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NO. 55364-0-I

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

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT L. VANCE,

Appellant.

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COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
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SECOND SUPPLEMENTAL  
BRIEF OF RESPONDENT

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## **I. ISSUES**

(1) Under Washington law, can the sentencing judge determine the facts necessary for imposition of an exceptional sentence?

(2) Under Federal law, did the jury find the facts necessary for imposition of an exceptional sentence, where the jury found that the defendant sexually molested four children, and the standard sentencing range only provided punishment for the crimes against one of those victims?

(3) If the jury findings were insufficient, is that error harmless because no reasonable person could doubt that all four victims were harmed by the sexual molestation?

(4) If the prior sentencing proceedings were procedurally inadequate, is a new sentencing proceeding barred by principles of Double Jeopardy or by the mandatory joinder rule?

## **II. STATEMENT OF THE CASE**

The defendant, Robert Vance, was found guilty by a jury of eight counts of sexual offenses committed against four different victims. For victim K.D., he was convicted of first degree child molestation (count 1). For victim A.D., he was convicted of first degree child molestation (count 3), second degree child molestation

(count 4), and felony communicating with a minor for immoral purposes (count 5). For victim H.C., he was convicted of first degree child molestation (count 7) and communicating (count 9). For victim J.D., he was convicted of second degree child molestation (count 10) and communicating (count 11). 1 CP 19, 65-67.

To prove the felony of communicating with a minor for immoral purposes, the State introduced a copy of the prior judgment and sentence convicting the defendant of first degree statutory rape and indecent liberties. Ex. 5. The jury returned special verdicts finding that the defendant had been previously convicted of first degree statutory rape. Supp. CP \_\_\_\_ (Special Verdict Forms, Sub No. 38-53). (The forms did not mention the indecent liberties conviction.)

The court initially sentenced the defendant to life imprisonment under the "two strikes" law. 1 CP 51-62. On appeal, the State conceded that it had not proved that the defendant's crimes occurred after the effective date of the applicable law. The case was therefore remanded for re-sentencing. 1 CP 45-47. At re-sentencing, the court imposed consecutive sentences for the three counts of first degree child molestation, for a total sentence of

594 months. 1 CP 24. In support of this sentence, the court determined that a presumptive sentence would be clearly too lenient. 1 CP 32-33.

On the second appeal, this court affirmed the sentence. The Supreme Court granted review and remanded for reconsideration in light of In re VanDelft, 158 Wn.2d 731, 147 P.3d 573 (2006), pet. for cert. filed, no. 06-1081 (2/1/07). This court has directed supplemental briefing on the impact of VanDelft; Washington v. Recuenco, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); and State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007).

### III. ARGUMENT

#### **A. UNDER THE WASHINGTON CONSTITUTION, FACTUAL FINDINGS SUPPORTING AN EXCEPTIONAL SENTENCE MAY BE MADE BY THE SENTENCING JUDGE.**

The defendant raises various state constitutional grounds for overturning the sentence in this case. All of these should be rejected.

The Washington constitution, unlike the Federal constitution, distinguishes between “facts which determine guilt or innocence” and “penalty factors.” There is no state constitutional right to a jury trial on penalty factors. State v. Hoffman, 116 Wn.2d 51, 126, 804

P.2d 577 (1991); see State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909, 124 S. Ct. 1616, 158 L. Ed. 2d 256 (2004) (under state constitution, juries have no authority over sentencing). Nor is there any state constitutional requirement that such factors be alleged in an information. State v. Brett, 126 Wn.2d 136, 154-55, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996).

Under Federal law the U.S. Supreme Court has held that aggravating factors must be submitted to a jury and proved beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). This holding does not, however, change the meaning of the State constitution. This court is bound by the Washington Supreme Court's interpretation of state law, notwithstanding the U.S. Supreme Court's interpretation of comparable Federal law. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Unless the Washington Supreme Court overrules Hoffman and Brett, this court is bound by them as a matter of state law. Under those decisions, there was no state constitutional error in the proceedings in the present case.

**B. THE SENTENCING PROCEEDINGS IN THIS CASE ALSO SATISFIED THE REQUIREMENTS OF THE FEDERAL CONSTITUTION.**

**1. When The Jury Found That The Defendant Sexually Molested Four Children, It Made All The Factual Findings Necessary To Support A Judicial Conclusion That A Standard Range Sentence Would Be Clearly Too Lenient.**

Of course, the defendant's claims are not based solely on state law. He claims that the proceedings violated the requirements of Blakely, as interpreted in State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005). In the State's last brief, it argued that the imposition of consecutive sentences does not implicate the concerns of Blakely. The Washington Supreme Court rejected this argument in In re VanDelft, 158 Wn.2d 731, 147 P.3d 573 (2006), pet. for cert. filed, no. 06-1081 (2/1/07).<sup>1</sup> Nevertheless, this court should uphold the exceptional sentence, because the jury's findings satisfied the requirements of Hughes.

Under Hughes, deciding whether a sentence would be "clearly too lenient" requires both factual determinations by the jury

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<sup>1</sup> Because there is a pending petition for certiorari in VanDelft, the State is not abandoning the arguments raised in its previous brief. The State does concede, however, that this court is bound by the holding of VanDelft unless it is altered by the U.S. Supreme Court.

and legal conclusions by the judge. Hughes explains the rule as follows:

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." State v. Batista, 116 Wn.2d 777, 787-88, 808 P.2d 1141 (1991).

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 some citations omitted).

Later in the Hughes opinion, the court further explained the necessary factual findings, by modifying its prior decision in State v. Smith, 123 Wn.2d 51, 864 P.2d 1371 (1993):

Instead of holding that the inquiry into *whether there are substantial and compelling reasons justifying an exceptional sentence* was automatically satisfied by finding a free crime, ... Smith actually held that the inquiry into whether ... 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,” was automatically satisfied. The inquiry ... whether there were substantial and compelling reasons for an exceptional sentence, is a legal conclusion that the trial court is still allowed to make following Blakely. But the inquiry actually analyzed in Smith was the same that was defined by this court in Batista to require two *factual findings*. The 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. We overrule Smith to the extent that it allows the too lenient conclusion to be made by judges. . .

Hughes, 154 Wn.2d at 140 (court’s emphasis, citations omitted).

Hughes thus makes it clear that the necessary factual findings are the ones required by Batista: whether the crimes involved egregious effects or extraordinary culpability. Absent such findings, the court is not allowed to decide that a standard range sentence is “too lenient.” On the other hand, if such findings are made, the court can decide whether the standard range sentence constitutes sufficient punishment in light of those findings. It is not the jury’s job to decide what punishment is sufficient – only to decide whether the requisite facts have been proved.

Similar analysis was applied by Division Three of this court in State v. Saltz, \_\_\_ Wn. App. \_\_\_, 154 P.3d 282 (2007). That case involved the aggravating factor for “prior unscored misdemeanor ... criminal history [that] results in a presumptive

sentence that is clearly too lenient.” RCW 9.94A.535(2)(b). Division Three held that this required a factual finding “that a standard range sentence would clearly be too lenient because of the serious harm or culpability given the number or nature of unscored misdemeanors.’ Saltz ¶ 14. The court recognized that the aggravating factor also took into account matters that could properly be decided by a judge. This did not, however, justify the resulting exceptional sentence: “The consideration of a factor properly determined by a judge together with a factual determination that should have been determined by the jury does not result in a legal conclusion properly made by the judge.” Id. ¶ 16.

Applying this analysis in the present case, there was no requirement of a specific jury finding that the sentence was “clearly too lenient.” Rather, the jury was required to find that the defendant’s crimes involved egregious effects or extraordinary culpability. If the verdicts reflect such a finding, the sentencing judge was entitled to conclude that these facts were, under the circumstances of the case, sufficiently substantial and compelling to justify an exceptional sentence.

The jury's verdict implicitly includes the necessary factual findings. By its verdict, the jury found that the defendant sexually molested four different children. Supp. CP \_\_\_\_ (Court's Instructions, Verdict Forms, Sub No. 38-53). This court has recognized that "children inevitably sustain injury from sexual abuse." American Economy Ins. Co. v. Estate of Wilker, 96 Wn. App. 87, 92, 977 P.2d 677 (1999). Thus, the jury's verdict shows that the defendant harmed four children. His crime therefore inflicted a greater degree of harm than would have resulted from crimes against a smaller number of victims.

Under Blakely, computation of the standard sentencing range remains the task of the trial court. See State v. Jones, 159 Wn.2d 231, 149 P.2d 636 (2006). In this case, the defendant's two prior convictions for sex offenses gave him an offender score of 6 for prior offenses alone.<sup>2</sup> For one of the victims (A.D.), the defendant was convicted of three counts of sexual offenses (first degree child molestation, second degree child molestation, and

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<sup>2</sup>As it happens, the jury in this case found the existence of one of the prior convictions, because it was an element of the crime of felony communication with a minor. 2 CP \_\_\_\_ (Special Verdict forms, Sub No. 38-53). This one prior conviction, combined with the defendant's current convictions, would yield an offender score greater than 9.

communicating with a minor for immoral purposes). These convictions alone led to an offender score of 9, without regard to the crimes against any of the other victims. Based on the jury's findings and the prior offenses, a standard range sentence would fail to take into account the harm to three of the four victims.<sup>3</sup>

Thus, under the circumstances of this case, a conclusion that the sentence would be "clearly too lenient" does not require consideration of any facts beyond those found by the jury and those reflected in prior convictions. To reach this conclusion, the sentencing court need only consider the following: (1) the defendant had two prior convictions for sex offenses; (2) he was convicted of sex offenses against four different children; (2) a standard range sentence would only impose punishment for crimes against one of these children. All of these are matters that the court could properly consider under Blakely. The first of these falls within the "prior conviction" exception. See Jones, 159 Wn.2d at 239-41. The second was established by the jury's verdict. The third follows as a matter of law from the other two. The court was

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<sup>3</sup> Even if the defendant had been convicted of only one count for each of the four victims, the standard range would still not take into account the harm to two of the four victims.

entitled to conclude that these facts established “substantial and compelling reasons” for imposition of an exceptional sentence. Hughes, 154 Wn.2d at 140.

This analysis might appear inconsistent with the result of VanDelft. The recitation of facts in that case indicates that the defendant was convicted of sexual offenses against multiple victims. VanDelft, 158 Wn.2d at 733. The court did not, however, consider the significance of this fact. The prosecutor does not appear to have argued that the necessary factual findings were implicit in the jury’s verdict. “In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised.” Berschauer/Phillips Construction Co. v. Seattle School Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Since VanDelft did not discuss whether a jury finding of sex crimes against multiple victims establishes “egregious effects,” the decision is not controlling on that point.

In the present case, the jury found that the defendant sexually abused four different children. A standard-range sentence would not provide punishment for crimes against three of these victims. It was for the judge, not the jury, to determine whether such punishment would be adequate under these circumstances.

In deciding that it would not, the court acted within its proper constitutional role. The exceptional sentence should be affirmed.

**2. If The Jury's Findings Are Not Sufficient, The Error Is Harmless, Since No Rational Person Could Doubt That The Defendant's Acts Harmed Four Different Children.**

Alternatively, if the jury's verdict did not provide sufficient factual findings to support the sentence, that error was harmless. The U.S. Supreme Court has held that harmless error analysis *can* be applied when a jury fails to determine a fact relevant to sentencing. Washington v. Recuenco, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). The court applied the standard set out in Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Under Neder, when an element has been omitted from jury instructions, the test for harmlessness is "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." Id. at 19.

As discussed above, the omitted "element" in the present case is whether there were "egregious effects of defendant's multiple offenses." Hughes, 154 Wn.2d at 137. The jury found that the defendant sexually abused four different children. No rational person could have found that the harm inflicted by these crimes was the same as the harm that would have been inflicted by

molesting a single child. As a result, the absence of an express determination of “egregious effects” was, at worst, harmless error.

The defendant argues that because the State did not prove what a standard range sentence would be, it did not establish that such a sentence would be clearly too lenient. Appellant’s 2<sup>nd</sup> Supp. Brief at 26. This argument assumes that the jury was required to determine what sentence was appropriate. As discussed above, that assumption is incorrect. Rather, the jury’s function is only to determine factual issues – specifically, whether the defendant’s crime involved “extraordinarily serious harm or culpability.” It is for the court, not the jury, to decide whether those facts are sufficiently “substantial and compelling” to justify an exceptional sentence. Hughes, 154 Wn.2d at 140. It is not the jury’s job to determine the appropriateness of any particular sentence.

The defendant also argues that harmless error analysis is improper as a matter of state law. Appellant’s 2<sup>nd</sup> Supp. Brief at 9-25. The problem with this argument is that the harmless nature of a Federal constitutional error is determined by Federal law, not state law. Chapman v. California, 386 U.S. 18, 21, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). As already pointed out, the proceedings in this case complied with the Washington constitution. Accordingly, there

is no state law error to which state harmless error analysis could be applied. Under applicable law, any error in the sentencing proceedings was harmless.

**C. IF THE EXCEPTIONAL SENTENCE IS REVERSED, THE PROPER REMEDY IS TO REMAND THE CASE FOR A NEW SENTENCING HEARING.**

**1. The Legislature Has Now Authorized The Empanelling Of Sentencing Juries Following Appellate Reversal.**

If this court nevertheless overturns the exceptional sentence, it should remand the case for a new sentencing proceeding. The defendant claims that such action is foreclosed by Hughes and by State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007). This is no longer correct. Pillatos was legislatively overruled by Laws of 2007, ch. 205. (A copy of that statute is attached to this brief.) To understand the effect of this statute, it is necessary to review the history of the Legislature's attempts to comply with Blakely.

The Washington Supreme Court first addressed the impact of Blakely in Hughes. The State argued that the cases should be remanded for jury determination of the relevant facts. The court held that it had no authority to create such a procedure:

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, quoting United States v. Jackson, 390 U.S. 570, 579-80, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968).

Shortly before Hughes was decided, the Legislature enacted Laws of 2005, ch. 68. This statute did create a procedure for jury determinations of aggravating factors. Among other procedural protections, the statute required the prosecutor to give notice of its intent to seek an exceptional sentence “prior to trial or entry of the guilty plea.” Laws of 2005, ch. 68, § 4(1), codified as RCW 9.94A.537(1).

In Pillatos, the Supreme Court considered the effect of this statute. It held that the statute applied to all cases where trial had not begun or pleas had not been accepted. Pillatos, 159 Wn.2d at 474. As to other cases, however, the court held sentencing juries could not be empanelled. This was because altering the sentencing procedures was the function of the legislature, not the judiciary. “To create such a procedure out of whole cloth would be to usurp the power of the legislature.” Id. at 469, quoting Hughes, 154 Wn.2d at 151-52.

The Legislature responded to Pillatos by enacting Laws of 2007, ch. 205. That statute includes the following intent statement:

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, 2004. 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.

To achieve this goal, the Legislature added the following provision 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 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).

Admittedly, this statutory provision does not precisely cover the situation in the present case. RCW 9.94A.535(3) lists aggravating factors that may be found by juries. The “multiple offenses” aggravating factor of former RCW 9.94A.535(2)(h) is not the same as any of the factors listed in that subsection. Rather,

this aggravating factor is similar to the “free crimes” factor set out in RCW 9.94A.533(2)(c). That subsection lists aggravating factors that can be determined by the court.

Nevertheless, the enactment of Chapter 205 eliminates the basis for the decisions in Hughes and Pillatos. To empanel a jury on remand, the court would not be “creat[ing] .. a procedure out of whole cloth” – it would be applying a procedure created by the Legislature. Nor would the court be “usurp[ing] the power of the legislature.” The legislature has now made it clear that it wishes to have exceptional sentences considered via constitutionally proper procedures, rather than allowing defendants to escape such sentences due to the absence of such a procedure.

In Hughes, the court recognized that it could “fill a minor gap in a statute” by “extrapolat[ing] from its general design details that were inadvertently omitted.” Hughes, 154 Wn.2d at 150-51. At this point, the exceptional sentence statute contains a “minor gap.” The legislature has enacted a procedure for jury determination of aggravating factors. It has made it clear that this procedure can be used on remand, after appellate reversal of findings that were improperly made by judges. The Legislature neglected, however, to address one narrow situation – where prior law made jury

findings necessary, but the Legislature eliminated the future need for such findings by changing the definition of the aggravating factor. This court can and should fill this gap by authorizing a sentencing procedure that is consistent with the statute and protects the defendant's constitutional rights.

**2. Double Jeopardy Requirements Are Not Violated When A Procedural Error In Sentencing Is Corrected By Holding A New Sentencing Proceeding.**

The defendant next argues that remanding the case for re-sentencing would violate Double Jeopardy requirements. This court rejected an identical argument in State v. Maestas, 124 Wn. App. 352, 101 P.3d 426 (2005). There, the trial court entered factual findings supporting an exceptional sentence. This court overturned the sentence under Blakely. The court went on to hold that a re-sentencing proceeding would not violate double jeopardy.

The court pointed out that a defendant has no legitimate expectation of a finality that he appeals. Maestas, 124 Wn. App. at 358. Under such circumstances, double jeopardy bars re-sentencing only if the defendant had been "acquitted" of the aggravating circumstances. The defendant had been convicted, not acquitted. Consequently, there was no double jeopardy bar to a new sentencing proceeding. Id. at 359-60.

Courts in other states have reached similar results. The Oregon Supreme Court considered this issue in State v. Sawatzky, 339 Ore. 689, 125 P.3d 722 (2005). The Oregon sentencing guidelines, like Washington's, required judges to determine the existence of aggravating factors. Id. at 723. The Oregon Supreme Court held this procedure invalid under Blakely. Nevertheless, applying reasoning similar to that of Maestas, the court held that double jeopardy considerations did not preclude remanding the case for a jury determination of these facts. Sawatzky, 125 P.3d at 726-27. The Alaska Court of Appeals reached a similar result in State v. Dague, 143 P.3d 988, 1010-14 (Alaska. App. 2006). (The court also held that, under the Alaska constitution, aggravating factors did not need to be included in indictments. Id. at 1007-10.)

Other courts have considered similar issues in the context of capital sentencing proceedings. Under the procedures formerly used in several states, judges would determine the existence of aggravating factors that rendered defendants eligible for the death penalty. Such procedures were held invalid in Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). Following Ring, many of these states modified their statutes to provide for jury determinations. Three courts have held that cases can be

remanded for jury determinations without violating Double Jeopardy requirements. State v. Ring, 206 Ariz. 534, 547-51, 65 P.3d 915, 928-32 (2003); State v. Lovelace, 140 Idaho 73, 75-77, 90 P.3d 298, 300-02, cert. denied, 543 U.S. 936, 125 S. Ct. 323, 160 L. Ed. 2d 242 (2004); Capano v. State, 889 A.2d 968, 980-85 (Del. 2006). Particularly in light of these holdings, this court should adhere to its decision in Maestas that a remand for re-sentencing would not constitute double jeopardy.

### **3. Remand For A Re-Sentencing Proceeding Does Not Constitute A New Trial For A “Related Offense.”**

The defendant claims that a new-sentencing proceeding is barred by the mandatory joinder rule, CrR 4.3.1.(b)(3):

A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense. . . The motion to dismiss ... shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

This court considered the application of this rule to sentencing remands in State v. Harris, 123 Wn. App. 906, 99 P.3d 902 (2004), remanded, 143 Wn.2d 1032, 119 P.3d 852 , rev'd on remand, 120 P.3d 954 (2005):

The rule prevents prosecutors from harassing a defendant by bringing successive charges over a long span of time even though all charges stem from the same criminal episode. It is unclear how an aggravating factor can become a new, related offense as [the defendant] argues. But even if we were to assume consideration of aggravating factors becomes “a related offense,” the rule is not implicated here. In fact, it is the court’s consideration of those factors which is the basis of [this] appeal. The aggravating factors *were* litigated at [the defendant’s] original sentencing hearing. Resentencing him on those factors after consideration by a jury of the underlying facts does not amount to successive prosecution.

Id., 123 Wn. App. at 912 (court’s emphasis, footnote omitted). This court later held in light of Hughes that a remand for re-sentencing was not authorized by statute. Id., 120 P.3d at 954. That conclusion, however, does not undercut this court’s reasoning with regard to the mandatory joinder rule. In accordance with Harris, the court should hold that the rule does not bar further sentencing proceedings.

Alternatively, even if the aggravating factor is considered a “related offense,” this court should invoke the “ends of justice” exception. This exception requires a showing of “extraordinary circumstances” that “involve reasons which are extraneous to the action of the court or go to the regularity of its proceedings.” State v. Dallas, 126 Wn.2d 324, 332, 892 P.2d 1082 (1995). This court

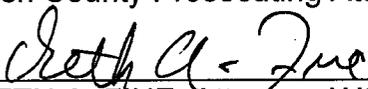
has applied the exception where the prosecutor's original decision was based on established law that was altered by a later decision. State v. Ramos, 132 Wn. App. 334, 101 P.3d 872 (2004), motion for review granted, no. 77347-5 (9/7/06); State v. Gamble, \_\_\_ Wn. App. \_\_\_, 155 P.3d 962 (2007). Similarly here, the prosecutor followed established procedures for seeking exceptional sentences. When those procedures were changed, it would not serve the ends of justice to prevent prosecutors from following the new procedures.

#### **IV. CONCLUSION**

For the reasons set out above, the exceptional sentence should be affirmed. If the sentence is reversed, the case should be remanded for a jury trial to determine the facts necessary to support a conclusion that a standard range sentence would be "clearly too lenient."

Respectfully submitted on May 24, 2007.

JANICE E. ELLIS  
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By:   
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ENGROSSED HOUSE BILL 2070

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AS AMENDED BY THE SENATE

Passed Legislature - 2007 Regular Session

State of Washington                      60th Legislature                      2007 Regular Session

By Representatives O'Brien, Goodman and Pearson

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Passed by the House April 18, 2007.

Passed by the Senate April 17, 2007.

Approved by the Governor April 27, 2007.

Filed in Office of Secretary of State April 30, 2007.