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STATE OF WASHINGTON

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NO. _____
Court of Appeals No. 55364-0-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ROBERT L. VANCE,

Respondent.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 FEB 6 AM 10:38

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The State of Washington seeks review of the decision designated in part II. The State was respondent in the Court of Appeals.

II. COURT OF APPEALS DECISION

In an opinion filed January 7, 2008, the Court of Appeals reversed the exceptional sentence imposed on the defendant and ordered imposition of a sentence within the standard range. The opinion is published, but a citation is not yet available. A copy of the opinion is attached.

III. ISSUES

(1) A jury found that the defendant sexually molested four different children. Do these findings establish that the defendant's offenses resulted in harm greater than that which would have resulted from molestation of a single child, so as to allow imposition of an exceptional sentence?

(2) Under the 2007 amendments to the Sentencing Reform Act, can an exceptional sentence be imposed on remand in a case where no pre-trial notice was given?

(3) If the jury findings in the present case are insufficient, would the defendant's rights be protected and the legislature's

intent fulfilled by remanding the case for a jury determination of the necessary facts?

IV. STATEMENT OF THE CASE

The defendant (respondent), Robert Vance, was found guilty by a jury of eight counts of sexual offenses committed against four different children. 1 CP 19, 65-67. He has prior convictions for first degree statutory rape and indecent liberties. Ex. 5. Since he was convicted of multiple counts of sexual offenses for three of the four children, his crimes against any one of those victims yields an offender score of 9 or more. See RCW 9.94A.525(17). As a result, a standard-range sentence for molesting all four children is the same as the sentence for molesting only one child. See RCW 9.94A.589(1)(a).

On this basis, the trial court imposed an exceptional sentence. 1 CP 32-33. The Court of Appeals reversed. The court held that an exceptional sentence could not be imposed without a jury finding that a standard-range sentence would be “clearly too lenient.” App. ¶¶ 6-7. It further held that there was no available procedure for making that determination. Id. ¶¶ 9-14. The court therefore directed imposition of a sentence within the standard range. Id. ¶ 16. The Court of Appeals decision thus *requires* that

the defendant receive *no* penalty for his sexual molestation of three children.

V. ARGUMENT

A. THIS COURT SHOULD DECIDE WHETHER THE MOLESTATION OF MULTIPLE CHILDREN ESTABLISHES EGREGIOUS EFFECTS OR EXTRAORDINARY CULPABILITY BEYOND THAT RESULTING FROM THE MOLESTATION OF A SINGLE CHILD.

This case provides the court with a chance to clarify what factual findings are necessary to render a sentence “clearly too lenient.” Under the Federal Constitution, an exceptional sentence can only be imposed if the underlying facts are found by a jury. Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Here, the Court of Appeals held that whether a sentence is “clearly too lenient” is a factual determination. App. ¶ 6. The Court based this conclusion on In re Van Delft, 158 Wn.2d 731, 147 P.3d 573 (2006), cert. denied, 127 S. Ct. 2876 (2007). Van Delft, in turn, relied on State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005).

A careful reading of Hughes shows that the Court of Appeals misunderstood its holding. Hughes does not hold that whether a crime is “clearly too lenient” *is* a factual determination. Rather it holds that this conclusion must be *based on* factual determinations:

This court has held that a judge may rely on the aggravating factor that the presumptive sentence is too lenient when there is some extraordinarily serious harm or culpability resulting from multiple offenses which would not otherwise be accounted for in determining the presumptive sentencing range. We have further defined that inquiry to require a court to find one of two factual bases to support the too lenient conclusion: (1) egregious effects of defendant's multiple offenses [or] (2) the level of defendant's culpability resulting from the multiple offenses.

Blakely left intact the trial judge's authority to determine whether facts alleged and found are sufficiently substantial and compelling to warrant imposing an exceptional sentence. . . . That decision is a legal judgment which, unlike factual determinations, can still be made by the trial court.

Hughes, 154 Wn.2d at 136-37 (footnote and citations omitted).

Thus, under Hughes, the necessary factual finding is that the multiple offenses resulted in "egregious effects" or "extraordinary culpability." "It is proper to rely on this aggravating factor when there is some extraordinarily serious harm or culpability resulting from multiple offenses which would not otherwise be accounted for in determining the presumptive sentencing range." State v. Batista, 116 Wn.2d 777, 787-88, 808 P.2d 1141 (1991). Once these facts are established, it is for the sentencing court to determine whether the circumstances are sufficiently compelling to justify an exceptional sentence.

In the present case, a jury found that the defendant had sexually molested four different children. The presumptive sentencing range, however, only accounted for crimes committed against one of these children. Each child who was molested was harmed. See American Economy Ins. Co. v. Estate of Wilker, 96 Wn. App. 87, 92, 977 P.2d 677 (1999) (“children inevitably sustain injury from sexual abuse”). Molesting four children is inherently more culpable than molesting any single child. Thus, the jury’s verdict contained all of the facts necessary to justify an exceptional sentence.

The Court of Appeals correctly pointed out that this conclusion is inconsistent with the results of Hughes and Van Delft. App. ¶ 18. In both of these cases, this court held that additional jury findings were required to justify an exceptional sentence, even after the defendant had been convicted of sex offenses against multiple children. This court did not, however, explain what additional findings were necessary. Nor did it explain how multiple children could be molested without extra harm or culpability. By overlooking the special nature of sex crimes against children, this court reached a conclusion that was inconsistent with its reasoning.

The Court of Appeals also relied on a ground that had not been briefed or argued. It concluded that allowing an exceptional sentence in this case would violate the holding of State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981). If an exceptional sentence could rest solely on jury findings, a defendant could avoid such a sentence by pleading guilty. Under Frampton, such a statutory scheme improperly chills the defendant's right to jury trial. App. ¶ 19.

This analysis is based on an erroneous premise: that a defendant could avoid an exceptional sentence by pleading guilty. When a defendant pleads guilty, an exceptional sentence can be based on facts admitted or stipulated by the defendant. State v. Suleiman, 158 Wn.2d 280, 288-89, 143 P.3d 795 (2006). If the defendant had pleaded guilty to the molestation of multiple children, and that fact was sufficient to support an exceptional sentence, the defendant could receive such a sentence. Since a defendant could not avoid the possibility of an exceptional sentence by pleading guilty, the Court of Appeals' reliance on Frampton was misplaced.

Under Hughes and Batista, an exceptional sentence can be imposed if the defendant's conduct involved "egregious effects" or "extraordinary culpability" that is not accounted for in a standard-

range sentence. Here, the defendant's abuse of multiple children was not accounted for in the standard sentencing range. To hold an exceptional sentence unauthorized for these crimes, the court must conclude that it is possible to abuse multiple children without (1) inflicting more harm than would result from the abuse of a single child *or* (2) exhibiting more culpability than would be exhibited by the abuse of a single child.

Unless a defendant can abuse a child without harming the child and without exhibiting any culpability, an exceptional sentence was proper in this case. The contrary decision of the Court of Appeals raises a significant question of Federal Constitutional law and an issue of substantial public interest. Review should be granted under RAP 13.4(b)(3) and (4).

B. SINCE THE COURT OF APPEALS DECISION NULLIFIES THE 2007 AMENDMENTS TO THE SENTENCING REFORM ACT, THAT HOLDING SHOULD BE REVIEWED BY THIS COURT.

Even if there were insufficient factual findings to justify an exceptional sentence, the question remains what is the proper remedy. Consideration of this issue requires a historical review of remedies for Blakely violations.

This court first considered this issue in Hughes. It held that there was no statutory procedure for jury findings as to aggravating

factors. The court declined to create such a procedure. Accordingly, in cases where exceptional sentences had been improperly imposed, the court remanded them for sentencing within the standard range. Hughes, 154 Wn.2d at 148-52.

Shortly before Hughes was decided, the Legislature did create a procedure for jury determinations of aggravating factors. sentences. Laws of 2005, ch. 68. This statute included a requirement that the prosecutor give notice of her intent to seek an exceptional sentence "prior to trial or entry of the guilty plea." Id. § 4(1), codified as RCW 9.94A.537(1). Applying this requirement, this court held that it was still impossible to impose exceptional sentences on remand, in any case where the statutorily-required notice had not been given. State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007).

The Legislature responded to Pillatos by enacting the following provision:

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 factors 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.

Laws of 2007, ch. 205, § 2(2), codified as RCW 9.94A.537(2).

This provision was expressly intended to overrule Pillatos:

In [Pillatos], 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 2007, ch. 205, § 1.

Notwithstanding this history, the Court of Appeals concluded that an exceptional sentence can *only* be imposed if pre-trial notice was given, as required by RCW 9.94A.537(1). App. ¶¶ 15-16. This construction completely frustrates the legislative intent underlying RCW 9.94A.537(2). Under the Court of Appeals analysis, the holding of Pillatos remains effective, despite the clearly-expressed legislative intent to overturn that holding.

This holding is not limited to the circumstances of the present case. It seems to apply to any cases in which exceptional sentences are remanded for new sentencing hearings, even if they are based on one of the factors listed in RCW 9.94A.535(3). Even if this court agrees with other portions of the Court of Appeals analysis, it should review this nullification of the 2007 amendments.

This is an issue of substantial public interest that should be reviewed under RAP 13.4(b)(4).

C. THIS COURT SHOULD DETERMINE WHETHER THE LEGISLATIVE INTENT ALLOWS RE-IMPOSITION OF EXCEPTIONAL SENTENCES BASED ON THE “FREE CRIME” AGGRAVATING FACTOR.

The Court of Appeals also concluded that re-imposition of an exceptional sentences was precluded by the “plain language” of RCW 9.94A.537(2). App. ¶¶ 10-14. In reaching this conclusion, the Court made the error of looking at a portion of the statute in isolation.

The current Sentencing Reform Act provides for two types of aggravating circumstances. RCW 9.94A.535(3) lists aggravating factors that must be found by a jury. RCW 9.94A.525(2) lists circumstances under which “[t]he trial court may impose an aggravated exceptional sentence without a finding of fact by the jury.” These circumstances include the following:

The 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), This omits the “clearly too lenient” requirement that was contained in former RCW 9.94A.535(2)(h). As a result, the Court of Appeals has held that this factor provides a

constitutionally-proper basis for imposition of an exceptional sentence without jury findings. State v. Newlun, 2008 WL 171221 (Wn. App. 1/22/08).

As the Court of Appeals pointed out, RCW 9.94A.537(2) covers only aggravating factors that must be found by the jury under RCW 9.94A.535(3). This provision does not address factors that may be found by the court under RCW 9.94A.535(2). From this, the Court of Appeals concluded that the “plain language of the statute” precluded re-imposition of an exceptional sentence under the circumstances of this case. That conclusion is wrong. The plain language of RCW 9.94A.535(2)(c) would *allow* imposition of an exceptional sentence under the circumstances of this case, without *any* jury finding.

The State concedes that RCW 9.94A.535(2)(c) cannot constitutionally be applied, in accordance with its language, under the circumstances of the current case. Because that statute decreases the proof required for imposition of an exceptional sentence, it effectively increases the quantum of punishment. A provision that increased the punishment for a crime would be an *ex post facto* law if applied retroactively. See State v. Schmidt, 143 Wn.2d 658, 672-73, 23 P.3d 462 (2001). This case thus presents a

situation in which the plain language of the statute *cannot* be constitutionally applied. One portion or the other *must* be disregarded. The Court of Appeals applied RCW 9.94A.537(2), but in doing so it disregarded RCW 9.94A.535(2)(c). This is not a question of statutory construction, but of the remedy that should be applied for a partially unconstitutional statute.

The rule governing this situation is set out in Hughes:

It is one thing to fill a minor gap in a statute – to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality.

Hughes, 154 Wn.2d at 150-51.

At the time Hughes was decided, the SRA contained no provision for jury determinations of aggravating factors. To allow such determination, the court would have had to “create from whole cloth a complex and completely novel procedure.” Now there is such a procedure. The Legislature, however, failed to provide for one special situation: where an exceptional sentence was imposed in an earlier sentencing proceeding under the former version of the “free crimes” aggravating factor. The court need only “fill a minor

gap in the statute” by applying the legislatively-created procedure to this situation.

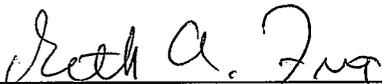
Remanding this case for any necessary jury findings would fully protect the defendant’s constitutional rights. It would also fulfill the legislative intent set out in Laws of 2007, § 1. The Court of Appeals’ rejection of this remedy presents an issue of substantial public interest that should be reviewed under RAP 13.4(b)(4).

VI. CONCLUSION

This court should grant review and reverse the Court of Appeals. The exceptional sentence should be upheld. Alternatively, the case should be remanded for a jury determination of whether imposition of a standard-range sentence would be “clearly too lenient.”

Respectfully submitted on February 5, 2008.

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State v. Vance

Wash.App. Div. 1,2008.

Only the Westlaw citation is currently available.

Court of Appeals of Washington, Division 1.

STATE of Washington, Respondent,

v.

Robert L. VANCE, Appellant.

No. 55364-0-I.

Jan. 7, 2008.

Background: Defendant was convicted after a jury trial in the Snohomish Superior Court, Larry E. Mckeeman, J., of three counts of child molestation in the first degree, two counts of child molestation in the second degree, and three counts of communication with a minor for immoral purposes. The Court of Appeals reversed and remanded for resentencing. After the Snohomish Superior Court, Larry E. Mckeeman, J., resentedenced defendant, the Court of Appeals affirmed, 131 Wash.App. 1016, 2006 WL 158664. The Supreme Court reversed and remanded, 159 Wash.2d 1011, 152 P.3d 1032. After being resentedenced again in the Snohomish Superior Court, Larry E. Mckeeman, J., defendant appealed.

Holdings: The Court of Appeals, Dwyer, J., held that:

(1) trial court could not impose exceptional sentence based its own finding that presumptive sentences was clearly too lenient;

(2) error was not harmless;

(3) statute allowing empaneling of a jury in a resentencing hearing did not allow trial court to empanel jury to consider whether presumptive concurrent sentences were clearly too lenient; and

(4) jury verdict finding defendant guilty of several counts of child molestation did not itself reflect a finding that presumptive concurrent sentences were too lenient.

Reversed and remanded with directions.

[1] Jury 230 ⇌ 34(7)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k34 Restriction or Invasion of Functions of Jury

230k34(5) Sentencing Matters

230k34(7) k. Particular Cases in

General. Most Cited Cases

Trial court could not impose exceptional sentences by sentencing defendant consecutively for three counts of child molestation in the first degree, based on the court's own finding that presumptive concurrent sentences were clearly too lenient; factual finding used to justify exceptional sentences had to be made by the jury, not the court. West's RCWA 9.94A.030(41), 9.94A.535, 9.94A.589(1)(a).

[2] Criminal Law 110 ⇌ 1177

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1177 k. Sentence and Judgment and Proceedings After Judgment. Most Cited Cases

Trial court's error, in imposing an exceptional sentence by sentencing defendant consecutively for child molestation, based on its own finding, rather than a jury finding, that concurrent sentences were too lenient, was not harmless; at the time of defendant's convictions, no procedure authorizing the empaneling of a jury to conduct fact finding related to the imposition of an exceptional sentence existed, and thus error could not be harmless.

[3] Jury 230 ⇌ 146

230 Jury

230VI Impaneling for Trial, and Oath

230k146 k. Impaneling and Organization in General. Most Cited Cases

Trial courts do not have inherent authority to em-

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panel sentencing juries.

[4] Sentencing and Punishment 350H ⇌335

350H Sentencing and Punishment

350HII Sentencing Proceedings in General

350HII(G) Hearing

350Hk335 k. Use of Jury. Most Cited Cases
 Statute allowing empaneling of a jury in a resentencing hearing to consider aggravating factors to determine whether an exceptional sentence is justified did not allow trial court to empanel a jury to determine whether concurrent sentences for three counts of child molestation was clearly too lenient, justifying an exceptional sentence for defendant; list of aggravating factors that a jury would be allowed to consider was exclusive and did not include the factor that a sentence was clearly too lenient. West's RCWA 9.94A.535(3), 9.94A.537.

[5] Criminal Law 110 ⇌893

110 Criminal Law

110XX Trial

110XX(K) Verdict

110k893 k. Construction and Operation.
 Most Cited Cases

Sentencing and Punishment 350H ⇌115(3)

350H Sentencing and Punishment

350HI Punishment in General

350HI(E) Factors Related to Offender

350Hk115 Exercise of Rights

350Hk115(3) k. Right to Stand Trial.

Most Cited Cases

Jury verdict finding defendant guilty of several counts of child molestation did not reflect a finding that presumptive concurrent sentences were too lenient, as an aggravating factor justifying an exceptional sentence; since if defendant pleaded guilty a jury could not have been convened to make the findings necessary to support the imposition of an enhanced punishment upon him, defendant could not be exposed to the imposition of enhanced punishment by reason of his choice to go to trial.

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Seth Aaron Fine, Attorney at Law, Mary Kathleen Webber, Snohomish County Prosecutors Office, Everett, WA, for Respondent.

Dwyer, J.

*1 ¶ 1 When the superior court imposes consecutive sentences of confinement upon a defendant who has been convicted of multiple felonies that are not defined as serious violent offenses, it imposes exceptional sentences. Such exceptional sentences were imposed in this case. These sentences were premised upon the trial court's determination that the imposition of concurrent sentences would result in punishment that was clearly too lenient. Because the United States Constitution requires that such a determination be made by a jury, rather than by the sentencing judge, and because no procedure existed at the time of Robert Vance's convictions for his jury to make such a finding, we reverse the challenged sentences, order them vacated, and remand the case to the trial court with directions that standard range sentences be imposed upon him.

¶ 2 This case has had a long and eventful life. In July 2003, a jury convicted Robert Vance of three counts of child molestation in the first degree, two counts of child molestation in the second degree, and three counts of communication with a minor for immoral purposes. At the subsequent sentencing hearing the court determined that Vance was a persistent offender, as defined in Washington's "two-strikes law,"^{FN1} and sentenced him to serve a term of life imprisonment without the possibility of early release. On direct appeal, we reversed the sentence and remanded the matter to the trial court for re-sentencing.^{FN2} At Vance's second sentencing hearing, held on October 29, 2004, the trial court found that the imposition of concurrent sentences for his three convictions of child molestation in the first degree, the presumptive sentencing consequence pursuant to RCW 9.94A.589,^{FN3} would result in a sentence that was clearly too lenient. Thus, pursuant to former RCW 9.94A.535(2)(i) (2003),^{FN4} the court imposed consecutive sentences for these offenses.^{FN5} However, child molestation in the first degree is not established by

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statute as a serious violent offense. *See* RCW 9.94A.030(41).^{FN6}

¶ 3 Vance again appealed, this time contending that by imposing consecutive sentences, the sentencing judge had imposed exceptional sentences upon him in violation of Vance's Sixth Amendment right to trial by jury as discussed in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). We affirmed.^{FN7} Our Supreme Court subsequently granted review of that decision and remanded the case to us for reconsideration in light of its decision in *In the Matter of the Personal Restraint of VanDelft*, 158 Wash.2d 731, 147 P.3d 573 (2006), *cert. denied*, --- U.S. ---, 127 S.Ct. 2876, 167 L.Ed.2d 1172 (2007). *State v. Vance*, noted at 159 Wash.2d 1011, 152 P.3d 1032 (2007).

[1] ¶ 4 Before us now for the third time, on direct appeal from the most recent sentences imposed based on the jury's 2003 verdicts, Vance again contends that the exceptional sentences violate his right to trial by jury as set forth in *Blakely* because the sentencing judge, rather than the jury, conducted the fact finding necessary to justify the imposition of exceptional sentences.^{FN8} Based on our Supreme Court's holding in *VanDelft*, we agree.

*2 ¶ 5 In *VanDelft*, the sentencing judge imposed an exceptional sentence by ordering VanDelft's sentence for kidnapping in the second degree, committed with sexual motivation, to run consecutively to his other sentences. *VanDelft*, 158 Wash.2d at 735, 147 P.3d 573. RCW 9.94A.030(41) does not include kidnapping in the second degree as a serious violent offense. Sentences for felonies not established as serious violent offenses "shall be served concurrently." RCW 9.94A.589(1)(a).^{FN9} Thus, consecutive sentences for those felonies not established as serious violent offenses "may only be imposed under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.589(1)(a).

¶ 6 Former RCW 9.94A.535 (2002) set forth those factors that the legislature allowed a sentencing court to consider in determining whether to impose an exceptional sentence. At the time Van-

Delft was sentenced, one of those factors was 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." *VanDelft*, 158 Wash.2d at 739, 147 P.3d 573 (quoting former RCW 9.94A.535(2)(i)). The sentencing judge premised the imposition of exceptional sentences on the judge's finding that the imposition of concurrent sentences would result in punishment that was "clearly too lenient," given VanDelft's high offender score. *VanDelft*, 158 Wash.2d at 739-40, 147 P.3d 573. However, our Supreme Court held that the sentencing judge erred by making this finding, *VanDelft*, 158 Wash.2d at 743, 147 P.3d 573, and ordered that the sentence for the kidnapping in the second degree conviction be vacated and the matter returned to the trial court for resentencing, with directions that the sentence for the kidnapping conviction be imposed to run concurrently with the sentences on the other counts. *VanDelft*, 158 Wash.2d at 743, 147 P.3d 573. In so holding, the court reiterated its holding in *State v. Hughes*, 154 Wash.2d 118, 110 P.3d 192 (2005), *abrogated in part by Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006), that " '[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*.'" *VanDelft*, 158 Wash.2d at 742, 147 P.3d 573 (quoting *Hughes*, 154 Wash.2d at 140, 110 P.3d 192).^{FN10}

¶ 7 We agree with Vance that *VanDelft* is indistinguishable from his case. Child molestation in the first degree is not statutorily established as a serious violent offense. The challenged sentences for each of the three counts of this offense are statutorily presumed to run concurrently. Therefore, in ordering the sentences to run consecutively, the sentencing court imposed exceptional sentences. Thus, just as our Supreme Court held that the trial judge in *VanDelft* erred by imposing exceptional sentences based on the judge's own factual determination, we now hold that Vance's sentencing judge erred by doing the same.

*3 [2][3] ¶ 8 We next must consider whether

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the error was harmless. Initially, the State argued that the error was harmless because no rational person could doubt that Vance's acts harmed several different victims. However, this argument was eviscerated by our Supreme Court's decision in *State v. Womac*, 160 Wash.2d 643, 160 P.3d 40 (2007), which was filed after this case was remanded to us. In *Womac*, the court held that when no legal procedure existed at the time of conviction whereby the jury could have made the findings necessary to support the imposition of an exceptional sentence, the error committed by the sentencing judge in making the factual determination necessary to support the imposition of an exceptional sentence cannot be harmless. *Womac*, 160 Wash.2d at 663, 160 P.3d 40. Trial courts do not have inherent authority to empanel sentencing juries. *Womac*, 160 Wash.2d at 663, 160 P.3d 40. At the time of Vance's convictions, no procedure authorizing the empanelling of a jury to conduct fact finding related to the imposition of an exceptional sentence existed. The State now concedes that *Womac* controls and that the trial court's error cannot be deemed harmless.

[4]¶ 9 We next must consider whether recent amendments to the Sentencing Reform Act of 1981(SRA) allow the State to once again seek an exceptional sentence on remand. In 2005, the legislature amended chapter 9.94A RCW to allow a jury, by special interrogatory, to unanimously find, beyond a reasonable doubt, aggravating factors that could support the imposition of an exceptional sentence.^{FN11} However, the amended statute only applied to "pending criminal matters where trials have not begun or pleas not yet accepted." *State v. Pillatos*, 159 Wash.2d 459, 470, 150 P.3d 1130 (2007). Therefore, the provisions of the 2005 amendments cannot apply to Vance, who went to trial in 2003.

¶ 10 In response to *Pillatos*, the legislature again amended the SRA, Laws of 2007, ch. 205, §§ 1-3, and added a new section to RCW 9.94A.537:

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 on by the superior court in imposing the previous sentence, at the new sentencing hearing.

RCW 9.94A.537(2). The aggravating circumstances listed in RCW 9.94A.535(3) are "an *exclusive list*" of the factors a jury may consider in deciding whether to impose a sentence above the standard range. RCW 9.94A.535(3) (emphasis added).

¶ 11 The State concedes that the aggravating factor relied upon by Vance's sentencing judge is not listed in RCW 9.94A.535(3).^{FN12} Nevertheless, the State, quoting chapter 205, section 1, of the Laws of 2007, argues that it should be allowed to seek an exceptional sentence on remand, contending that the legislature's intent is clear: "[T]he 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." Although the State urges us to fill what it characterizes as a "minor gap" from an inadvertent legislative omission, we decline to do so.

*4 ¶ 12 When interpreting a statute, we look first to its plain language. *State v. Armendariz*, 160 Wash.2d 106, 110, 156 P.3d 201 (2007). See *State v. Martin*, 94 Wash.2d 1, 8, 614 P.2d 164 (1980). If the plain language of the statute is unambiguous, our inquiry is at an end and the statute must be enforced in accordance with its plain meaning. *Armendariz*, 160 Wash.2d at 110, 156 P.3d 201.

¶ 13 This has long been the rule. In *Martin*, for example, our Supreme Court declined to imply the existence of a special sentencing provision by which the death penalty could be imposed in a guilty plea case where a statute specifically required that the trial jury be reconvened and charged with deciding the question of death. *Martin*, 94 Wash.2d at 7-9, 614 P.2d 164.^{FN13} The court reasoned that the plain language of the death penalty statute foreclosed the possibility of impaneling a special jury when a defendant pleaded guilty:

Clearly the legislature did not anticipate the possibility that an accused might plead guilty to a

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charge of first degree murder. Thus, it simply failed to provide for that eventuality. As attractive as the State's proposed solution may be, we do not have the power to read into a statute that which we may believe the legislature has omitted, be it an intentional or an inadvertent omission. The statutory hiatus is unfortunate. Nevertheless, it would be a clear judicial usurpation of legislative power for us to correct that legislative oversight.

Martin, 94 Wash.2d at 8, 614 P.2d 164 (citations omitted).

¶ 14 The same reasoning applies here. We cannot ignore the plain language of RCW 9.94A.535(3). Vance's sentencing judge based the exceptional sentence on an aggravating circumstance not found in RCW 9.94A.535(3). Thus, the State's contention that the 2007 amendments provide it with the ability to seek an exceptional sentence on remand fails.

¶ 15 Moreover, Vance notes that even if the 2007 amendments allowed the 2005 provisions to be applied retroactively, the State did not satisfy RCW 9.94A.537(1) because the State did not give Vance pre-trial notice of its intention to seek an exceptional sentence. *See Womac*, 160 Wash.2d at 663, 160 P.3d 40. We agree.

¶ 16 RCW 9.94A.537 provides:

(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.

The State does not dispute Vance's claim that it never gave him such notice. Accordingly, the State cannot benefit from either the 2005 or the 2007 legislative changes.

[5] ¶ 17 In its briefing, the State also argues that Vance's sentences are consistent with *Blakely's* dictates because the aggravating factor relied upon by the sentencing judge was reflected in the jury's ver-

dicts.^{FN14} In other words, even though no procedure was in place to impanel a jury to make the factual determinations needed for an exceptional sentence, the State argues that in Vance's case there was no constitutional violation because Vance's jury actually made the findings necessary to support the imposition of an exceptional sentence.

*5 ¶ 18 In its briefing, the State points to the jury's determination that Vance had molested several different victims, a finding inherent in its multiple guilty verdicts. However, at oral argument, the State correctly conceded that this argument was foreclosed by the Supreme Court's decision in *Hughes*, 154 Wash.2d 118, 110 P.3d 192, because the facts of *Hughes* were similar to those herein. We agree. Moreover, the facts in *VanDelft* are also analogous. Defendants in both *VanDelft*, 158 Wash.2d at 734, 147 P.3d 573, and *Hughes*,^{FN15} 154 Wash.2d at 128, 110 P.3d 192, were convicted of sexual offenses against multiple victims. The sentencing judges in both cases imposed exceptional sentences because standard range sentences were deemed to be "too lenient." *VanDelft*, 158 Wash.2d at 740, 147 P.3d 573; *Hughes*, 154 Wash.2d at 128, 110 P.3d 192. Those sentences were reversed despite the fact that juries convicted *VanDelft* and defendant Selvidge of sexual offenses against multiple victims. *VanDelft*, 158 Wash.2d at 743, 147 P.3d 573; *Hughes*, 154 Wash.2d at 140, 110 P.3d 192. The *VanDelft* court expressly noted that a finding that a concurrent sentence would be clearly "too lenient" was not reflected in the jury verdict. 158 Wash.2d at 743, 147 P.3d 573. Accordingly, the State correctly conceded at oral argument that the contention it makes in its briefing is foreclosed by this authority.

¶ 19 The State's argument is also foreclosed under *State v. Frampton*, 95 Wash.2d 469, 627 P.2d 922 (1981). In *Frampton*, the question was whether the then-current statutory scheme for imposing the death penalty was unconstitutional in light of our Supreme Court's decision in *Martin.Frampton*, 95 Wash.2d at 473, 627 P.2d 922. The court reaffirmed its holding in *Martin* that a defendant who pleaded guilty at arraignment could not be subjected to the

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enhanced penalty of death for murder in the first degree because that penalty, according to the applicable statute, could only be found to be warranted by the trial jury. *Frampton*, 95 Wash.2d at 478, 627 P.2d 922. See *Martin*, 94 Wash.2d at 7-9, 614 P.2d 164. In *Frampton* the court held that the statutory procedure for imposing the death penalty was unconstitutional as applied to all defendants, regardless of whether the defendant had pleaded guilty or been convicted after a jury trial. *Frampton*, 95 Wash.2d at 480, 627 P.2d 922. Relying on *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), the court reasoned:

The maximum penalty for a defendant who pleads guilty to first degree murder is life imprisonment with possibility of parole. A defendant who pleads not guilty and is subject to a jury trial may receive the death penalty. Where, pursuant to statutory procedure, the death penalty is imposed upon conviction following a plea of not guilty and a trial, but is not imposed when there is a plea of guilty, that statute is unconstitutional.

Frampton, 95 Wash.2d at 478, 627 P.2d 922. The court further reasoned that such a situation needlessly chills a defendant's constitutional right to plead not guilty and demand a jury trial, thus violating due process. *Frampton*, 95 Wash.2d at 479, 627 P.2d 922. *Frampton* announced the principle "that a statutory scheme that punishes people charged with the same offense differently, depending upon whether they plead guilty or have a jury trial, is unconstitutional." *State v. Bowerman*, 115 Wash.2d 794, 803, 802 P.2d 116 (1990) (analyzing *Frampton*).

*6 ¶ 20 In circumstances where, if Vance pleaded guilty, a jury could not have been convened to make the findings necessary to support the imposition of an enhanced punishment upon him, we cannot hold that by going to trial Vance exposed himself to the imposition of enhanced punishment. The Supreme Court's decision in *Frampton* forecloses such a result.

¶ 21 We reverse Vance's challenged sentences, order them vacated, and remand this matter to the

superior court with directions that it impose standard range sentences upon him.^{FN16}

WE CONCUR: SCHINDLER, A.C.J., and AGID, J.

FN1.RCW 9.94A.570 provides that a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release. Former RCW 9.94A.030(32)(b) (2003) defines a "persistent offender" as an offender who:

(i) Has been convicted of: (A) Rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; (B) any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, or burglary in the first degree; or (C) an attempt to commit any crime listed in this subsection (32)(b)(i); and

(ii) Has, before the commission of the offense under (b)(i) of this subsection, been convicted as an offender on at least one occasion, whether in this state or elsewhere, of an offense listed in (b)(i) of this subsection or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in (b)(i) of this subsection....

FN2. In this court, the State had conceded that it had not proved that Vance's current offenses occurred after the July 22, 2001, effective date of the comparability clause of the two-strikes statute. *State v. Vance*, noted at 122 Wash.App. 1040, 2004 WL 1658630 (2004).

FN3.RCW 9.94A.589 addresses consecutive or concurrent sentences and provides that:

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range

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for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535....

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection....

FN4. Former RCW 9.94A.535(2)(i) (2003) allowed a court to impose an exceptional sentence after finding 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, as expressed in RCW 9.94A.010."

FN5. The court found that, based on Vance's two prior felony convictions and his multiple current convictions, Vance's offender score was "27," which resulted in an applicable standard range of 149-198 months of confinement. The court imposed a sentence of 198 months imprisonment on each of the child molestation in the first degree counts, to run consecutively to one another and concurrently with the sen-

tences on the other five convictions. Thus, Vance was sentenced to serve a total term of 594 months in prison.

FN6.RCW 9.94A.030(41) establishes the following crimes as "serious violent offense[s]": murder in the first degree, homicide by abuse, murder in the second degree, manslaughter in the first degree, assault in the first degree, kidnapping in the first degree, rape in the first degree, and assault of a child in the first degree.

FN7. Our decision was premised upon the apparent authority of *State v. Cubias*, 155 Wash.2d 549, 120 P.3d 929 (2005), in which our Supreme Court, faced with a seemingly similar *Blakely* challenge, had affirmed a trial court's imposition of consecutive sentences where each individual sentence imposed was itself within the applicable standard range. *State v. Vance*, noted at 131 Wash.App. 1016, 2006 WL 158664 (2006).

FN8. We review constitutional challenges and questions of law de novo. *State v. Womac*, 160 Wash.2d 643, 649, 160 P.3d 40 (2007).

FN9. Conversely, pursuant to RCW 9.94A.589(1)(b), sentences for separate and distinct serious violent offenses "shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection."

FN10. The Supreme Court also explained an important distinction between the facts in *VanDelft* and the facts in *Cubias*. *VanDelft*, 158 Wash.2d at 742-43, 147 P.3d 573. Unlike the situation in *VanDelft*, in *Cubias*, the consecutive sentences imposed did not constitute exceptional sentences. *Cubias*' sentences, which were all within the standard range, were for serious violent felonies as defined by statute. Thus, the statutory presumption of concurrent sen-

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tences did not apply. *VanDelft*, 158 Wash.2d at 742, 147 P.3d 573.

FN11. The 2005 amendments include a new section that reads as follows:

(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) 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.

Former RCW 9.94A.537 (Laws of 2005, ch. 68, § 4).

FN12. The "multiple offense policy" set forth in former RCW 9.94A.535(2)(i) ("The 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, as expressed in RCW 9.94A.010.") was revised by the 2005 amendments. Laws of 2005, ch. 68, § 3. The legislature deleted the "clearly too lenient" language, and provided that this aggravating circumstance should be found by a judge rather than by a jury. *See* RCW 9.94A.535(2)(c) ("The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.").

FN13. The *Martin* court was analyzing a death penalty statute, former RCW 10.94.020 (1979), *repealed by* Laws of 1981, ch. 138, § 24.

FN14. The State at one time also argued that, under Washington State Constitution,

the sentencing judge may make factual findings supporting an exceptional sentence. It appears, however, from the State's final brief and presentation at oral argument that it has prudently abandoned this argument.

FN15. *Hughes* was a consolidated appeal involving three different cases. *Hughes*, 154 Wash.2d at 126, 110 P.3d 192. The facts of the case of defendant George Selvidge, as discussed in *Hughes*, supply the basis for our present discussion. *See Hughes*, 154 Wash.2d at 128, 110 P.3d 192.

FN16. Because the issues discussed are dispositive, we do not reach Vance's arguments as to whether exceptional sentences are barred by double jeopardy concerns or whether the mandatory joinder rule applies.

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