

NO. 82029-5  
consolidated with 82425-8

THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD MUTCH,

Appellant.

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BY RONALD L. CAMENTER  
CLERK

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHATCOM COUNTY

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APPELLANT'S SUPPLEMENTAL BRIEF

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FILED AS  
ATTACHMENT TO EMAIL

ORIGINAL

TABLE OF CONTENTS

A. INTRODUCTION .....	1
B. ASSIGNMENTS OF ERROR .....	2
C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	3
D. STATEMENT OF THE CASE .....	4
E. ARGUMENT .....	7
1. IMPOSING MULTIPLE PUNISHMENTS ON MUTCH FOR CONVICTIONS BASED ON THE SAME OFFENSE VIOLATES DOUBLE JEOPARDY AND THE SAME CRIMINAL CONDUCT SENTENCING REQUIREMENT ...	7
a. Multiple punishments violate double jeopardy when the jury did not find five separate and distinct events .....	7
b. The double jeopardy violation requires reversal .....	12
c. Where multiple offenses involve the same time, place, victim, and intent, the same criminal conduct doctrine authorizes singular punishments .....	13
d. The sentencing judge did not address Mutch's request to treat the offenses as "same criminal conduct." .....	19
e. The court's failure to consider the identical nature of the convictions when imposing an exceptional sentence based solely on multiple current offenses constitutes an abuse of discretion .....	20
2. THE COURT LACKED AUTHORITY TO IMPOSE AN EXCEPTIONAL SENTENCE BASED ON MUTCH'S MISCALCULATED OFFENDER SCORE .....	21
a. The court lacked authority to impose an exceptional sentence .....	21

b. The court's exceptional sentence is also fundamentally flawed by virtue of its failure to find that all necessary elements of the enhanced sentence had been proven .....25

i. The court premised the exceptional sentence on an overinflated understanding of Mutch's offender score .....25

ii. The court never analyzed whether the aggravating circumstance sufficiently justified an exceptional sentence .....27

F. CONCLUSION .....28

TABLE OF AUTHORITIES

**Washington Supreme Court Decisions**

In re Detention of Pouncey, 168 Wn.2d 382, 229 P.3d 768 (2010) ..... 12

State v. Armenta, 134 Wn.2d 1, 948 P.2d 1280 (1997) ..... 27

State v. Aumick, 126 Wn.2d 422, 894 P.2d 1325 (1995) ..... 12

State v. Bobenhouse, 166 Wn.2d 881, 214 P.3d 907 (2009)..... 8

State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005) ..... 20

State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008); ..... 11

State v. Kilgore, 167 Wn.2d 28, 216 P.3d 393 (2009)..... 13

State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988)..... 11

State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008)..... 24

State v. Noltie, 116 Wn.2d 831, 809 P.2d 1990 (1991)..... 8, 9

State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007) ..... 22, 24

State v. Porter, 133 Wn.2d 177, 942 P.2d 974 (1997)..... 14

State v. Quismondo, 164 Wn.2d 499, 192 P.3d 342 (2008) ..... 20

State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999) ..... 11, 13, 16, 17

State v. Turner, 169 Wn.2d 448, 238 P.3d 461 (2010) ..... 7

State v. Vander Houwen, 163 Wn.2d 25, 177 P.3d 93 (2008) ..... 8

State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010)... 7,

<u>Wash. State Physicians Ins. Exch. &amp; Ass'n v. Fisons Corp.</u> , 122 Wn.2d 299, 858 P.2d 1054 (1993) .....	20
--	----

**Washington Court of Appeals Decisions**

<u>State v. Berg</u> , 147 Wn.App. 923, 198 P.3d 529 (2008) .....	12
<u>State v. Borsheim</u> , 140 Wn.App. 357, 165 P.3d 417 (2007) .....	8, 9
<u>State v. Calvert</u> , 79 Wn.App. 569, 903 P.2d 1003 (1995); <u>rev. denied</u> , 129 Wn.2d 1005 (1996) .....	14
<u>State v. Carter</u> , 156 Wn.App. 561, 234 P.3d 275 (2010) .....	9
<u>State v. Crumble</u> , 142 Wn.App. 798, 177 P.3d 129 (2008) .....	24
<u>State v. Grantham</u> , 84 Wn.App. 854, 932 P.2d 657 (1997) ....	16, 17
<u>State v. Hayes</u> , 81 Wn.App. 425, 914 P.2d 788 (1996) .....	9
<u>State v. Holland</u> , 77 Wn.App. 420, 891 P.2d 49, <u>rev. denied</u> , 127 Wn.2d 1008 (1995) .....	9
<u>State v. Mutch</u> , 87 Wn.App. 433, 942 P.2d 1018 (1997), <u>rev. denied</u> , 134 Wn.2d 1016 (1998) .....	4
<u>State v. Palmer</u> , 95 Wn.App. 187, 975 P.2d 1038 (1999) .	15, 16, 17
<u>State v. Saunders</u> , 120 Wn.App. 800, 86 P.3d 232 (2004) .....	15

**United States Supreme Court Decisions**

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) .....	7
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) .....	24

<u>Brown v. Ohio</u> , 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977)	7
<u>Magwood v. Patterson</u> , __ U.S. __, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010)	13

**United States Constitution**

Fifth Amendment.....	7
Sixth Amendment.....	2, 7

**Washington Constitution**

Article I, section 9.....	7
Article I, section 21.....	2, 7
Article I, section 22.....	2, 7

**Statutes**

Former RCW 9.94A.360.....	26
Former RCW 9.94A.400.....	14, 19
Former RCW 9.94A.560.....	12
RCW 9.94A.535.....	22, 24, 25, 27
RCW 9.94A.537.....	22, 23, 24, 27
RCW 9.94A.585.....	27, 28
RCW 9.94A.589.....	14
RCW 9A.44.010.....	11

**Court Rules**

RAP 2.3..... 12

A. INTRODUCTION.

In 1994, Richard Mutch received a sentence of life without the possibility of parole because he was convicted for a most serious offense and had two prior convictions that the trial court deemed proper predicate convictions. In 2008, this Court held that one of Mutch's prior convictions was not a qualifying predicate for a "three-strike" sentence and ordered a new sentencing hearing.

In July of 2008, the resentencing judge imposed an exceptional sentence above the standard range based on the State's claim that Mutch's offender score was "20." When Mutch sought direct review in this Court, the State acknowledged that Mutch's offender score was less than "20," and set an immediate resentencing hearing without waiting for the outcome of appellate review. The sentencing court imposed the same exceptional sentence after a November 13, 2008 resentencing hearing.

Mutch sought direct review from his November resentencing and this Court accepted review of both cases. This Court has invited briefing addressing errors from the November resentencing hearing.

B. ASSIGNMENTS OF ERROR.

1. The jury's verdicts did not authorize the court to impose multiple punishments for second degree rape as required by the jury trial rights of the Sixth Amendment and Article I, sections 21 and 22 of the Washington Constitution.

2. Without jury authorization, the multiple punishments for the same offense violate the double jeopardy clauses of the state and federal constitutions.

3. The five rape convictions for the same offense, at the same time, place, and against the same victim constitute the same criminal conduct.

4. The court lacked statutory authority to impose an exceptional sentence.

5. The court did not find all necessary legal requirements for imposing an exceptional sentence.

6. The court's misunderstanding of Mutch's offender score invalidates the claimed basis for the exceptional sentence.

7. To the extent the court's conclusions of law 1, 2, and 3, are deemed findings of fact regarding Mutch's offender score, they are not supported by the record. CP 181-92 (attached as Appendix A).

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

1. The court's authority to impose punishment does not exceed the precise findings of the deliberating jury. This limitation is based on the inviolate right to a jury trial and the double jeopardy clauses of the state and federal constitutions. Where the jury found Mutch committed a single offense, rather than separate and distinct offenses, may the court impose multiple punishments?

2. Under the same criminal conduct rule, multiple offenses count as a single crime for sentencing purposes if they involve the same time, place, victim and objective intent. Mutch was convicted of five counts of second degree rape based on the same time, place, victim, and objective intent. When Mutch committed the same offense against the same person in an uninterrupted, continuous course of events, are his offenses the same criminal conduct?

3. The governing statutes dictate that a person is not eligible for an exceptional sentence on resentencing from a pre-2005 conviction unless he previously received an exceptional sentence and the new sentence rests on the same aggravating circumstance. Did the court lack authority to impose an

exceptional sentence on Mutch when he had not previously received one when he was convicted and sentenced in 1994?

4. Imposing an exceptional sentence requires the court to find a valid aggravating circumstance and then determine whether that circumstance provides a substantial and compelling justification for a sentence greater than the standard range. The court relied on the aggravating circumstance of having current offenses that are not counted in the offender score, but it misunderstood Mutch's actual offender score and it never concluded that this circumstance presented a substantial and compelling justification for an exceptional sentence. Did the court misunderstand or neglect the findings critical to the lawful imposition of an exceptional sentence above the standard range?

D. STATEMENT OF THE CASE.

In 1994, Richard Mutch was convicted of five counts of second degree rape and one count of kidnapping based on a single incident. The complainant, J.L., testified at trial that she had befriended Mutch through a shared interest in developing an Amway business.<sup>1</sup> RP 129-36.<sup>2</sup> Initially, J.L. and Mutch's

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<sup>1</sup> State v. Mutch, 87 Wn.App. 433, 435, 942 P.2d 1018 (1997), rev. denied, 134 Wn.2d 1016 (1998) (Court of Appeals decision containing brief explanation of facts of case).

relationship was romantic and intimate, and Mutch gave J.L. flowers and talked of marriage. 1RP 133-134, 136. 138; RP 157. Shortly thereafter, J.L. limited their relationship to a business partnership. 1RP 138.

On February 2, 1994, Mutch visited J.L. at her home, worked on Amway with her, had dinner, and watched a movie. RP 158, 160-61, 167. J.L. told Mutch he could sleep over because she thought he was intoxicated. RP 170. Mutch became physically assaultive and verbally hostile. RP 172-75. He ordered J.L. to say things like he was a king and she belonged to him. RP 174-75. Then he instructed her to perform oral sex followed by vaginal sex. RP 177-78. J.L. said that she complied out of fear and ceased any resistance. RP 176-78. After the first period of sexual activity ended, Mutch demanded the same acts again, without further physical assaults or any explicit threats. RP 178.

The "same thing" happened four times in a row, until Mutch agreed to let J.L. sleep. RP 178. Mutch slept, awoke, and demanded sex again one last time. RP 181. "And it was the same

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<sup>2</sup> The verbatim report of proceedings ("RP") from Mutch's trial is contained in the Court of Appeals No. 35810-3-I, and a motion to transfer those transcripts has been filed. The trial transcripts are consecutively paginated and referred to herein by RP, followed by the page number. All other transcripts are referenced by the date of the proceeding.

thing. It was exactly the same thing. I did the oral thing and the intercourse thing and I went, it went by real fast and I got dressed real quick." RP 181. Then Mutch and J.L. left the house to get a marriage license. RP 181. J.L. reported the incident to police while Mutch was preparing a marriage application at the county clerk's office. RP 187-88.

Judge Steven Mura presided at Mutch's trial, but Mutch was resentenced in 2008 by Judge Ira Uhrig. CP 180-83. When Judge Uhrig counted Mutch's offender score in November 2008, he rebuffed Mutch's request to treat the rape convictions as the same criminal conduct. 11/13/08RP 34-38. The court imposed an exceptional sentence based on Mutch's high offender score, which it calculated by tripling the multiple rape counts. CP 180-83. If the rape convictions were counted as a single offense, his offender score for would be four.

E. ARGUMENT.

1. IMPOSING MULTIPLE PUNISHMENTS ON MR. MUTCH FOR CONVICTIONS BASED ON THE SAME OFFENSE VIOLATES DOUBLE JEOPARDY AND THE SAME CRIMINAL CONDUCT SENTENCING REQUIREMENT

a. Multiple punishments violate double jeopardy

when the jury did not find five separate and distinct events. Where a jury trial is had, a sentencing judge may impose only the sentence authorized by the jury's verdict. State v. Williams-Walker, 167 Wn.2d 889, 899, 225 P.3d 913 (2010) ("When the jury is instructed on a specific enhancement and makes its finding, the sentencing judge is bound by the jury's finding."); see Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amend. 6; Wash. Const. art. I, §§ 21, 22.

It violates double jeopardy for a court to impose punishment for multiple convictions for the same crime. Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010); U.S. Const. amend. 5; Wash. Const. art. I, § 9. The jury only authorized the court to impose punishment against Mutch for one count of second degree rape; therefore the remaining convictions for the same offense must be stricken.

In order to insulate multiple convictions based on a single incident from violating double jeopardy, the jury must unanimously agree that at least one separate act constitutes a particular charged count in a criminal case. State v. Noltie, 116 Wn.2d 831, 842-43, 809 P.2d 1990 (1991); State v. Borsheim, 140 Wn.App. 357, 365, 165 P.3d 417 (2007). Either by clear jury instructions or unambiguous charging practices, the court needs to ensure the jury's verdict rests on unanimous agreement of separate acts necessary for each conviction. See State v. Vander Houwen, 163 Wn.2d 25, 37, 177 P.3d 93 (2008) ("In the absence of a unanimity jury instruction, each juror could have convicted Vander Houwen based on different criminal acts"); see also State v. Bobenhouse, 166 Wn.2d 881, 893, 214 P.3d 907 (2009) ("In 'multiple acts' cases, the jury must unanimously agree as to which incident constituted the crime charged.").

By clearly directing that the verdict in each count must be based on an act separate and distinct from another count charging the same offense, the trial court avoids imposing multiple punishments for the same offense. As the Court of Appeals explained,

we made clear more than a decade ago that, in sexual abuse cases where multiple identical counts are alleged to have occurred within the same charging period, the trial court must instruct the jury "that they are to find 'separate and distinct acts' for each count."

Borsheim, 140 Wn.App. at 370 (quoting State v. Hayes, 81 Wn.App. 425, 431, 914 P.2d 788 (1996); Noltie, 116 Wn.2d at 846). This principle, rooted in protection against double jeopardy, has been broadly enforced.<sup>3</sup>

Mutch's convictions run afoul of this double jeopardy principle. He was charged with five identical offenses during the same two-day time period. CP 137-39. The court did not give a unanimity instruction or instruct the jury that its verdict for each count must rest on separate and distinct acts. Court's Instructions (COA CP 21-60) (copy attached as Appendix B).<sup>4</sup>

On the contrary, each "to convict" instruction contained the identical charging language and time period for each count of rape.

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<sup>3</sup> See e.g., State v. Carter, 156 Wn.App. 561, 568, 234 P.3d 275 (2010) (reversing three counts of rape in same charging period due to lack of clear "separate and distinct" jury finding); State v. Berg, 147 Wn.App. 923, 935, 198 P.3d 529 (2008) (same holding for two counts of rape); Hayes, 81 Wn.2d at 431 (affirming where court instructed jury that each conviction must rest on "an occasion separate and distinct from" remaining counts); State v. Holland, 77 Wn.App. 420, 425, 891 P.2d 49, rev. denied, 127 Wn.2d 1008 (1995) (reversing two counts of child molestation where, "It is impossible, on this record, to conclude that all 12 jurors agreed on the same act to support convictions on each count."):

The "to convict" instructions directed the jury to decide whether Mutch committed the acts necessary for rape in the second degree "during the period of time intervening between the 2<sup>nd</sup> day of February 1994, and the 3<sup>rd</sup> day of February 1994." Instructions 15-19 (COA CP 43-47). The verdict forms did not identify any distinguishing characteristic of the acts underlying for each count.

The verdict form simply said:

We, the Jury in the above-entitled case . . . having found the defendant, RICHARD HENRY MUTCH, not guilty of the crime of RAPE IN THE FIRST DEGREE, Count I, as charged, . . . find the defendant RICHARD HENRY MUTCH guilty of the lesser included crime of RAPE IN THE SECOND DEGREE.

Verdict Form B (COA CP 17) (copy attached as App. C). Verdict Form B contains the identical language, with the only distinction being the references to counts II, III, IV, and V. Id.

The charging document was not admitted into evidence, but even if it had been, each count used the same charging period and the identical allegations of criminal conduct. CP 137-39. The references to "count I" or "count II" contained no practical meaning. The instructions did not ensure the jury's verdicts rested on separate, unanimous agreement of the underlying acts.

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<sup>4</sup> The Clerk's Papers from the Court of Appeals file are referred to by the CP number previously designated, and are submitted to this Court by motion to

The jury's verdicts violate double jeopardy because they do not demonstrate unanimous agreement that Mutch committed five separate offenses of second degree rape. When a verdict does not specify the underlying act relied on, the verdict is ambiguous and principles of lenity require the ambiguity to be construed in favor of the accused. State v. Kier, 164 Wn.2d 798, 811, 194 P.3d 212 (2008); see also Williams-Walker, 168 Wn.2d at 899.

Mutch's case does not present an occasion in which it can rest upon an unambiguous election as to the basis of the jury's verdict. See, State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). The State charged five counts of rape, but either oral contact or vaginal penetration could meet the definition of sexual intercourse, and thus, there were more than five potential acts before the jury. See State v. Tili, 139 Wn.2d 107, 119, 985 P.2d 365 (1999); RCW 9A.44.010(1); RP 178, 181. The State's closing argument simply said "we have four events that took place from the 2<sup>nd</sup> through the 3<sup>rd</sup>." RP 686-87. Then, they had sex again after he slept and, "this is count five." RP 689. The prosecutor emphasized, "it was the same thing" each time, for all counts, without further explanation. Id.

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transfer filed with this brief.

Even if the prosecutor had made some argument regarding its intended basis of each count, “[a] jury should not have to obtain its instruction on the law from the arguments of counsel.” In re Detention of Pouncey, 168 Wn.2d 382, 392, 229 P.3d 768 (2010) (quoting State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995)). The charging documents, instructions, and verdict forms made no distinct between any events and consequently, do not represent unanimous findings of separate and distinct events.

b. The double jeopardy violation requires reversal.

In Mutch’s first direct appeal, a single count of second degree rape required the imposition of a “three-strike” sentence if he had qualifying predicate convictions. Former RCW 9.94A.560 (1994). The remaining rape convictions had no practical import. It is only after he was resentenced based on the multiplying effect of those various convictions that he was expressly punished multiple times for these identical offenses. Double jeopardy violations are manifest constitutional errors, and they should be corrected even if not previously raised. Berg, 147 Wn.App. at 931; RAP 2.3(a).

When a case is remanded and a new judgment is imposed, the defendant may raise claims on appeal that were not previously raised, when those same errors occur at the new sentencing

hearing. Magwood v. Patterson, \_\_\_ U.S. \_\_\_, 130 S.Ct. 2788, 2801, 177 L.Ed.2d 592 (2010). “An error made a second time is still a new error.” Id. This is particularly true when the trial court reevaluates the circumstances of the case and imposes a new sentence based on a new exercise of discretion. Id.; see also State v. Kilgore, 167 Wn.2d 28, 37, 216 P.3d 393 (2009) (when “the trial court exercise[s] its discretion” at resentencing, it may “give rise to an appealable issue.”). The trial court’s imposition of an exceptional sentence predicated on its evaluation of the multiplying effect of using five identical and undistinguished offenses to calculate Mutch’s offender score violates double jeopardy and he is entitled to relief.

c. Where multiple offenses involve the same time, place, victim, and intent, the same criminal conduct doctrine authorizes singular punishments. Multiple convictions must be treated as the “same criminal conduct” at sentencing, when the offenses were (1) committed at the same time and place; (2) involved the same victim; and (3) involved the same objective criminal intent. Tili, 139 Wn.2d at 122; former RCW

9.94A.400(1)(a) (1994); RCW 9.94A.589(1)(a).<sup>5</sup> When offenses constitute the "same criminal conduct," they count as a single offense in the offender score.

The verdict forms and jury instructions show that Mutch was convicted of five counts of second degree rape, each one from the identical time period of the "2<sup>nd</sup> day of February and the 3<sup>rd</sup> day of February, 1994." Each incident occurred at the same place and involved the same victim. Each offense required the same intent. Therefore, the offenses appear to constitute the same criminal conduct.

The same time element of same criminal conduct does not require simultaneous acts. State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997). In Porter, the defendant was convicted of sequential drug sales. Because they occurred as a continuing, uninterrupted sequence of conduct over a short time period, they constituted the same criminal conduct for sentencing purposes. Id. at 185-86; see also State v. Calvert, 79 Wn.App. 569, 578, 903 P.2d 1003 (1995); rev. denied, 129 Wn.2d 1005 (1996) (same time includes forgeries on same day, where exact time unknown).

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<sup>5</sup> The current version of the sentencing law governing "same criminal conduct" is substantially the same as the version in effect at the time of the incident.

The same objective intent is measured by whether there was a marked break in the action and a change in tactics. See State v. Saunders, 120 Wn.App. 800, 824, 86 P.3d 232 (2004) ("we look objectively at whether one crime furthered the other, or whether there was a substantial change in the nature of the criminal objective."); State v. Palmer, 95 Wn.App. 187, 192, 975 P.2d 1038 (1999).

In Palmer, the defendant was convicted of two counts of rape for an incident in which he threatened and assaulted his ex-wife, forcing her to submit to sexual intercourse. 95 Wn.App. 189-90. During a break between the two charged rapes, the defendant repeated the threats and assaultive acts he had made earlier. The Court of Appeals ruled that the offenses were the same criminal conduct because the defendant did not do anything in the intervening time "that was not related to raping" his ex-wife. Id. at 191-92.

Addressing the sequential nature of the two offenses, the Court of Appeals held, "the fact that Palmer renewed his threats between the two rapes and had an opportunity to reflect does not alter our analysis. The defendant's threats and use of violence were no different throughout the evening." Id. at 192.

This Court cited Palmer favorably in Tili, a case involving three rape convictions which occurred within a relatively short period of time. In Tili, this Court held that the closely related rapes were “uninterrupted” and “continuous” thereby “render[ing] it unlikely that Tili formed an independent criminal intent between each separate penetration.” 139 Wn.2d at 124.

Tili distinguished another Court of Appeals case, State v. Grantham, 84 Wn.App. 854, 859, 932 P.2d 657 (1997). In Grantham, the defendant forced anal intercourse upon an unwilling victim. After the first rape, a new argument erupted as the victim demanded Grantham stop. He kicked her, grabbed at her, and threatened her not to tell anyone. Id. at 856. She refused to look at him and begged to be taken home. Id. Grantham responded by physically assaulting her and forcing her to perform oral sex. Id. Grantham used distinct methods to accomplish the two rapes, which the court labeled “significant,” to the same criminal conduct inquiry. Id. at 859. He formed a new criminal intent during the period between the two offenses when he showed the “presence of mind to threaten” the complainant not to report the offense, he rebuffed the complainant’s pleading to stop and let her go, and he

“had to use new physical force to obtain sufficient compliance to accomplish the second rape.” Id.

Unlike in Grantham, here J.L. accused Mutch of committing sexual acts one after the other without significant pause, until after the fourth repetition of the various acts, when Mutch finally fell asleep. He used physical force at the beginning, to secure J.L.'s initial compliance, but did not use further force re-gain her submission during the incident. RP 178, 181.

Like Tilj and Palmer, Mutch used “an unchanging pattern of conduct.” 139 Wn.2d at 124; 95 Wn.App. at 92. As J.L. described it, Mutch insisted upon “the same thing,” again and again. RP 178, 181. His method did not vary. Each time, he wanted the complainant to repeat mantras praising him and declaring subservience, then he wanted oral sex, and then vaginal sex. Id.

As J.L. described the gap between the first and second repetitions of sexual acts, she said:

So I got off and laid down and he started the repeating thing again, who's the king and who do you belong to and who's your pussy belong to and all that stuff. And then he wanted me to do it again and it was the same thing for like four times that night, I had to do the same exact thing.

RP 178.

Rather than displaying consciousness of guilt or fear of being prosecuted during gaps in the incident, Mutch perceived his actions as a romantic prelude to the marriage that he intended. The complainant thought it was in her best interest to feign interest in Mutch's plans and submit to his demands, and she did not threaten to alert any authorities. RP 178-80. Thus, Mutch barely paused and never changed his focus as he sought the complainant's submission to his demands.

The sexual acts occurred one after another, without a distinct break in the action and without evidence of a newly formed intent to commit a separate offense. Likewise, the jury's verdict rests on the identical acts occurring in the same time period, without distinction. Verdict Form B (COA CP 16-17); Instructions 15-19 (COA CP 43-47).

The only time Mutch paused was when he fell asleep after the fourth set of sexual acts. Immediately upon awakening, he asked the complainant for one more sexual encounter and she submitted. RP 181. This fifth event was "the exact same thing." RP 181. There was no clear break and newly formed intent. The same criminal conduct doctrine requires a trial court to impose a

sentence treating the similar offenses as a single point in the offender score.

d. The sentencing judge did not address Mutch's request to treat the offenses as "same criminal conduct." The trial court did not expressly rule upon whether Mutch's offenses constituted the same criminal conduct. At the resentencing hearing, Mutch asked the court to impose a single sentence based on same criminal conduct. 11/13/08RP 35, 37. The judge presiding at this hearing had not been the trial judge and he never indicated having familiarity with the underlying trial testimony. See CP 181 (court notes review of sentencing findings for criminal history).

Judge Uhrig asked the prosecutor to comment on Mutch's request that the court treat the offenses as the same criminal conduct. The prosecutor asserted "they are sexual offenses and they would certainly count separately." 11/13/08RP 35. Yet no sentencing law orders the separate counting of sexual offenses. Under former RCW 9.94A.400(1), the same criminal conduct rules apply. To resolve whether the offenses were the same criminal conduct, the court needed to revisit the factual allegations and jury verdict, but it did not do so and the prosecution misleadingly advised the sentencing judge that there was a legal barrier to

counting the offenses as the same criminal conduct. 11/13/08RP 35, 37.

Judge Uhrig expressed no opinion on the same criminal conduct question. The judge ended the discussion, adopting the State's recommendation and concluding the hearing by saying he had reviewed the prosecution's findings of fact and believed they are accurate "and adequately set forth my finding in this matter." 11/13/08RP 39. The findings of fact do not mention same criminal conduct.

e. The court's failure to consider the identical nature of the convictions when imposing an exceptional sentence based solely on multiple current offenses constitutes an abuse of discretion. A court abuses its discretion when it fails to exercise discretion, or rules on an untenable basis. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). "Indeed, a court 'would necessarily abuse its discretion if it based its ruling on an erroneous view of the law,'" thus a court's incorrect understanding of its discretionary authority is itself error. State v. Quismondo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

The resentencing judge did not analyze same criminal conduct. The jury's verdict and the uninterrupted, continuous nature of the single scheme shows that Mutch's offenses should not be treated as separate offenses based on the operation of double jeopardy as well as the same criminal conduct statute. Furthermore, because Mutch has been in custody since February 1992, and the longest standard range sentence he could receive under an offender score of "9," is 198 months, Mutch has served the entirety of any lawful sentence. See Offender Scoring Worksheet (copy attached as Appendix D).

2. THE COURT LACKED AUTHORITY TO IMPOSE AN EXCEPTIONAL SENTENCE BASED ON MUTCH'S MISCALCULATED OFFENDER SCORE

At the 2008 resentencing proceedings, the court lacked authority to impose an exceptional sentence for Mutch's 1994 convictions because he had not received an exceptional sentence previously. Furthermore, the court ignored the essential requirements for imposing an exceptional sentence.

a. The court lacked authority to impose an exceptional sentence. When the Legislature rewrote the exceptional sentencing scheme in 2005, it expressly declared that

the new procedures did not apply to a person who had been convicted before the effective date of the new statute. State v. Pillatos, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007); see RCW 9.94A.535; RCW 9.94A.537. “[B]y its terms,” the 2005 amendments do not apply to people convicted before the amendment. Id. Mutch was convicted before 2005 and the exceptional sentence procedures do not apply to him. CP 22.

In 2007, the legislature added a narrow exception, permitting the imposition of an exceptional sentence if a person had previously received an exceptional sentence and the case was remanded for resentencing. In re Restraint of Beito, 167 Wn.2d 497, 508, 220 P.3d 489 (2009); see RCW 9.94A.537(2). This provision comes with “its own express limits.” Beito, 167 Wn.2d at 508. It only authorizes the same aggravating circumstance as previously used to impose the earlier sentence. Id.

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.

(emphasis added). By its terms, RCW 9.94A.537(2) limits a court's resentencing authority.

One limitation is that an exceptional sentence above the standard range was previously imposed. RCW 9.94A.537(2) (“[i]n any case where an exceptional sentence above the standard range was imposed”). A second limitation is that it allows the court to consider only aggravating circumstances “that were relied upon” in imposing the previous sentence. Beito, 167 Wn.2d at 508. Finally, the aggravating circumstance must be one that is authorized by the current statute, which provides an exclusive list of available aggravating circumstances and sets forth the procedures for imposing an exceptional sentence. RCW 9.94A.537(3), (4) (5), (6).

Beito had previously received an exceptional sentence, before 2005, and his case was remanded for resentencing because his appeal was pending when Blakely<sup>6</sup> was decided. 167 Wn.2d at 501-02. In Beito, the aggravating factor used for the original sentence was not one exclusively authorized by the revised statute. Id. at 508. Under the restrictions imposed by the controlling statutes, the resentencing court lacked authority to impose an exceptional sentence in a resentencing proceeding. Id.

Unlike Beito, Mutch had not previously received an exceptional sentence. The life without parole provisions of the Sentencing Reform Act are not contained within the statutory scheme that gives a court discretion to impose an exceptional sentences. See RCW 9.94A.533; RCW 9.94A.535; RCW 9.94A.537.<sup>7</sup> A separate, unrelated statute makes life without the possibility of parole the mandatory sentence for any qualifying offender, without regard to the statutory maximum and without the ability to exercise any discretion. RCW 9.94A.570; Former RCW 9.94A.120(4)(1994).

Mutch did not receive an exceptional sentence in 1994, which is required to authorize a court to consider imposing one on resentencing under RCW 9.94A.537(2). Pillatos, 159 Wn.2d at 470. The narrow focus of the statute is consistent with legislative intent at the time it was enacted, and warrants it being strictly construed and it does not permit the court to impose an exceptional sentence in Mutch's circumstances.

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<sup>6</sup> Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

<sup>7</sup> See also State v. Magers, 164 Wn.2d 174, 193, 189 P.3d 126 (2008) (rejecting effort to analogize exceptional sentence to POAA sentence); State v. Crumble, 142 Wn.App. 798, 802, 177 P.3d 129 (2008) (POAA supercedes and is "exclusive statutory authority" for qualifying offender ).

b. The court's exceptional sentence is also fundamentally flawed by virtue of its failure to find that all necessary elements of the enhanced sentence had been proven.

i. The court premised the exceptional sentence on an overinflated understanding of Mutch's offender score. The court ruled that under the standard range, almost all of Mutch's convictions would go "unpunished" and rested its exceptional sentence on this aggravating circumstance. CP 182; RCW 9.94A.535(2)(c). Yet the court misunderstood Mutch's offender score.

In Conclusion of Law 2, the court justified the exceptional sentence on the basis that all but two counts of rape would be unpunished if Mutch received a standard range sentence. It found:

The Defendant's presumptive sentence under the Sentencing Reform Act is identical to that which would be imposed if he had committed only two counts of Rape in the Second Degree, and a non-violent felony, instead of five counts of Rape in the Second Degree and one count of Kidnapping in the Second Degree, all of which are either sex offenses of violent felony convictions.

CP 182. Similarly, Conclusion of Law 3 states:

The defendant has committed multiple current offenses and his high offender score will result in three counts of Rape in the Second Degree going

unpunished and one count of Kidnapping in the Second Degree going partially punished.

CP 182. This assessment of Mutch's offender score is wrong.

If Mutch had been convicted of only two counts of rape, his offender score would have been "5"; if convicted of three counts of rape, it would have been "8"; and it would be "11" if convicted of four rape counts.<sup>8</sup> It is by adding the kidnapping conviction and one additional count of rape that his score becomes "16." App. D (scoring worksheet for second degree rape).

The court found this "unpunished crime" aggravating circumstance applied and decided the length of the exceptional sentence based on its incorrect perception that that the standard range only explicitly accounted for two of the rape convictions. Furthermore, the court reached this conclusion without considering the facts of the case and without understanding Mutch's accurate offender score. The jury's verdicts did not find Mutch committed five separate and distinct crimes, and the court rebuffed Mutch's request that it analyze the application of same criminal conduct or consider the precise terms of the jury's verdict. 11/13/08RP 34-35.

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<sup>8</sup> Mutch's offender score rests on two points for a prior robbery and the remainder of the offenses are those from the current case. As "sex offenses," each rape conviction counts as three points and the kidnapping received two points as a "violent" offense. Former RCW 9.94A.360 (1994); see App. D.

ii. The court never analyzed whether the aggravating circumstance sufficiently justified an exceptional sentence. RCW 9.94A.535 requires a court to find "substantial and compelling reasons justifying an exceptional sentence."<sup>9</sup> The same requirement applies when a jury finds the aggravating circumstance. RCW 9.94A.537(6). The court must supply its reasons for imposing an exceptional sentence in written findings. RCW 9.94A.535; RCW 9.94A.585. Judge Uhrig never found that substantial and compelling reasons justified the exceptional sentence it imposed.

The court's written findings are silent on this necessary element of an exceptional sentence. CP 180-83. When required written findings are silent on a necessary element, that silence is construed as evidence that the factor was not sufficiently proven. State v. Armenta, 134 Wn2d 1, 14, 948 P.2d 1280 (1997). Without an explicit finding that there are substantial and compelling reasons justifying the exceptional sentence, the reasons supplied by the

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<sup>9</sup> RCW 9.94A.535 provides in pertinent part:  
The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

sentencing court do not justify an exceptional sentence. See RCW 9.94A.585(4).

The court imposed an exceptional sentence based on a critical misunderstanding about how the standard range accounted for Mutch's current convictions. It never assessed whether his standard range was a compelling basis for imposing an exceptional sentence. The court's exceptional sentence is flawed legally and factually, due to inadequate and inapplicable findings.

Mutch should receive a standard range term that accounts for same criminal conduct as well as the prohibition against placing Mutch in double jeopardy. Since Mutch has served the entirety of the maximum sentence of 198 months he could receive under the standard range with an offender score of "9," he should be ordered released.

F. CONCLUSION.

For the foregoing reasons, Mr. Mutch respectfully requests this Court grant review, reverse the improperly imposed exceptional sentence, and order the imposition of a standard range sentence.

DATED this 19<sup>th</sup> day of November 2008.

Respectfully submitted,



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NANCY P. GOLLINS (WSBA 28806)  
DAVID L. DONNAN (WSBA 19271)  
Washington Appellate Project (91052)  
Attorneys for Appellant

**APPENDIX A**  
**Findings of Fact and Conclusions of Law, November 13, 2008**

FILED IN OPEN COURT  
11-13 20 08  
WHATCOM COUNTY CLERK

By \_\_\_\_\_  
Deputy

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON FOR  
WHATCOM COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

RICHARD HENRY MUTCH,

Defendant

Case No. 94-1-00117-8

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW SUPPORTING EXCEPTIONAL  
SENTENCE

THIS MATTER having come on regularly before the above-entitled court, and the State of Washington being represented by David S. McEachran, the Prosecuting Attorney in and for Whatcom County, Washington, and the defendant, RICHARD HENRY MUTCH, being personally resent and representing himself and also being represented by counsel, Jon Komorowski, and the Court being fully advised in the premises and having received memorandums from the parties and heard argument of counsel, now therefore,

The Court makes the following FINDINGS OF FACT:

- 1) That the defendant, Richard Henry Mutch was convicted of Rape in the Second Degree, Counts, I-V and Kidnapping in the Second Degree, Count VI, by jury verdict on the 28<sup>th</sup> day of September, 1994.

1 2) The defendant, Richard Henry Mutch, was sentenced in the Whatcom County  
2 Superior Court as a "Persistent Offender" to a term of life without parole on the 16<sup>th</sup>  
3 day of December, 1994.  
4

5 3) The defendant subsequently filed a Personal Restraint Petition with the Washington  
6 State Supreme Court challenging the comparability of one of the "strike" offenses  
7 underlying his sentence. This Personal Restraint Petition was granted by order of the  
8 Supreme Court on the 30<sup>th</sup> day of April, 2008, and this matter was returned to this  
9 Court for resentencing.  
10

11 4) The defendant did not challenge the criminal history presented at his 1994 sentencing  
12 in the Personal Restraint Petition that brought him back to this Court. The trial court  
13 took testimony and admitted exhibits identifying defendant as the person who was  
14 convicted of the below listed offenses at the original sentencing hearing held in  
15 Whatcom County Superior Court on the 16<sup>th</sup> day of December, 1994. Findings of Fact  
16 and conclusions of law relating to the criminal history were also entered by the trial  
17 court. This court has taken judicial notice of the hearing, exhibits admitted, Findings  
18 of Fact and Conclusions of Law, and finds the defendant's criminal history consists  
19 of the following:  
20  
21  
22

23 a. Robbery in the First Degree 7/14/1966

24 b. Robbery in the First Degree 7/14/1966  
25  
26

27 Based upon the above Findings of Fact, the Court makes the following:

28 **CONCLUSIONS OF LAW:**

29 1. The defendant's Offender Score under the Sentencing Reform Act is 16 for the  
30 crimes of Rape in the Second Degree. Using the crime of Kidnapping in the Second  
31 Degree the Offender Score is 12. The Sentencing Grid only goes to a score of 9.  
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2. The Defendant's presumptive sentence under the Sentencing Reform Act is identical to that which would be imposed if he had committed only two counts of Rape in the Second Degree, and a non-violent felony, instead of five counts of Rape in the Second Degree and one count of Kidnapping in the Second Degree, all of which are either sex offenses or violent felony convictions.
3. The defendant has committed multiple current offenses and his high offender score will result in three counts of Rape in the Second Degree going unpunished and one count of Kidnapping in the Second Degree going partially unpunished.
4. The State of Washington has given adequate notice to defendant Mutch that a sentence exceeding the presumptive standard range was being sought by the State, through the imposition of the "Persistent Offender" sentencing in 1994.
5. Pursuant to the argument of the State, the defendant should receive an exceptional sentence over the standard range based on RCW 9.94A.535(2)(c).
6. Independent of any argument by the State relating to notice given of an exceptional sentence, or reasons supporting an exceptional sentence, the Court has reached its own determination that the defendant should receive an exceptional sentence over the presumptive standard range based on RCW 9.94A.535(2)(c).

DONE IN OPEN COURT this 13 day of November, 2008.

JUDGE / COMMISSIONER

Presented by:

*David S. McEachran*  
David S. McEachran  
Prosecuting Attorney  
WSB # 2496

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Copy Received and Approved for Entry:

~~Jon Komorowski  
Attorney for Defendant  
WSB # \_\_\_\_\_~~

Copy Received and Approved for Entry:

*Refused / unlawful*  
Richard Henry Mutch  
Pro Se

**APPENDIX B**  
**To-Convict Instructions, Numbers 15-19**

INSTRUCTION NO. 15

To convict the defendant of the crime of RAPE IN THE SECOND DEGREE, COUNT I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- a) That during the period of time intervening between the 2nd day of February, 1994 and the 3rd day of February, 1994, the defendant engaged in sexual intercourse with Jessie Light;
- b) That the sexual intercourse was by forcible compulsion;
- c) That the acts occurred in Whatcom County.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 16

To convict the defendant of the crime of RAPE IN THE SECOND DEGREE, COUNT II; each of the following elements of the crime must be proved beyond a reasonable doubt:

- a) That during the period of time intervening between the 2nd day of February, 1994 and the 3rd day of February, 1994, the defendant engaged in sexual intercourse with Jessie Light;
- b) That the sexual intercourse was by forcible compulsion;
- c) That the acts occurred in Whatcom County.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

To convict the defendant of the crime of RAPE IN THE SECOND DEGREE, COUNT III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- a) That during the period of time intervening between the 2nd day of February, 1994 and the 3rd day of February, 1994, the defendant engaged in sexual intercourse with Jessie Light;
- b) That the sexual intercourse was by forcible compulsion;
- c) That the acts occurred in Whatcom County.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 18

To convict the defendant of the crime of RAPE IN THE SECOND DEGREE, COUNT IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

- a) That during the period of time intervening between the 2nd day of February, 1994 and the 3rd day of February, 1994, the defendant engaged in sexual intercourse with Jessie Light;
- b) That the sexual intercourse was by forcible compulsion;
- c) That the acts occurred in Whatcom County.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 19

To convict the defendant of the crime of RAPE IN THE SECOND DEGREE, COUNT V, each of the following elements of the crime must be proved beyond a reasonable doubt:

- a) That during the period of time intervening between the 2nd day of February, 1994 and the 3rd day of February, 1994, the defendant engaged in sexual intercourse with Jessie Light;
- b) That the sexual intercourse was by forcible compulsion;
- c) That the acts occurred in Whatcom County.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

**APPENDIX C**  
**Verdict Form B**

FILED  
CLERK

SEP 23 AM 10 59

COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR WHATCOM COUNTY

THE STATE OF WASHINGTON )

Plaintiff, )

vs. )

RICHARD HENRY MUTCH, )

Defendant )

NO. 94-1-00117-8

VERDICT FORM B

*Verdict Reached 10:35am*

We, the Jury in the above-entitled case, duly impaneled and sworn, having found the defendant, RICHARD HENRY MUTCH, not guilty of the crime of RAPE IN THE FIRST DEGREE, COUNT I, as charged, or being unable to unanimously agree as to that charge, find the defendant RICHARD HENRY MUTCH guilty of the lesser included crime of RAPE IN THE SECOND DEGREE.

We, the Jury in the above-entitled case, duly impaneled and sworn, having found the defendant, RICHARD HENRY MUTCH, not guilty of the crime of RAPE IN THE FIRST DEGREE, COUNT II, as charged, or being unable to unanimously agree as to that charge, find the defendant RICHARD HENRY MUTCH guilty of the lesser included crime of RAPE IN THE SECOND DEGREE.

We, the Jury in the above-entitled case, duly impaneled and sworn, having found the defendant, RICHARD HENRY MUTCH, not guilty of the crime of RAPE IN THE FIRST DEGREE, COUNT III, as charged, or being unable to unanimously agree as to that charge, find the defendant RICHARD HENRY MUTCH guilty of the lesser included crime of RAPE IN THE SECOND DEGREE.

We, the Jury in the above-entitled case, duly impaneled and sworn, having found the defendant, RICHARD HENRY MUTCH, not guilty of the crime of RAPE IN THE FIRST DEGREE, COUNT IV as charged, or being unable to unanimously agree as to that charge, find the defendant RICHARD HENRY MUTCH guilty of the lesser included crime of RAPE IN THE SECOND DEGREE.

We, the Jury in the above-entitled case, duly impaneled and sworn, having found the defendant, RICHARD HENRY MUTCH, not guilty of the crime of RAPE IN THE FIRST DEGREE, COUNT V as charged, or being unable to unanimously agree as to that charge, find the defendant RICHARD HENRY MUTCH guilty of the lesser included crime of RAPE IN THE SECOND DEGREE.

Calvin T. Johnson

**APPENDIX D**  
**Offender Scoring Worksheet**

**RAPE, SECOND DEGREE  
(RCW 9A.44.050)  
VIOLENT SEX**

**I. OFFENDER SCORING (RCW 9.94A.360 (17))**

**ADULT HISTORY:** (If the prior offense was committed *before* 7/1/86, count prior adult offenses served concurrently as one offense; those served consecutively are counted separately. If both current and prior offenses were committed *after* 7/1/86, count all convictions separately, except (a) priors found to encompass the same criminal conduct under RCW 9.94A.400(1)(a), and (b) priors sentenced concurrently that the current court determines to count as one offense.)

Enter number of sex offense convictions ..... x 3 = \_\_\_\_\_  
 Enter number of other serious violent and violent felony convictions ..... x 2 = \_\_\_\_\_  
 Enter number of other nonviolent felony convictions ..... x 1 = \_\_\_\_\_

**JUVENILE HISTORY:** (Adjudications entered on the same date count as one offense except for violent offenses with separate victims)

Enter number of sex offense adjudications ..... x 3 = \_\_\_\_\_  
 Enter number of other serious violent and violent felony adjudications ..... x 2 = \_\_\_\_\_  
 Enter number of other nonviolent felony adjudications ..... x 1/2 = \_\_\_\_\_

**OTHER CURRENT OFFENSES:** (Other current offenses which do not encompass the same conduct count in offender score)

Enter number of other sex offense convictions ..... x 3 = \_\_\_\_\_  
 Enter number of other serious violent and violent felony convictions ..... x 2 = \_\_\_\_\_  
 Enter number of other nonviolent felony convictions ..... x 1 = \_\_\_\_\_

**STATUS:** Was the offender on community placement on the date the current offense was committed? (if yes), + 1 = \_\_\_\_\_

Total the last column to get the Offender Score  
 (Round down to the nearest whole number)  

**II. SENTENCE RANGE**

A. OFFENDER SCORE:  
 STANDARD RANGE  
 (LEVEL X)

0	1	2	3	4	5	6	7	8	9 or more
61 - 68 months	67 - 75 months	82 - 82 months	67 - 89 months	72 - 96 months	77 - 102 months	98 - 130 months	108 - 144 months	129 - 171 months	149 - 198 months

- B. The range for attempt, solicitation, and conspiracy is 75% of the range for the completed crime (RCW 9.94A.410).
- C. Twenty-four months community placement must be served following release from state prison (RCW 9.94A.120 (8)(b)).
- D. Add 12 months to the entire standard range with a special verdict/finding that the offender was armed with a deadly weapon (RCW 9.94A.310, 9.94A.125).

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, )  
 )  
RESPONDENT, )  
 )  
v. )  
 )  
RICHARD MUTCH, )  
 )  
APPELLANT. )

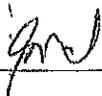
NO. 82029-5

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18<sup>TH</sup> DAY OF NOVEMBER, 2010, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |                                     |  |   |
|-------------------------------------|--|---|
| <input checked="" type="checkbox"/> | HILARY THOMAS, DPA<br>DAVID MCEACHRAN, DPA<br>WHATCOM COUNTY PROSECUTOR'S OFFICE<br>311 GRAND AVENUE<br>BELLINGHAM, WA 98225 | <input checked="" type="checkbox"/> U.S. MAIL<br><input type="checkbox"/> HAND DELIVERY<br><input type="checkbox"/> _____ |
| <input checked="" type="checkbox"/> | RICHARD MUTCH<br>730230<br>MONROE CORRECTIONAL COMPLEX-WSR<br>PO BOX 777<br>MONROE, WA 98272                                 | <input checked="" type="checkbox"/> U.S. MAIL<br><input type="checkbox"/> HAND DELIVERY<br><input type="checkbox"/> _____ |

SIGNED IN SEATTLE, WASHINGTON THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2010.

X \_\_\_\_\_ 

Washington Appellate Project  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
(206) 587-2711