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Supreme Court No. _____
COA No. 55364-0-1

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STATE OF WASHINGTON

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT L. VANCE,

Appellant.

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ANSWER TO PETITION FOR REVIEW

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A. ISSUES PRESENTED

1. This Court has repeatedly held an exceptional sentence violates the constitution if it is based on a judicial finding that allowing current offenses to go unpunished would result in a presumptive sentence that is clearly too lenient. Is the Court of Appeals' decision to reverse Mr. Vance's exceptional sentence, which was based on such a judicial finding, consistent with this Court's decisions, making review unnecessary?

2. As this Court has recognized, RCW 9.94A.537(1) unambiguously prevents the State from seeking an exceptional sentence, whether on remand or in the first instance, unless the State provides the defendant notice, prior to trial, of its intention to seek such a sentence. Is the Court of Appeals' conclusion the State may not seek an exceptional sentence on remand, as the State did not provide Mr. Vance with the requisite notice, consistent with the statute and this Court's decisions?

3. This Court has repeatedly held courts may not fashion a procedure to impanel a jury to consider aggravating factors absent statutory authority. Where there is no statutory authority to impose an exceptional sentence based on the particular aggravating factor

at issue in this case, did the Court of Appeals correctly remand for imposition of a sentence within the standard range?

4. Would trial on the aggravating circumstance without retrial on the underlying conviction violate the constitutional prohibition against double jeopardy?

5. Would trial for first degree child molestation with aggravating circumstances that were not charged in the information violate the mandatory joinder rule?

B. SUMMARY OF CASE

Robert Vance was found guilty by a jury of three counts of first degree child molestation, two counts of second degree child molestation, and three counts of communication with a minor for immoral purposes. CP 19. The sentencing court imposed an exceptional sentence, in the form of consecutive sentences, based on the "multiple offense policy" aggravating factor in former RCW 9.94A.535(2)(i) (2003). RP 15-16; CP 21, 32-33. The court found,

The defendant's [offender] score, along with the presumption for concurrent sentences in the Sentencing Reform Act, would result in the defendant receiving no actual sanction for many of the current offenses if he were to receive a standard range sentence in this cause. As a result, a standard range sentence would result in the defendant receiving a number of 'free crimes' as explained in State v. Stephens, 116 Wn.2d 238 (1991). Therefore, the Court finds an exceptional sentence above the

standard range is justified pursuant to the operation of the multiple offense policy of RCW 9.94A.535(2)(i) because the presumptive standard range sentence would be clearly too lenient in light of the purposes of the Sentencing Reform Act.

CP 33. The court did not base the exceptional sentence on multiple victims and made no finding regarding multiple victims.

At no point prior to or during trial did the State seek to amend the information to include the above allegation.

On appeal, the Court of Appeals concluded that because the exceptional sentence was based on factual findings by a judge rather than a jury, it violated Mr. Vance's rights under the Sixth and Fourteenth Amendments pursuant to the United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) and this Court's decisions in State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), overruled on other grounds by Washington v Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) and In re Personal Restraint of VanDelft, 158 Wn.2d 731, 147 P.3d 573 (2006). State v. Vance, ___ Wn. App. ___, 174 P.3d 697 (2008). The Court of Appeals further concluded that, because no legal procedure existed at the time of the conviction to enable the jury to make the findings necessary to support the exceptional sentence, the error was not harmless. App.

¶ 8 (citing State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007)). Finally, the court concluded the State could not seek an exceptional sentence on remand under the 2007 amendments to the Sentencing Reform Act (SRA), because the exceptional sentence was based on an aggravating factor not found in the new statute, RCW 9.94A.535(3), and thus no statutory procedure currently exists to authorize the court to submit the aggravating factor to a jury. App. ¶¶ 11-14. Alternatively, the court concluded the State could not seek an exceptional sentence on remand, because the State did not give Mr. Vance pretrial notice of its intention to seek an exceptional sentence, as required by RCW 9.94A.537(1). App. ¶ 15 (citing Womac, 160 Wn.2d at 663). Thus, the court reversed and vacated the exceptional sentence and remanded for imposition of a sentence within the standard range. App. ¶ 21.

C. ARGUMENT

1. THE COURT OF APPEALS' CONCLUSION THE EXCEPTIONAL SENTENCE WAS UNCONSTITUTIONAL BECAUSE IT WAS BASED ON IMPROPER JUDICIAL FACT-FINDING IS CONSISTENT WITH THIS COURT'S DECISIONS, WHICH NEED NOT BE RE-EXAMINED

The sentencing court imposed the exceptional sentence based on its finding, by a preponderance of the evidence, that due to Mr. Vance's offender score and the presumption for concurrent

sentences in the SRA, resulting in Mr. Vance “receiving no actual sanction for many of the current offenses if he were to receive a standard range sentence,” a presumptive sentence “would be clearly too lenient in light of the purposes of the Sentencing Reform Act.” CP 33. Thus, the court relied on the aggravating factor in former RCW 9.94A.535(2)(i) (2003) that “[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter.” Former RCW 9.94A.535(2)(i) (2003).

In Hughes, this Court unambiguously held “[t]he conclusion that allowing a current offense to go unpunished is clearly too lenient is a factual determination that *cannot* be made by the trial court following Blakely.” 154 Wn.2d at 140. In VanDelft, the court imposed an exceptional sentence in the form of consecutive sentences based on its finding that concurrent sentencing would “fail to hold [VanDelft] accountable for all of the crimes for which he was convicted.” 158 Wn.2d at 739-40. This Court reiterated its holding in Hughes that this “clearly too lenient” aggravating factor must be found by a jury and not by a judge. Id. at 743.

As the State concedes, the Court of Appeals correctly concluded that Mr. Vance’s case is indistinguishable from VanDelft.

The State offers no compelling reason to re-examine the holdings of Hughes and VanDelft.

Moreover, this Court should decline the State's invitation to accept review and hold the "clearly too lenient" finding may follow as a matter of law from the facts in this case. The State contends the jury's findings that there were multiple victims necessarily and *as a matter of law* justifies the exceptional sentence imposed. This argument is not consistent with the record, as the sentencing court did not rely on the fact there were multiple victims in imposing the exceptional sentence. Further, the "clearly too lenient" finding is a subjective determination that cannot follow simply from the fact there are multiple victims. The jury should be allowed to base the finding on its own evaluation of the evidence.

In reviewing an exceptional sentence above the standard range, the appellate court may ask only whether the reasons relied upon by the sentencing court are supported by the record, whether they justify an exceptional sentence as a matter of law, and whether the sentence is clearly excessive. State v. Jackson, 150 Wn.2d 251, 273-74, 76 P.3d 217 (2003). Here, in imposing the exceptional sentence, the sentencing court did not rely on the fact there were multiple victims. Instead, it relied on the fact there were

multiple *offenses* and that Mr. Vance would “receiv[e] no actual sanction for many of the current offenses if he were to receive a standard range sentence.” CP 33; former RCW 9.94A.535(2)(i) (2003). Because a reviewing court may not affirm an exceptional sentence based on a reason not relied upon by the sentencing court, this Court may not affirm the exceptional sentence based on the fact there were multiple victims.

Moreover, whether multiple current offenses result in a presumptive sentence that is “clearly too lenient” is a subjective determination that the court cannot decide as a matter of law. In Hughes, this Court emphatically held the “clearly too lenient” finding must be left to the jury’s judgment and cannot follow as a matter of law from the fact there are multiple current offenses. 154 Wn.2d at 137-38, 140 (rejecting earlier holdings of State v. Stephens, 116 Wn.2d 238, 803 P.2d 319 (1991) and State v. Smith, 123 Wn.2d 51, 864 P.2d 137 (1993), that factual inquiry required to find presumptive sentence clearly too lenient is “automatically satisfied whenever ‘the defendant’s high offender score is combined with multiple current offenses so that a standard sentence would result in ‘free’ crimes.’”); cf. State v. Suleiman, 158 Wn.2d 280, 292-93, 143 P.3d 795 (2006) (rejecting State’s argument that aggravating

factor of particular victim vulnerability follows as matter of law from stipulated fact that defendant drove more aggressively in response to victim passenger's pleas that he slow down).

Consistent with this Court's cases, the Court of Appeals has recognized the "clearly too lenient" finding is a subjective determination that must be left to the jury. See State v. Saltz, 137 Wn. App. 576, 582, 154 P.3d 282 (2007). The jury must be permitted to decide whether there are particular egregious effects or extraordinary culpability that follow from the fact of multiple offenses. To constrain the jury's fact-finding role by holding the court may make the "clearly too lenient" finding as a matter of law would usurp the jury's function and conflict with this Court's decisions. This Court should decline the State's invitation to do so.

2. THE COURT OF APPEALS' CONCLUSION THE LACK OF PRE-TRIAL NOTICE PRECLUDES IMPOSITION OF AN EXCEPTIONAL SENTENCE ON REMAND IS CONSISTENT WITH THIS COURT'S DECISIONS AND LEGISLATIVE INTENT

The State contends the 2007 "fix" legislation overruled this Court's holding in State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007) that an exceptional sentence may not be imposed on remand where the statutorily-required notice had not been given.¹

¹ This issue is currently pending in this Court in State v. Powell, No. 80496-6. Oral argument has not yet been scheduled in the case.

This argument is not consistent with the terms of the statute and does not warrant review in this case.

RCW 9.94A.537 is unambiguous. By its plain terms, RCW 9.94A.537 sets out the circumstances under which a trial court can impanel a jury to consider aggravating circumstances after a judicially-imposed exceptional sentence is reversed under Blakely.

RCW 9.94A.537(2), a new section added in 2007, authorizes the trial court to impanel a jury to consider aggravating factors that were relied upon by a judge in imposing a previous exceptional sentence if those aggravating factors are listed in RCW 9.94A.535(3). RCW 9.94A.537(1), which limits consideration of aggravating factors to instances in which the defendant was given notice of the aggravating factors "prior to trial or entry of the guilty plea," was not altered when the new section (2) was added. Thus, RCW 9.94A.537(1) further limits RCW 9.94A.537(2) to those instances in which notice was given prior to trial or to a plea.

Specifically, RCW 9.94A.537(2), which became effective April 18, 2007, provides that:

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.

The Legislature did not, however, amend RCW 9.94A.537(1), which provides that:

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.

Contrary to the State's argument, these provisions are not alternatives. They are the first two of six subsections that are interrelated: (1) sets out the general requirement that the State give notice prior to trial of aggravating factors; (2) enables the court to impanel a jury if a new sentencing hearing is required after reversal of an exceptional sentence imposed by a judge; (3) requires a jury determination of facts supporting an aggravating factor; (4) specifies which facts shall be presented to the jury during trial and which in a separate proceeding; (5) provides for the separate proceeding to follow immediately after trial; and (6) requires that the jury find the facts unanimously and beyond a reasonable doubt. There are not "or"s between the sections. In addition, section (4) was amended at the time section (2) was added to provide that specified aggravating circumstances shall be presented "during the

trial of the alleged crime, *unless the jury has been impaneled solely for resentencing.*” (emphasis added).

Moreover, sections (1) and (2) address different concerns. Section (1) addresses the due process requirement of notice to a defendant of what the State will have to prove in order to convict and punish him. Section (2) provides a mechanism for submitting aggravating factors to a jury on remand, where other requirements of the statute are met.

The way to harmonize the two provisions is to apply section (2) to any case in which notice of aggravating factors was given prior to the initial trial. The Legislature distinguished “trial” from “sentencing hearing.” Notice is clearly required before “trial,” not just before a new “sentencing hearing.”

It is well established that the meaning of plain and unambiguous statutory language is not subject to interpretation. State v. Delgado, 148 Wn.2d 723, 730, 63 P.3d 792 (2003); Koenig v. City of Des Moines, 158 Wn.2d 173, 182, 142 P.3d 162 (2000) (plain language does not require construction). Further, a statute must be construed as a whole to give effect to all of the language and to harmonize all provisions. City of Seattle v. Fontainilla, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996). Sections (1) and (2) are

unambiguous and need not be construed; they can be harmonized by limiting the applicability of (2) to instances in which notice was given under (1).

Harmonizing the provisions, so that section (1) acts as a limitation on section (2), is not contrary to the "intent statement" that accompanied the 2007 amendments. Laws of Washington 2007 ch. 205 § 1. That statement indicates the Legislature was addressing the holding of this Court in State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007), "that the changes made to the sentencing reform act concerning exceptional sentences in chapter 69, Laws of 2005 do not apply to cases where the trial had already begun or guilty pleas had already been entered prior to the effective date of the act." RCW 9.94A.537(1) is part and parcel of the changes in chapter 68, Laws of 2005, which the Legislature in its 2007 statement intended to make applicable to convictions that were already entered through trial or plea. What the Legislature intended, as set out in its statement, was to make the 2005 amendments retroactively applicable to cases reversed on appeal and to grant the trial court authority to impanel juries after remand for resentencing. The notice requirement must apply equally with the other provisions, such that those who received notice prior to

trial or a plea could face a jury on remand for a new sentencing hearing, but those who did not receive notice could not.

Further, broad statements of intent do not impeach or add to a statute's unambiguous operative language. Delgado, 148 Wn.2d at 727-30 (applying plain language of "two strikes" definition in declining to rely on Legislature's contrary "finding" of intent); State v. Smith, 144 Wn.2d 665, 672, 30 P.3d 1245 (2002) (although statutory intent indicates "general legislative discontent" with prior Supreme Court decision, it did not change plain operative language of statute); accord State v. Alvarez, 74 Wn. App. 250, 258, 872 P.2d 1123 (1994), aff'd, 128 Wn.2d 1, 904 P.2d 754 (1995); In re Detention of R.W., 98 Wn. App. 140, 145, 988 P.2d 1034 (1999).

Finally, even if the statement of intent was intended to be remedial, such a remedial statement would not apply retroactively to overrule a prior construction of the statute by this Court. Pillatos, 159 Wn.2d at 473 (citing Overton v. Econ. Assistance Auth., 96 Wn.2d 552, 558, 637 P.2d 652 (1981) and Johnson v. Morris, 87 Wn.2d 922, 926, 557 P.2d 1299 (1976)).

In Pillatos, this Court interpreted former RCW 9.94A.537 as creating a procedure for a jury to consider aggravating factors in support of an exceptional sentence, but only in cases that had not

gone to trial or had a guilty plea entered. Pillatos, 159 Wn.2d at 470. In State v. Womac, 160 Wn.2d 643, 663, 160 P.3d 40 (2007), this Court clarified that *even if* the new sentencing provisions apply to all cases on remand, the notice requirement of the statute must still be met. Although the Legislature amended the statute after Pillatos, it did not alter the notice requirement of section (1).

The requirements of the plain language of RCW 9.94A.537 are clear and unambiguous: a trial court may impanel a jury for consideration of aggravating factors on remand after reversal under Blakely only as long as the defendant received notice, prior to trial, of the aggravating factors the State would seek to establish. The Court of Appeals' holding is consistent with the plain language of the statute and review by this Court is not warranted.

3. THE COURT OF APPEALS CORRECTLY
DETERMINED NO STATUTORY AUTHORITY
EXISTS TO SUBMIT THE PARTICULAR
AGGRAVATING FACTOR TO A JURY ON REMAND

The State contends the Court of Appeals erred in holding that re-imposition of an exceptional sentence on remand is precluded by the plain language of RCW 9.94A.537(2). The State concedes the "multiple offense" aggravating factor contained in the new statute, RCW 9.94A.535(2)(c), cannot be constitutionally applied in this case, because it decreases the proof required for

imposition of an exceptional sentence and would result in an ex post facto violation. But the State argues the Court of Appeals should have fashioned a procedure to permit the trial court to resurrect the aggravating factor from former RCW 9.94A.535(2)(i) and submit the factor to a jury on remand. This argument is inconsistent with the statute and this Court's decisions.

The statute does not authorize the trial court on remand to empanel a jury to impose an exceptional sentence under the facts of this case. The new statute does not authorize a jury to make the "clearly too lenient" factual finding necessary to support the particular aggravating factor at issue here. The "multiple offense policy" aggravating factor of former RCW 9.94A.535(2)(i) required a finding that a presumptive sentence would be "clearly too lenient." Under Hughes, that finding must be made by a jury. The new statute, RCW 9.94A.535(2)(c), permits the trial court to impose an exceptional sentence based on multiple current offenses *without* a finding that a presumptive sentence would be "clearly too lenient." The former aggravating factor has been eliminated and replaced by the new factor, which, the State agrees, may not be constitutionally applied in this case. Thus, the statute does not authorize

imposition of an exceptional sentence based on the specific aggravating factor relied upon by the trial court.

The State's argument that this Court may fashion such a procedure, in the absence of statutory authority, is contrary to this Court's decisions and the provisions of the SRA. The 2007 legislation specifically provides that the trial court may convene a jury on remand to consider *only* those aggravating circumstances listed in RCW 9.94A.535(3) that were relied upon by the superior court in imposing the previous sentence. RCW 9.94A.537(2).² The "clearly too lenient" aggravating factor is not listed in RCW 9.94A.535(3). Moreover, all of this Court's relevant decisions, from Hughes and its predecessors, to Pillatos and Womac, teach that the trial court has no inherent authority to convene a jury to find an aggravating factor in support of an exceptional sentence.

Finally, there should be no dispute that the Legislature's omission of the "clearly too lenient" factor from the new legislation was intentional and thus did not create a "minor gap" that may be

² RCW 9.94A.537(2) provides:

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.

filled in by this Court. In 2005 the Legislature explicitly amended RCW 9.94A.535 to allow the sentencing court, rather than a jury, find the aggravating circumstance that “[t]he defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.” RCW 9.94A.535(2)(c). The “clearly too lenient” aggravating factor in the context of multiple current offenses no longer exists. See RCW 9.94A.535(3) (providing *exclusive* list of aggravating factors that may be found by a jury). It cannot be doubted that the Legislature’s decision to transform this aggravating factor into one that need not be submitted to a jury was entirely intentional. Thus, the Court of Appeals’ conclusion that there is no statutory authority to convene a jury on remand to find the particular aggravating factor at issue here is consistent with Legislative intent and this Court’s decisions.

4. IF THIS COURT GRANTS REVIEW, IT SHOULD ALSO ADDRESS MR. VANCE’S CHALLENGES BASED ON DOUBLE JEOPARDY AND THE MANDATORY JOINDER RULE

Because the issues addressed in the Court of Appeals’ opinion were dispositive, the court did not address Mr. Vance’s arguments that imposition of an exceptional sentence on remand would violate the constitutional prohibition against double jeopardy

and is precluded by the mandatory joinder rule. App. ¶ 21 n.16. If this Court grants review, Mr. Vance requests this Court address whether retrial on the greater offense is precluded by the Double Jeopardy Clause and the mandatory joinder rule.

a. Retrial on the greater offense is precluded by the mandatory joinder rule. Once it is understood that “elements and sentencing factors must be treated the same for Sixth Amendment purposes,” Recuenco, 126 S.Ct. at 2553, it follows directly that under state law those factors must be charged in an information. It is well established in Washington that “[a]ll essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him.” State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). “This conclusion is based on constitutional law and court rule.” Id.

In State v. Goodman, 150 Wn.2d 774, 785-86, 83 P.3d 410 (2004), this Court held the identity of the controlled substance delivered is an essential element of the crime that must be alleged in the information where the type of drug determined the length of punishment. Axiomatic in Washington law is the requirement that

the charging document must “*allege facts supporting every element of the offense*” in order to be constitutionally sufficient. *Id.* at 785.

CrR 4.3.1(b)(3) requires *all* related offenses be joined for trial in one charging document. “CrR 4.3(c) was intended as a limit on the prosecutor. As such, it does not differentiate based upon the prosecutor’s intent. Whether the prosecutor intends to harass or is simply negligent in charging the wrong crime, CrR 4.3(c) applies to require a dismissal of the second prosecution.” State v. Dallas, 126 Wn.2d 324, 332, 892 P.2d 1082 (1995). Thus, under the plain language of the rule, *after trial* the State is precluded from amending an information to charge *any* related offense. Even if this Court finds that the “ends of justice” exception applies, that exception cannot be read to permit the State now to file more serious charges.

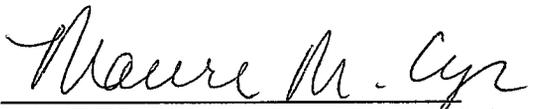
b. The Double Jeopardy Clause prevents retrial on the greater offense. Because aggravating factors are the same as elements of the crime, it would violate the constitutional prohibition against double jeopardy to try Mr. Vance for the more serious offense of first degree child molestation with aggravating circumstances as long as he remains convicted for first degree child molestation without aggravating circumstances.

The Double Jeopardy Clause bars subsequent prosecutions for a single act. Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Double jeopardy also bars successive prosecutions for greater and lesser-included offenses. Brown v. Ohio, 432 U.S. 161, 169-70, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). Mr. Vance was tried and convicted only of the lesser offense of first degree child molestation *simpliciter*. Thus, it would violate double jeopardy now to allow the State to charge, prosecute and convict him of the greater crime of first degree child molestation with aggravating circumstances.

D. CONCLUSION

Because it does not satisfy any of the criteria of RAP 13.4 this Court should deny the State's petition for review. However, if the Court grants the State's petition, it should also accept review of Mr. Vance's challenges based on double jeopardy and the mandatory joinder rule.

Respectfully submitted this 7th day of March 2008.


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DECLARATION OF MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the **Answer to Petition for Review** filed under **Court of Appeals No. 55364-0-I** (for transmittal to the Supreme Court) to which this declaration is affixed/attached, was mailed or caused to be delivered to each attorney or party or record for respondent: **Mary Kathleen Webber - Snohomish County Prosecuting Attorney**, appellant and/or other party, at the regular office or residence or drop-off box at the prosecutor's office.

gri

MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: March 7, 2008