, 2007.

GERALD A. HORNE
Pierce County Prosecuting Attorney

By: 
TERRY LANE
Deputy Prosecuting Attorney
WSB # 16708

txl

NOTICE TO DEFENSE OF AGGRAVATING CIRCUMSTANCES UPON WHICH STATE INTENDS TO SEEK EXCEPTIONAL SENTENCE. 1

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APPENDIX "B"

RCW 9.94A.537

LEXSTAT RCW 9.94A.537

ANNOTATED REVISED CODE OF WASHINGTON
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*** STATUTES CURRENT THROUGH ALL 2007 1ST SPECIAL SESSION AND THE ***
*** RESULTS OF THE NOVEMBER 2007 GENERAL ELECTION (2008 C 2) ***
*** ANNOTATIONS CURRENT THROUGH NOVEMBER 8, 2007 ***

TITLE 9. CRIMES AND PUNISHMENTS
CHAPTER 9.94A. SENTENCING REFORM ACT OF 1981

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 9.94A.537 (2008)

§ 9.94A.537. Aggravating circumstances -- Sentences above standard range

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

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

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

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

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

(6) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to *RCW 9.94A.535* to a term of confinement up to the maximum allowed under *RCW 9A.20.021* for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

HISTORY: 2007 c 205 § 2; 2005 c 68 § 4.

NOTES:

INTENT -- 2007 C 205: "In *State v. Pillatos*, 150 P.3d 1130 (2007), the Washington supreme court held that the changes made to the sentencing reform act concerning exceptional sentences in chapter 68, Laws of 2005 do not apply to cases where the trials had already begun or guilty pleas had already been entered prior to the effective date of the act on April 15, 2005. The legislature intends that the 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." [2007 c 205 § 1.]

EFFECTIVE DATE -- 2007 C 205: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 27, 2007]." [2007 c 205 § 3.]

INTENT -- 2005 C 68: "The legislature intends to conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in *Blakely v. Washington*, 542 U.S. ... (2004). In that case, the United States supreme court held that a criminal defendant has a Sixth Amendment right to have a jury determine beyond a reasonable doubt any aggravating fact, other than the fact of a prior conviction, that is used to impose greater punishment than the standard range or standard conditions. The legislature intends that aggravating facts, other than the fact of a prior conviction, will be placed before the jury. The legislature intends that the sentencing court will then decide whether or not the aggravating fact is a substantial and compelling reason to impose greater punishment. The legislature intends to create a new criminal procedure for imposing greater punishment than the standard range or conditions and to codify existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances. The legislature does not intend the codification of common law aggravating factors to expand or restrict currently available statutory or common law aggravating circumstances. The legislature does not intend to alter how mitigating facts are to be determined under the sentencing reform act, and thus intends that mitigating facts will be found by the sentencing court by a preponderance of the evidence.

While the legislature intends to bring the sentencing reform act into compliance as previously indicated, the legislature recognizes the need to restore the judicial discretion that has been limited as a result of the *Blakely* decision." [2005 c 68 § 1.]

SEVERABILITY -- 2005 C 68: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2005 c 68 § 6.]

EFFECTIVE DATE -- 2005 C 68: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 15, 2005]." [2005 c 68 § 7.]

EDITOR'S NOTES.

Pursuant to 2005 c 68 § 7, this section took effect April 15, 2005.

EFFECT OF AMENDMENTS.

2007 c 205 § 2, effective April 18, 2007, added (2); redesignated former (2) through (5) as (3) through (6); in (4), added "jury has been impaneled solely for resentencing, or unless the"; and in (5), added "listed in *RCW* 9.94A.535(3)(e)(iv), (h)(i), (o), or (t)."

JUDICIAL DECISIONS

ANALYSIS

Exceptional sentence
Statutory amendments

EXCEPTIONAL SENTENCE.

Defendant pleaded guilty after *RCW* 9.94A.537 became effective, but the sentencing court refused to empanel a jury to find the aggravating factors alleged by the State because it erroneously believed that it lacked the authority to do so; because remand would not violate double jeopardy, the sentencing court's decision was remanded to empanel a jury to

consider the aggravating factors for sentencing in accordance with *RCW 9.94A.537*. *State v. Murawski*, 139 Wn. App. 587, 161 P.3d 1048 (2007).

Where defendant was convicted of second degree malicious mischief, the exceptional sentence based on two aggravating circumstances was upheld because, although the determination that defendant's prior unscored misdemeanor criminal history resulted in a presumptive sentence that was clearly too lenient was a factual one for the jury, the rapid recidivism fact stipulated to by defendant was a substantial and compelling factor that could be upheld. *State v. Saltz*, 137 Wn. App. 576, 154 P.3d 282 (2007).

STATUTORY AMENDMENTS.

Court disagreed with the assertion that 2005 c 68, unconstitutionally chilled the right to a trial by subjecting a defendant to an exceptional sentence only if he or she pled not guilty, because 2005 Wash. Laws ch. 68 did not limit sentencing juries to cases where the defendant pled not guilty, but instead, it provided specific procedures for trying aggravators to juries. *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007).

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.