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STATE OF WASHINGTON

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DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF
DIVISION II

STATE OF WASHINGTON

Respondent

vs.

ANDRES SEBASTIAN FERRER

Appellant

ON APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY
The Honorable Greg Gonzales
Superior Court No. 14-1-00656-0

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in calculating Mr. Ferrer's offender score to be 2.
2. The trial court erred in concluding that the assault charge and the harassment charge were not the "same criminal conduct."
3. The length of the exceptional sentence was "clearly excessive."

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the conduct constituting felony harassment and assault in the second degree took place at the same time, and location, and involved the same victim, did the trial court err in concluding they were not the "same criminal conduct" for purposes of calculating the standard sentencing range?
(Assignments of Error 1 and 2)
2. Where the trial court incorrectly calculates the offender score, must an exceptional sentence based on the faulty offender score be vacated?

(Assignments of Error 1 and 2)
3. Assuming that the trial court correctly calculated the offender score and standard range sentence, must the sentence be vacated because the length of the exceptional sentence is "clearly excessive"?
(Assignment of Error 3)

III. STATEMENT OF THE CASE

A. Procedural History

Appellant Andres Ferrer was charged on May 7, 2015 by a third amended information with assault in the second degree, RCW 9A.36.021

(1) (a) and (g) and felony harassment, RCW 9A.46.020.¹ CP 103. A hearing under CrR 3.5 was held on the first day of trial, May 11, 2015.

Judge Greg Gonzales presided over the trial which commenced on May 11 and concluded on May 13, 2015. The jury returned verdicts of guilty on both counts, and found by way of special verdict that the two crimes were committed within the sight or sound of the victim or defendant's minor children. CP 69-70, 72-74. The jury also returned a special verdict indicating it relied on the "substantial bodily injury" prong of the assault charge rather than the "strangulation" prong. CP 71.

The case proceeded to a sentencing hearing on May 22, 2015. The court entered the findings of fact and conclusions of law from the CrR 3.5 hearing. The court determined that standard range for the offense was 12–14 months based on its determination that the assault charge and harassment charge were separate criminal conduct. The prosecutor asked for an exceptional sentence, based on the aggravating factor found by the jury that the case involved domestic violence and had occurred within the sight or sound of the couple's children. The prosecutor suggested an additional year was appropriate for each of the three children, for a total enhancement of 36 months, and a total sentence of 50 months. The court adopted this sentence of 50 months. CP 78. Mr. Ferrer filed a timely notice of appeal from the judgment and sentence. CP 94.

¹ Previous charging documents filed in this case after the initial information had added several counts, but all arising out of the same transaction. CP 1, 13, 47.

B. Trial Testimony

Kristina Ferrer and Andres Ferrer were married in 2010 but separated in March of 2014. In the spring of 2014, she planned to divorce Mr. Ferrer and had prepared the paperwork for it, but had not told him yet. RP II 333-34.² They had two children together. She had a daughter by a previous relationship, Autumn, who was 18 by the time of the trial. RP II 218.

On March 22, 2014, Kristina was still living in their family home, which the couple had agreed to sell. RP II 288. Mr. Ferrer came to the house that day to do some repairs which were required for the pending sale. RP II 289, 334; RP IV 625. She went to a barbecue with her two daughters, Ava and Sylvie, ages 2 and 3 at the time of the incident. Autumn called her while she was at the barbecue to let her know that Mr. Ferrer had been back at the house since she had left. RP II 291.

When she came home, she could not get in through the garage so she called Autumn to open the door from the inside. Autumn helped her carry the younger girls upstairs because they were asleep. RP II 293.

She covered them up and then looked around the room and some things were missing. One of their daughter's baby pictures was missing, so she looked into the closet to see if Mr. Ferrer had taken out his own things. RP II 294, 338-339. There are two clothes bars, upper and lower, so for

² The verbatim report of proceedings is in five volumes, numbered continuously. The volume number will be used in citation for the court's convenience.

a person to fit in the closet if it is closed he would have to crouch down. To her surprise, she saw Mr. Ferrer squatting in the closet. She yelled at him because she was startled. RP II 339. He looked crazed and angry. RP II 294. He asked her angrily where she had taken the children. She told him they had been to the barbecue with her. He jumped up at her. He pushed her down on the bed. He started punching her with his right hand. He asked her if she wanted to die. He put his hands on her neck. RP II 297. He was strangling her. She could not breathe. Her head was pounding. She lost control of her bladder and bowels. RP II 299. He again asked her if she wanted to die, or told her she was going to die. She was able to get up. He was "chest bumping" her as he guided her to another part of the bedroom. He pushed her down to the floor and started punching her again on the left side of her head. He was intermittently strangling her, also with his right hand. RP II 301, 305. When he was doing this she could not speak or breathe. There was a pounding or throbbing in her head. Her vision was affected. RP II 302. Mr. Ferrer repeated over and over that she was going to die. RP II 303 .

She was able to get up a second time. The couple's toddler girls were screaming and crying by this time. They were afraid. Mr. Ferrer said to one of the girls, "this is the last time you will see Daddy, Ladybug." He told Kristina, "Try to divorce me and you'll die." He walked down the hall, smashing the glass on photographs as he went, saying, "The next time I see you, you are dead." RP II 307-308.

Kristina did not smell alcohol on his breath, and he appeared to be steady on his feet. His speech was not slurred. RP II 306-307. She did not recall telling the police later that she had smelled alcohol on his breath. RP II 352. As he went down the hall, she got her phone and called 911. RP II 309. The recording of her call was played for the jury. RP II 310-314.³ From the timing of her call, and that of her daughter Autumn, who initiated her own call as soon as she heard her mother crying out, it can be inferred that the incident lasted about three minutes. RP II 237, 309.⁴

When the police arrived, Kristina had not changed her pants, which she claimed to have soiled. She did not show the police officer the condition of her pants, either. RP II 315-16. She gave them a written statement. RP II 316. She had plenty of time to tell them what had happened, but did not tell them about losing control over her bowels and bladder. RP II 348. When describing what had happened, she did not tell Officer Alba that she had been strangled. RP II 351.

The next day, Kristina talked with Andres' mother Claudine, and his sister Virginia about what had happened to her. She did not tell either woman that she had been strangled. RP II 357-58.

Kristina had headaches over the next few weeks. She had bruising on her neck which developed over a 2-3 week period after her encounter

³ There does not appear to have been a transcript made of the tape from its original. The transcriptionist has attempted to reproduce the dialog as well as possible from the CD of the trial.

⁴ The time stamp on Autumn's call was 11:14 PM. The time stamp on Kristina's call was 11:17, when the incident was already over.

with Mr. Ferrer. She did not go to work during this period. She also had problems with her vision for a few weeks, but these were not still ongoing at the time of the trial. RP II 320-21, 327. She also lost a dental crown, which she believed was attributable to the incident, but this was eight days after the incident. RP II 324, 354-55. The prosecution introduced several photos of the bruising, taken at different time intervals after the incident. RP II 325-326, Supp. CP ____ (Ex. 40, 42, 43, 44). She also wrote out a second statement for the police. RP II 328.

Kristina testified she believed Mr. Ferrer when he said he would kill her. The court sustained an objection to the prosecutor's question about whether factors other than the events of that night made her take the threat seriously. RP II 329. Without objection, she testified that she did not want Mr. Ferrer to be able to find her and had moved to an undisclosed address. RP II 330. She was being escorted out of her work place. She was still afraid Mr. Ferrer would kill her.⁵

Autumn Crawford is the daughter of Kristina Ferrer. She was 18 at the time of the trial. Appellant Andres Ferrer is her step-father. He had lived in the family home since she was in sixth grade, but she never thought of him as a father figure. RP II 217, 218. She never liked him or had a good relationship with him. RP II 269.⁶

⁵ The date of her testimony was about 14 months after the date of the incident.

⁶ Mr. Ferrer testified that their relationship was good until she became a teenager. RP IV 622.

On March 22, 2014 she was playing with an X-box in her room when she heard Mr. Ferrer come in. RP II 223. He looked surprised when he saw her. RP II 225. After a while she heard his car leave. RP II 224. After he left, she noticed the internet connection was not working. RP II 226. She called her mom, who told her to replugin the router, because this had happened before. RP II 226; 335–336. Later than night, she heard some rustling noises and decided to lock her bedroom door. RP II 227. When Kristina arrived home, she called Autumn because she could not open the garage door. RP II 227. Autumn went to the garage and unlocked it for her mom. RP II 228. Her mom asked her to carry one of her younger sisters, Sylvie, who was sleeping, upstairs. She put Sylvie on the bed in the bedroom. RP II 229–230.

From the hallway outside of the bedroom, Autumn saw Mr. Ferrer come out of the closet. His demeanor was threatening. He was asking where his kids were. RP II 230–31. She did not see Mr. Ferrer make any physical contact with her mom. RP II 233. Autumn went downstairs. She heard banging and screaming. She called 911. RP II 23. She made the call from downstairs and then went outside because she was afraid Mr. Ferrer would hurt her, too. RP II 234. When he came outside he told her to check on her mom because she might be dead. RP II 234. He was yelling at her from 20 feet away. RP II 280–81. He did not try to interfere with her call to the police. RP II 279. He left on foot, pausing to put on his shoes, RP II 278.

She went inside to check on her mom. RP II 236. Her mom was sitting on the bed crying and holding her sisters, who were also crying and upset. RP II 236- 237. She went downstairs to lock the door, called her aunt, and waited for the police. She filled out a written statement for the police. RP II 244-45. The tape of her 911 call was played for the jury.⁷

Autumn was asked to describe the effects the incident had on her mom. Her mom had bruising on her neck and there was some swelling which lasted for about a week. RP II 266. Since the incident her mom seemed more afraid. Autumn and her mom moved out of the house. Her mom seemed scared for her life and for her kids' safety. RP II 267.

Dr. Crina Crisan treated Kristina Ferrer on March 26 at the Urgent Care clinic. Her patient told her that she had been assaulted by her husband four days ago. Her symptoms included headache, dizziness, neck pain and seeing spots. She also had an upset stomach and anxiety symptoms. RP II 369.

On examination, the doctor observed that she was bruised on the left side of the neck, and the left external ear. RP II 370. Dr. Crisan told the jury that bruises go through several coloration stages from reddish purple to bluish or brownish, and then green/yellow and finally to normal coloration. RP II 372.

⁷ Defense counsel noted his previous objections to this call, which had been discussed with the trial court earlier. RP I 49-51;60, 67-68; 70-71.

After an extensive offer of proof outside the presence of the jury, RP III 377-411, the doctor diagnosed Ms. Ferrer as the victim of physical assault, with anxiety, bruising on the neck, and headaches. RP III 415. Her symptoms were “consistent with” being strangled. RP III 421.

Kristina Ferrer was in no acute distress at the time of exam. She had normal blood pressure. High blood pressure would be indicative of anxiety. Her X-rays were normal. The bruising which the doctor saw was a superficial injury. RP III 428-29. She did not see any injuries like a fingerprint or some kind of bruise that would look like it was left by a finger on Kristina’s throat. RP III 430. Kristina’s symptom of seeing spots could be attributable to an electrolyte problem, or abnormal blood sugar. Kristina did not mention losing control of her bladder or bowels in the history she gave. RP III 434.

Officer Eddie Alba was called to the Ferrer residence because of a report of a domestic violence disturbance. RP III 456. He made contact with Kristina Ferrer, who was crying and hysterical. RP III 458. Her face was puffy and red. She had a bump on the back of her head and some dried blood on her ear. She showed no signs of intoxication despite having consumed wine at the barbeque she had attended, RP II 288, RP III 459. The officer took several photos to document the condition of her face and neck and ears. RP III 461, 462, Supp. CP 1, (Ex. 9, 10A, 18A, 14, 19). He noted there were broken picture frames and broken glass on the floor. RP III 463. He interviewed Kristina and then asked her to do a written

statement. She had told him that she had smelled alcohol on Mr. Ferrer's breath and that he appeared intoxicated. RP III 489.

He was with her for an hour and was standing within 3 feet of her. RP III 486, 490. He never got the impression from that contact that she had lost control of her bladder or bowels. She did not mention losing control of her bowels or bladder. RP III 490. She declined any medical treatment. RP III 486. Because Kristina had not mentioned anything verbally regarding strangulation, he referred the case for evaluation as an assault in the fourth degree. RP III 486. He then called Mr. Ferrer and left a message on his cell phone because he did not answer. RP IV 469.

Andrew Hamlin, a Vancouver police officer, was assigned to do the follow up investigation. RP III 496, 498. He took additional photographs of Kristina's face. He felt she had obvious discoloration and obvious bruising, RP III 501, and offered his opinion that some of the marks on her face were finger marks. RP III 505. He acknowledged that the marks he attributed to finger pressure could be caused by blunt force, and that prolonged or severe strangulation would be more likely to leave marks. RP III 505, 507.

Sandra Aldridge, also a police officer, took some additional photos of Ms. Ferrer's face. EX. 26, 27, 31 and 32, Supp. CP 1-2; RP III 513-14. She considered it unusual to have marks "this severe". RP III 515. She also took Exhibits 50-53, which were photos of Kristina's face taken the same day as the other exhibits. RP III 521, Supp. CP 2.

Erik Anderson, another Vancouver police officer, met with Kristina at her house. He asked her to come to the Domestic Violence office the next day and give a second statement about the case. RP III 528. He was present when the photos were taken by Sandra Aldridge. RP III 530. He also attempted to contact Mr. Andres, but was unsuccessful. RP III 532. He gave his opinion that the injuries which Kristina had suffered to her neck were not caused by falling. RP III 540.

Steve Donahue, another Vancouver police officer, testified about his interrogation of Mr. Ferrer when the latter came to the police station to surrender himself. RP III 592.

Donahue testified that Mr. Ferrer told him that he got upset after argument with his wife, with whom he was going through a divorce.⁸ Then he went to his sister's house on Hayden Island and started drinking. He went back to his house and hid himself in the closet to wait for his wife. He suspected his wife might be seeing someone else and he wanted to see if she brought someone home with her. She found him in the closet. They were yelling at each other. He got in her face. She pushed him away. He shoved her onto the bed and hit her on the head several times. Then he got up to leave. He broke some picture frames on the way out and then left. RP IV 596-97. Donahue testified that Mr. Ferrer said he gets enraged and upset when he drinks, RP IV 598, but he was not showing any signs of

⁸ Mr. Ferrer testified he was served with divorce papers while he was in jail, so he had not told Officer Donahue that he was in the midst of a divorce. RP IV 668.

intoxication when they talked. RP IV 600. He was cordial, cooperative and forthcoming when they talked. RP IV 602. Their conversation was not tape recorded. RP IV 603.

After the state rested, Mr. Ferrer testified in his own behalf. He is a fire alarm technician. RP IV 620 . His marriage to Kristina was going well until 2014 when they decided to separate. It was primarily his decision. RP IV 622-23, 674.

The couple had agreed to sell their house. Because they worked at different hours, they split custody of their children, Ava and Sylvie. There was no formal parenting plan in place. RP IV 674 .

Mr. Ferrer was doing repairs on the house to comply with the inspection which was done on the house as part of the sale. RP IV 625. On March 22, 2014, he came to the house on four occasions. On the first trip, he saw his wife but not Autumn. RP IV 628. She told him the kids were at their aunt's house. RP IV 628. He was sorry not to be able to see them. He went to Lowe's to get things for the repairs. When he got back, no one was there. He did some work in the crawl space, then looked into a roof repair issue but it was too close to the edge for him to attempt. RP IV 631-633.

He went back to Hayden Island and started to drink. He had not had alcohol in six years. He drank enough to pass out. RP IV 635.

He returned to the house around 6:30 or 7 in the evening. Only Autumn was there. He started gathering some of his things. He left the house to go back to Hayden Island around 8 PM. RP IV 636.

Because Kristina had not responded to his texts during the day, he went back to the house again to talk with her about where the kids had been. RP IV 638. He also had a concern that she was seeing someone else. RP IV 639, 675. He did not park his car in the driveway because he thought she would not come into the house if she saw it, and he would not be able to talk with her. RP IV 669-70. No one was home when he arrived around 10:45. He did not hear the TV or the X-box, so he just sat in the living room for a while. RP IV 641.

He wanted to talk with Kristina, but he panicked. He did not want her to know he was there, so he decided to hide in the closet in their bedroom. RP IV 642-644. The doors of the closet are solid and cannot be seen through. RP IV 647-48. He heard her voice in the bedroom and then she opened the closet door. RP IV 651. He was embarrassed and scared. RP IV 652. She was very angry. She demanded to know what he was doing there. She was yelling. RP IV 653.

He did not see the kids on the bed. He asked her where the kids were. He had assumed the kids would be with their aunt. RP IV 649-50. She told him she had been at a function with friends, but did not answer his question about the kids. She began to shove him. She shoved him into a night-stand. They had never had a physical confrontation before. RP IV

653-55. She pushed him again, so he pushed her back. He was just trying to get away from the whole situation. RP IV 655. He pushed her toward the bed and she grabbed onto him and they fell onto the bed. She wrapped her legs around his waistline. RP IV 656-57. He hit her in the back of the head to get her to release her hold. She did not let go, and he hit her again in the neck area, with his right hand. RP IV 657. He punched her three times in the head and neck on her left side. RP IV 676. He admitted causing the bruising on her neck and her ear. RP IV 678. He would not have hit her if she had not pushed him and then prevented him from leaving. RP IV 660. He did not strangle her or grab onto her neck. RP IV 657. He did not say he was going to kill her. RP IV 658, 661.

Mr. Ferrer looked to his right and saw his kids crying. He was not aware previously that they were there. RP IV 659. He told his daughters he was sorry. He felt bad they had seen the scuffle between their parents. RP IV 660.

On his way out, he punched some of the pictures on the wall, breaking the glass in the frames, got his shoes and left. RP IV 661, 676. As he was leaving, he saw Autumn. She said she was on the phone with the police. RP IV 663. He told her to go check on her mother, because she might be hurt, although she had been sitting up on the bed when he left. RP IV 661. He did not say Kristina might be dead. RP IV 663.

Mr. Ferrer became aware the police wanted to talk to him because of messages they subsequently left on his phone, so he turned himself in

to the police the next morning around 9 AM. RP IV 664. At the police station, he spoke to Officer Donahue. RP IV 666. He told the officer he formerly had problems with alcohol, but had been sober for six years. He did not tell Officer Donahue that he goes into a rage when he drinks. RP IV 669. He also did not tell Donahue he flew into a rage when Kristina pushed him. RP IV 670.

C. Sentencing Hearing

At the sentencing hearing, the state asked for a sentence of 50 months. This represented the high end of the standard range, and 36 months in addition, based on the jury's finding that Autumn Crawford and also both of Mr. Ferrer's children were present at the time of the assault. RP V 826, 828-829, 842-843. The prosecutor also argued that the assault was "pre-planned" and that the standard range did not accurately reflect his behavior. RP V 827.

Defense counsel argued that the standard range should be 6-12 months based on an offender score of one, and also that the harassment and assault charge should be deemed to be the "same criminal conduct". RP V 850-852, 854.

The trial court concluded that although there was one continuous course of conduct, the harassment had a separate intent from the assault, and hence was not "same criminal conduct" under RCW 9.94A.589. RP V 857. The court then followed the prosecution's recommendation for the top

of the sentence range, and added 36 months for the aggravating factor that was found by the jury. RP V 865-86.

III. ARGUMENT AND AUTHORITY

- A. The trial court erred in calculating the standard range for the offenses, which should have been found to be “same criminal conduct.”

RCW 9.94A.589 defines “same criminal conduct” as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” If the court makes such a finding, then the two are counted as one for the purposes of calculating the offender score. In this case, that would have reduced Mr. Ferrer’s offender score to zero. *The resultant standard range would have been 3-9 months.* See Appendix A, Guideline Range Calculation sheet for Assault in the Second Degree.

The crimes of harassment and assault in the second degree charged in this case happened at the same time and place, and involved the same victim. The only issue in this case is whether they required the same intent.

A trial court’s determination that two crimes do not constitute the same criminal conduct is reviewed for an abuse of the trial court’s discretion or for misapplication of the law. *State v. Elliot*, 114 Wn. 2d 6, 17, 785 P.2d 440 (1990). A trial court abuses its discretion if its decision is exercised on untenable grounds, or for untenable reasons. *State ex. rel. Carroll v. Junker*, 79 Wn. 2d 12, 482 P.2d 775 (1971).

In determining whether two crimes have the same intent for the purposes of this analysis, Washington courts look to the test set out in *State v. Dunaway*, 109 Wn. 2d 207, 743 P.2d 1237 (1987):

Therefore, in deciding if crimes encompassed the same criminal conduct, trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next. As it did in [State v.] *Edwards*,⁹ part of this analysis will often include the related issues of whether one crime furthered the other and if the time and place of the two crimes remained the same.

Accord: *State v. King*, 113 Wn. App. 243, 295, 54 P.3d 1218 (2002), *rev. den.* 149 Wn. 2d 1015 (2003). However, intent in this context is not the *mens rea* for the crimes but the defendant's objective purpose in committing the crime. *State v. Davis*, 174 Wn. App. 623, 300 P.3d 465 (2013); *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2ds 1144 (1990). Courts also look to whether one crime furthered another and whether the two crimes were part of a recognizable scheme or plan. *State v. Lewis*, 115 Wn. 2d 294, 302, 797 P.2d 1141 (1990).

Crimes with significantly different *mens rea* requirements have been found to be "same criminal conduct" under the *Dunaway* test.¹⁰ In *State v. Taylor*, 90 Wn. App. 312, 950 P.2d 526 (1998) the court found assault and kidnapping to be the "same criminal conduct." In *State v. Davis*, 174 Wn. App. 623 300 P. 3d 465 (2013), the court upheld a trial court determination that attempted murder and assault were the "same

⁹ *State v. Edwards*, 45 Wn. App. 378, 380-82, 725 P.2d 442 (1986)

¹⁰ The *Dunaway* court noted that the *Edwards* formulation of the rule had already been codified by the Legislature in former 9.94A.400, now RCW 9.94A.589.

criminal conduct". In an unrelated *State v. Davis*, 177 Wn. App. 454, 311 P.2d 1278 (2013), the court found kidnapping and assault to be the "same criminal conduct." See also *State v. Miller*, 92 Wn. App. 693, 964 P.2d 1196 (1998) (theft of firearm and assault in the third degree) and *State v. Anderson*, 72 Wn. App. 453, 864 P.2d 1001(1994) (escape and assault).

In *State v. Mandanas*, 168 W. 2d 84, 228 P.2d 13 (2010), the defendant punched his victim in the face, hit him with a gun, and then pointed the gun at the victim's face and threatened to kill him. He was charged with and convicted of assault and harassment. The trial court found that this was not the "same criminal conduct". The Court of Appeals, in an unpublished decision, reversed this part of the judgment. The Supreme Court took review on a separate sentencing issue only¹¹, and did not disturb the Court of Appeals holding as to "same criminal conduct." 168 Wn. 2d at 86.

Kristina Ferrer testified that Mr. Ferrer threatened to kill her several times during the course of their three minute struggle in the bedroom. According to her testimony, this was while he was hitting her and attempting to strangle her. RP II 299, 303, 304. He also made threats as he was leaving the bedroom immediately after the assault. RP II 307-308. It is clear that his criminal intent, viewed objectively, did not change during this period and both crimes were part of a scheme to vent his

¹¹ The court took review on the issue of whether multiple firearm enhancements were required where "same criminal conduct" had been found.

frustration about the disintegration of their marriage. In that sense, the threats to kill her would have reinforced the physical force he was applying at the time and so the harassment furthered, rather than hindered, the effect of the assault. The two offenses were “intimately connected,” *State v. Dunaway, supra* at 215, and thus constituted the “same criminal conduct.”

In its sentencing memo, the state suggested that this case bore resemblances to *State v. Wilson*, 136 Wn. App. 596, 150 P.3.d 144 (2007). In *Wilson*, the defendant was charged with assault in violation of a no contact order and also felony harassment. Wilson broke down the door of his victim’s apartment, pulled her out of bed by her hair, and kicked her in the stomach. There was no indication he verbally threatened her while doing so. When she told him she was calling the police, he left the house. He warned his friends who were outside the house that the police were being called, and then reentered the house. He took a piece of wood from the door he had broken and threatened to kill his victim. The Court of Appeals held that the trial court erred when it found that the two crimes met the “same criminal conduct” test because the assault had already been completed before Wilson returned to the house to threaten his victim. Wilson had time to reflect when he left the house, and formed a new and different criminal intent, the intent to threaten and harass his victim.

Wilson is clearly distinguishable. First, Kristina Ferrer testified several times that Mr. Ferrer threatened to kill her several times during

their struggle in the bedroom. There is no such indication in *Wilson* that threats were made *during* the assault that occurred there. Secondly, Mr. Ferrer never left the house and returned, as Wilson did. There was no opportunity to reflect or to form a new intent. His parting words, which according to Kristina's testimony was another threat, were made just as he was leaving the bedroom, and immediately upon the completion of the physical struggle between them. The course of conduct was continuous.

The trial court in the present case acknowledged there was only one continuous course of conduct involved, but erroneously concluded that there were two separate criminal acts. RP V 857. The court appeared to agree with the prosecutor that the very last threat, made just as Mr. Ferrer was leaving the bedroom and going down the hall,¹² was somehow qualitatively different than the earlier threats Kristina had testified about that occurred in the midst of their struggle and somehow signalled a change in Mr. Ferrer's intent. RP V 857-858. In truth, the threats were *intimately interwoven with the assault*. When asked why she believed the threats, Kristina testified, "because he just tried to murder me in the bedroom." RP II 308. Unlike *Wilson*, the record in this case is thus quite clear that there was no change in Mr. Ferrer's intent. According to the state's own evidence, the threats began during the course of the assault

¹² Kristina's testimony makes clear that this was just *before* Mr. Ferrer was leaving the room:

Q: Did he say anything to you?

A: He said, "Try to divorce me and you die." **And then he walked out in the hall.** (emphasis added) RP II 307.

and continued even as Mr. Ferrer was leaving. The threats furthered the message of the assault, as Kristina herself obviously believed.

B. Because the trial court erred in calculating the standard range, the entire sentence must be vacated.

The trial court erred in ruling that the two offenses were separate criminal conduct and in determining that Mr. Ferrer's offender score was two points. When a trial court miscalculates the standard range, any exceptional sentence based on it must be vacated, unless it is clear from the record that the trial court would have imposed the same sentence despite the incorrect standard range. *State v. Parker*, 142 Wn. 2d 182, 189, 937 P. 2d 575 (1997).¹³ Accord, *State v. Chambers*, 176 Wn. 2d 573, 589, 293 P.3d 1185 (2013). There is no such indication in the record here. Accordingly, this court must vacate the entire sentence and remand for a new sentencing hearing.

C. The length of Mr. Ferrer's sentence was "clearly excessive."

Assuming, *arguendo*, that the court correctly found that Mr. Ferrer's offender score was two, based on "separate and distinct criminal conduct," this court must determine whether the resulting exceptional sentence was clearly excessive. Mr. Ferrer submits that it was clearly excessive given the facts of this case.

¹³ The court added a footnote to underscore its holding: "Given the fact that a correct standard range is intended as the departure point, we cannot imagine many instances where it could be shown that the resulting exceptional sentence would have been the same regardless of the length of the standard range." FN 15 at 193.

A sentence beyond the sentence range is reviewable under RCW

9.94A.585 (4):

(4) To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

The jury here was instructed on an aggravating factor approved by the Legislature, RCW 9.94A.535 (2)(h)(ii), and made a unanimous finding on this aggravating factor. Mr. Ferrer does not challenge the factual support for this finding as there was some testimony that his own young children were in the bedroom during the incident, even though he did not know this until the end. However, the sentence imposed by the trial court in reliance on this jury finding was “clearly excessive” under the facts of this case.

An appellate court reviews the length of an exceptional sentence under the abuse of discretion standard. *State v. Ferguson*, 142 Wn.2d 631, 651, 15 P.3d 1271 (2001); *State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2103); *State v. Lav*, 154 Wn. 2d 85, 93, 110 P.3d 717 (2005). The trial court abused its discretion in this case, and this court should vacate the sentence and remand for resentencing.

The incident between Mr. Ferrer and Kristina Ferrer lasted about three minutes, based on the time differential between the 911 call begun by Autumn and the one Kristina made when the incident was over.

Autumn did not see any physical contact between her mother and her stepfather, but did hear her mother screaming. The two younger girls, who were 2 and 3 years old at the time, had been asleep at the beginning of the incident. No testimony was presented about what they saw or heard, but there was testimony that they woke up during the incident and were crying.

The doctor who examined Kristina Ferres after the incident described the bruising she observed as “superficial”. RP III 428-29. Her X-rays were normal, indicating no structural damage to her neck. Her blood pressure was normal. The doctor did not recall any swelling, and did not put it in her notes. RP II 370-71. The doctor did not diagnose a concussion. RP II 378. She did not see signs of internal bleeding that would trigger the need for a CAT scan. RP III 390.

There was no testimony that Mr. Ferrer used any weapon during the incident. If he had, and the prosecutor had alleged and proven it to the jury, the court would have sentenced him using a deadly weapon enhancement, which would have added 12 months onto the standard range. RCW 9.94A.533 (4)(b). In contrast, the sentence of 50 months imposed here was three times as severe as if Mr. Ferrer had used a deadly weapon during the incident. The length of additional time imposed (three years) was basically the equivalent of the sentence which would have been imposed had there been a firearm used in the commission of the crime. RCW 9.94A.533 (3)(b). The sentence imposed was also the equivalent of

a mid-range sentence for second degree assault if Mr. Ferres had had an offender score of seven. The net effect of the use of three separate 12 month enhancements more than *quadrupled* the standard range which the court had determined.

In the fiscal years from 2012 through 2014, the latest ones for which statistics are available, the aggravator employed here has been imposed in 30 cases. Not all of these were necessarily assault in the second degree cases. There was a total of 135 upward exceptional sentences for second degree assaults for those three years, which include *any* basis for an exceptional sentence upward.¹⁴

Since 1998, the first year for which the Guidelines Commission has data, until 2014, this aggravator has been employed in 101 cases. In 48 of these cases, it was the sole aggravator used by the court to support the exceptional sentence. In the 16 cases with standard ranges that were roughly comparable to the one employed by the trial court here (3-9 months, 6-12 months, 12 to 14 months) only three of the sentences in this group of 16 cases exceeded 50 months.¹⁵ Out of the 27 second degree assault cases with this aggravator, only 13 sentences exceeded the

¹⁴ From Tables 11 and 15, STATISTICAL SUMMARY OF ADULT FELONY SENTENCING Fiscal years 2012 through 2014, published by Caseload Forecast Council, successor to Sentencing Guidelines Commission. Copies attached as Appendix B, for the court's convenience.

¹⁵ Case numbers 9, 27, 39, 41, 42, 44, 45, 47, 48, 52, 57, 72, 81, 84, 89, 95 from the table in Appendix C. The case number is to the far left, and is hand written. This data was provided by Duc Luu of the Caseload Forecast Council, successor to the SGC. The codes for the exceptional sentence type follows the table.

sentence given in this case. However, of these assault cases, only three had a comparable standard range (3-9 months, 6-12 months) to begin with.¹⁶

While Washington courts have not required proportionality review of sentences imposed in excess of the standard range in the absence of a statutory mandate to do so, see *State v. Ritchie*, 126 Wn. 2d 388, 396, 894 P.12d 1308 (1995), the actions of other trial courts in similar cases surely give some guidance on the issue of whether a sentence is clearly excessive. In the nearly twenty years with available statistics, only three trial judges have ever meted out sentences more harsh than the one given here in second degree assault cases with comparable standard ranges. The comparison with other assault sentences with the same statutory aggravating factor shows that the sentence in this case is an outlier, and “clearly excessive” under the facts of this case. This court should vacate the sentence and remand to the trial court for a new sentencing hearing.

V. CONCLUSION

The trial court erred in the sentencing phase of this trial in two respects. It should have found that the assault and harassment charges were the “same criminal conduct” for the purposes of calculating the offender score pursuant to RCW 9.94A.589. The two crimes happened at the same time and place, and involved the same victim. They were committed with the same criminal objective or intent. Had the trial court correctly determined that they were the same criminal conduct, Mr.

¹⁶ Cases 42, 84 and 89 from the table in Appendix C.

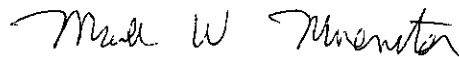
Ferrer's offender score would have been zero, and the resulting standard range would have been 3-9 months, a non-prison term.

The second error the trial court made was in the length of the exceptional sentence it imposed. The court added 36 months to the standard range it had found, for a total of 50 months. Although Mr. Ferrer was unarmed throughout the assault, the sentence given was as long as if he had been armed with a firearm during the offense. The sentence given was more than quadrupled the bottom of the standard range found by the court. Given the facts of this case, the sentence was "clearly excessive".

For either of these two reasons, this court should vacate the sentence and remand to the trial court for resentencing.

Dated this 28th day of August, 2015

LAW OFFICE OF MARK W. MUENSTER



Mark W. Muenster, WSBA 11228
Attorney for Andes Ferrer, Appellant

APPENDICES

- Appendix A Second Degree Assault ranges, Guidelines Manual 2014
- Appendix B Statistical Summaries for Adult Sentencing, Tables 11 and 15
(Partial) for FY 2012–2014
- Appendix C Spreadsheets for Exceptional sentences, prepared by Duc Luu of
Caseload Forecast Council

Assault Second Degree

RCW 9A.36 021(2)(a)
CLASS B – VIOLENT

OFFENDER SCORING RCW 9 94A 525(8)

If the present conviction is for a felony domestic violence offense where domestic violence was plead and proven, use the General Violent Offense Where Domestic Violence Has Been Plead and Proven scoring form on page 265.

ADULT HISTORY

Enter number of serious violent and violent felony convictions x 2 = _____

Enter number of nonviolent felony convictions x 1 = _____

JUVENILE HISTORY

Enter number of serious violent and violent felony dispositions x 2 = _____

Enter number of nonviolent felony dispositions x 1 = _____

OTHER CURRENT OFFENSES

(Other current offenses that do not encompass the same conduct count in offender score)

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 custody on the date the current offense was committed? x 1 = _____

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

SENTENCE RANGE

	Offender Score									
	0	1	2	3	4	5	6	7	8	9+
LEVEL IV	6m 3 - 9	9m 6 - 12	13m 12+ - 14	15m 13 - 17	17.5m 15 - 20	25.5m 22 - 29	38m 33 - 43	50m 43 - 57	61.5m 53 - 70	73.5m 63 - 84

- ✓ For attempt, solicitation, conspiracy (RCW 9.94A 595) see page 93 or for gang-related felonies where the court found the offender involved a minor (RCW 9 94A 833) see page 252 for standard range adjustments
- ✓ For deadly weapon enhancement, see page 256
- ✓ For sentencing alternatives, see page 243
- ✓ For community custody eligibility, see page 253
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 249

The Caseload Forecast Council is not liable for errors or omissions in the manual, for sentences that may be inappropriately calculated as a result of a practitioner's or court's reliance on the manual, or for any other written or verbal information related to adult or juvenile sentencing. The scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules. If you find any errors or omissions, we encourage you to report them to the Caseload Forecast Council

APPENDIX A

APPENDIX B

Table 11. Sentence Departures by Type and Offense
Fiscal Year 2012

OFFENSE	EXCEPTIONAL		SSOSA		FTOW		DOSA		WEC*		TOTAL		
	Above	Below	N	%	N	%	N	%	N	%			
ABANDON DEPENDANT PERSONS 1 (POST 06/07/06)	0	0	0	0.0%	0	0.0%	1	100.0%	0	0.0%	0	0.00%	1
AGGRAVATED MURDER 1 (POST 7/24/99)	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.00%	0
ALIEN IN POSSESSION OF A FIREARM	0	0	0	0.0%	0	0.0%	1	4.5%	0	0.0%	0	0.00%	22
ANIMAL CRUELTY 1	0	0	0	0.0%	3	25.0%	0	0.0%	0	0.0%	0	0.00%	12
ANIMAL CRUELTY 1 - SEX/CONDUCT	0	0	0	0.0%	1	100.0%	0	0.0%	0	0.0%	0	0.00%	1
ANIMAL FIGHTING	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.00%	2
ARSON 1	2	1	1	30.8%	0	0.0%	0	0.0%	0	0.0%	0	0.00%	13
ARSON 2	2	2	0	16.7%	0	0.0%	0	0.0%	0	0.0%	0	0.00%	24
ASSAULT 1-POST 7/1/90(NEW L12)	6	4	0	11.8%	0	0.0%	0	0.0%	0	0.0%	0	0.00%	85
ASSAULT 2 - POST 7/1/88	39	35	6	9.3%	0	0.0%	8	0.9%	2	0.23%	0	0.00%	862
ASSAULT 3 - POST 7/1/88	47	33	5	5.7%	0	0.0%	262	17.5%	38	2.54%	0	0.00%	1,495
ASSAULT OF A CHILD 1	1	0	0	12.5%	0	0.0%	0	0.0%	0	0.0%	0	0.00%	8
ASSAULT OF A CHILD 2	0	0	1	7.7%	0	0.0%	0	0.0%	0	0.0%	0	0.00%	13
ASSAULT OF A CHILD 3	3	2	0	13.9%	0	0.0%	7	19.4%	1	2.78%	0	0.00%	36
ATTEMPT ELUDE POLICE VEHICLE	13	3	1	3.3%	0	0.0%	15	2.9%	26	5.05%	0	0.00%	515
BAIL JUMP W/CLASS A (POST 7/89)	0	1	0	10.0%	0	0.0%	0	0.0%	0	0.0%	0	0.00%	10
BAIL JUMP W/CLASS B or C (POST 7/89)	6	12	1	6.4%	0	0.0%	21	7.0%	27	9.06%	1	0.34%	298
BIGAMY	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.00%	1
BRIBERY	0	0	0	0.0%	0	0.0%	1	100.0%	0	0.0%	0	0.00%	1
BRIBING A WITNESS	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.00%	100
BURGLARY 1	4	2	0	6.0%	0	0.0%	0	0.0%	0	0.0%	0	0.00%	1
BURGLARY 2 - PRE 7/90	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.00%	1,189
BURGLARY 2 (NONDWELLING)-POST 7/90	20	20	1	3.4%	0	0.0%	89	7.5%	118	9.92%	2	0.17%	1,189
CHILD MOLEST 1 (7/90 - 8/31/01)	1	0	0	8.3%	0	0.0%	0	0.0%	0	0.0%	0	0.00%	12
CHILD MOLEST 1 <18 (POST 8/31/01)	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.00%	2
CHILD MOLEST 1 >17 (POST 8/31/01) (712)	3	1	0	3.2%	24	19.2%	0	0.0%	0	0.0%	0	0.00%	125
CHILD MOLEST 2 (POST 7/90)	3	4	1	10.7%	11	14.7%	0	0.0%	0	0.0%	0	0.00%	75
CHILD MOLEST 3 (POST 7/90)	1	4	0	7.4%	4	5.9%	0	0.0%	0	0.0%	0	0.00%	65
CIGARETTE TRANSPORT UNLAWFUL	0	0	0	0.0%	0	0.0%	1	100.0%	0	0.0%	0	0.00%	1

Table 11. Sentence Departures by Type and Offense
Fiscal Year 2013

OFFENSE	EXCEPTIONAL		SSOSA		FTOW		DOSA		FOSA*		TOTAL
	Above	Below	Within	%	N	%	N	%	N	%	
ABANDON DEPENDANT PERSONS 2 (POST 06/07/06)	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	1
ADVERTISE CONTROLLED SUBSTANCES	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0
AGGRAVATED MURDER 1 (7/1/90-7/24/99)	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	1
AGGRAVATED MURDER 1 (POST 7/24/99)	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	5
ALIEN IN POSSESSION OF A FIREARM	0	0	0	0.0%	0	0.0%	1	5.9%	0	0.0%	17
ALTER/FORGE CAUSE PATIENT'S DEATH	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	1
ANIMAL CRUELTY 1	1	0	0	4.3%	0	0.0%	2	8.7%	0	0.0%	23
ANIMAL CRUELTY 1 - SEX/CONDUCT	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	2
ARSON 1	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	21
ARSON 2	2	0	0	5.9%	0	0.0%	0	0.0%	1	2.94%	34
ASSAULT 1-POST 7/1/90(NEW L12)	6	9	0	17.6%	0	0.0%	0	0.0%	0	0.0%	85
ASSAULT 2 - POST 7/1/88	53	36	5	11.2%	0	0.0%	5	0.6%	0	0.0%	841
ASSAULT 3 - POST 7/1/88	50	44	1	6.4%	0	0.0%	237	16.0%	43	2.90%	1,482
ASSAULT OF A CHILD 1	3	1	0	66.7%	0	0.0%	0	0.0%	0	0.0%	6
ASSAULT OF A CHILD 2	0	1	0	7.1%	0	0.0%	0	0.0%	0	0.0%	14
ASSAULT OF A CHILD 3	3	0	2	11.6%	0	0.0%	9	20.9%	0	0.0%	43
ASSAULT POLICE OFFICER W/ PROJECTILE STUN GUN	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	1
ATTEMPT ELUDE POLICE VEHICLE	6	9	0	2.8%	0	0.0%	12	2.3%	17	3.22%	528
BAIL JUMP W/ CLASS A (POST 7/89)	0	1	0	20.0%	0	0.0%	0	0.0%	1	20.00%	5
BAIL JUMP W/ CLASS B or C (POST 7/89)	9	10	0	6.9%	0	0.0%	18	6.5%	23	8.33%	276
BIGAMY	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	1
BRIBING A WITNESS	0	0	0	0.0%	0	0.0%	1	50.0%	0	0.0%	2
BURGLARY 1	5	2	1	6.9%	1	0.9%	0	0.0%	0	0.0%	116
BURGLARY 2 - PRE 7/90	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0
BURGLARY 2 (NONDWELLING)-POST 7/90	16	34	2	3.9%	0	0.0%	100	7.5%	152	11.47%	1,325
CHILD MOLEST 1 (7/90 - 8/31/01)	1	0	0	14.3%	2	28.6%	0	0.0%	0	0.0%	7
CHILD MOLEST 1 <18 (POST 8/31/01)	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	3
CHILD MOLEST 1 >17 (POST 8/31/01) (712)	3	4	0	7.2%	21	21.6%	0	0.0%	0	0.0%	97

**Table 11. Sentence Departures by Type and Offense
Fiscal Year 2014**

OFFENSE	EXCEPTIONAL				SSOSA				FTOW				DOSA				FOSA*			
	Above		Below		Within		%		N		%		N		%		N		%	
	1	0	0	0	100.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	TOTAL
ABANDON DEPENDANT PERSONS 1 (POST 06/07/06)	1	0	0	0	100.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	1
AGGRAVATED MURDER 1 (7/1/90-7/24/99)	0	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0
AGGRAVATED MURDER 1 (7/1/90-7/24/99) [Life]	0	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	1
AGGRAVATED MURDER 1 (POST 7/24/99) [Life]	0	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	4
ALIEN IN POSSESSION OF A FIREARM	0	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	12
ANIMAL CRUELTY 1	0	0	0	0	0.0%	0	0.0%	2	25.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	8
ANIMAL CRUELTY 1 - SEX/CONDUCT	0	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	1
ANIMAL FIGHTING	0	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	1
ARSON 1	0	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	8
ARSON 1 [Attempt]	1	0	0	0	50.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	2
ARSON 2	2	2	0	0	14.3%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	28
ARSON 2 [Attempt]	0	0	0	0	0.0%	0	0.0%	1	25.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	4
ASLT POLICEOFF W/ PROJECTILE STUN GUN	0	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	2
ASSAULT 1 (POST 7/1/90)	3	2	1	0	10.2%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	59
ASSAULT 1 (POST 7/1/90) [Attempt]	0	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	9
ASSAULT 1 (POST 7/1/90) [Conspiracy]	0	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	2
ASSAULT 2 (POST 7/1/88)	43	22	17	0	11.5%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	715
ASSAULT 2 (POST 7/1/88) [Attempt]	0	0	0	0	0.0%	0	0.0%	9	19.1%	4	8.5%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	47
ASSAULT 2 (POST 7/1/88) [Life]	0	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	2
ASSAULT 3 (POST 7/1/88)	35	50	19	0	6.9%	0	0.0%	252	16.6%	59	3.9%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	1,516
ASSAULT OF A CHILD 1	3	0	0	0	50.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	6
ASSAULT OF A CHILD 2	1	0	0	0	5.3%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	19
ASSAULT OF A CHILD 3	4	0	2	0	11.8%	0	0.0%	8	15.7%	29	5.4%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	51
ATTEMPTING TO ELUDE PURSUING POLICE VEHICLE	15	8	1	0	4.4%	0	0.0%	22	4.1%	29	5.4%	1	0.2%	0	0.0%	0	0.0%	0	0.0%	542
BAIL JUMP WITH CLASS A (POST 7/89)	0	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	3
BAIL JUMP WITH CLASS B OR C (POST 7/89)	0	15	7	0	7.0%	0	0.0%	22	7.0%	28	3.9%	2	0.6%	0	0.0%	0	0.0%	0	0.0%	314
BRIBING A WITNESS	0	1	0	0	33.3%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	3
BURGLARY 1	6	5	2	0	10.8%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	120
BURGLARY 1 [Conspiracy]	0	0	0	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	1

**Table 15. Aggravated Exceptional Sentence Reasons
Fiscal Year 2012**

REASON	NUMBER
Defendant agreed to prison, greater sentence, or treatment.	336
Criminal history score greater than 9 points.	38
Victim was particularly vulnerable.	21
A domestic violence offense that was a part of an ongoing pattern of psychological, physical, or sex abuse of victim multiple incidents over a prolonged period of time.	15
The sentence was the result of a plea	12
Rapid recidivism.	10
A domestic violence offense that occurred in sight or sound of victim's children under age 18	10
Major economic offense substantially greater than typical for the offense.	9
Defendant was in a position of trust (not an economic or drug offense).	9
Major economic offense - used position of trust, confidence, responsibility.	7
Major economic offense involving multiple victims or multiple incidents	6
Seriousness of the offense more egregious than the typical circumstances of the crime.	5
Deliberate cruelty to the victim	5
Drug offense - quantity substantially larger than personal use (dealing).	4
Major economic offense - high sophistication, planning, long time period.	3
Defendant violated zone of privacy	3
Defendant showed no remorse	3
Other aggravating factor	2
A law enforcement officer was either the victim or injured as a result of the offense	2
Crime injured/harmed a person other than the victim.	1
Offense resulted in the pregnancy of a child victim of rape	1
Part of an ongoing pattern of sexual abuse of the same victim under 18	1
Sophisticated and well planned methods (not an economic or drug offense).	1
The offense was a violent offense and the offender knew the victim was pregnant.	1
Total Aggravated Reasons	505
Total Aggravated Sentences:	461
Total Reasons Per Case:	1.1

**Table 15. Aggravated Exceptional Sentence Reasons
Fiscal Year 2013**

REASON	NUMBER
Defendant agreed to prison, greater sentence, or treatment. 9.94A.535(2)(a)	365
Victim was particularly vulnerable. 9.94A.535(3)(b)	22
A domestic violence offense that occurred in sight or sound of victims children under age 18. 9.94A.535(3)(h)(ii)	12
Defendant was in a position of trust (not an economic or drug offense). 9.94A.535(3)(n)	11
A domestic violence offense that was a part of an ongoing pattern of psychological, physical, or sex abuse of victim multiple incidents over a prolonged period of time.	9
Rapid recidivism. 9.94A.535(3)(t)	9
Criminal history score greater than 9 points.	8
Major economic offense substantially greater than typical for the offense. 9.94A.535(3)(d)(ii)	7
Deliberate cruelty to the victim. 9.94A.535(3)(a)	7
Major economic offense - used position of trust, confidence, responsibility. 9.94A.535(3)(d)(iv)	6
Current offense is a burglary and its victim was present in the building or residence crime committed	5
To obtain or maintain membership in an organization, association, or group. 9.94A.535(3)(aa)	5
A law enforcement officer was either the victim or injured as a result of the offense. 9.94A.535(3)(v)	5
The crime was gang related. 9.94A.535(3)(s)	5
Major economic offense - high sophistication, planning, long time period. 9.94A.535(3)(d)(iii)	4
The sentence was the result of a plea agreement in exchange for a reduced charge.	4
Crime injured/harmed a person other than the victim. 9.94A.535(3)(e)	3
The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).	3
Part of an ongoing pattern of sexual abuse of the same victim under 18. 9.94A.535(3)(g)	3
Major economic offense involving multiple victims or multiple incidents. 9.94A.535(3)(d)(i)	2
The multiple offense policy results in a clearly lenient presumptive sent. 9.94A.535(2)(c)	2
Vehicular Homicide/Assault/DUI with child passenger under sixteen	2
Seriousness of the offense/more egregious than the typical circumstances of the crime	2
Defendant showed no remorse. 9.94A.535(3)(q)	2
Sophisticated and well planned methods (not an economic or drug offense). 9.94A.535(3)(m)	1
Drug offense - quantity, substantially larger than personal use (dealing). 9.94A.535(3)(e)(ii)	1
A domestic violence offense in which the offender's conduct was deliberately cruel, or intimidated the victim. 9.94A.535(3)(h)(iii)	1
Offense resulted in the pregnancy of a child victim of rape. 9.94A.535(3)(l)	1
Other aggravating factor	1
Total Aggravated Reasons:	508
Total Aggravated Sentences:	469
Total Reasons Per Case	1.1

**Table 15. Aggravated Exceptional Sentence Reasons
Fiscal Year 2014**

REASON	COUNT
Defendant agreed to prison, greater sentence, or treatment 9.94A.535(2)(a)	421
Victim was particularly vulnerable.9.94A.535(3)(b)	32
Major economic offense substantially greater than typical for the offense.9.94A.535(3)(d)(ii)	18
Major economic offense - used position of trust, confidence, responsibility.9.94A.535(3)(d)(iv)	17
Major economic offense involving multiple victims or multiple incidents.9.94A.535(3)(d)(i)	16
Criminal history score greater than 9 points.	16
A domestic violence offense that was a part of an ongoing pattern of psychological, physical, or sex abuse of victim multiple incidents over a prolonged period of time	15
Defendant was in a position of trust (not an economic or drug offense) 9.94A.535(3)(n)	15
Major economic offense - high sophistication, planning, long time period 9.94A.535(3)(d)(iii)	13
Deliberate cruelty to the victim. 9.94A.535(3)(a)	12
The sentence was the result of a plea agreement in exchange for a reduced charge.	10
A domestic violence offense that occurred in sight or sound of victims children under age 18. 9.94A.535(3)(h)(ii)	8
Rapid recidivism 9.94A.535(3)(t)	7
Seriousness of the offense/more egregious than the typical circumstances of the crime	6
To obtain or maintain membership in an organization, association, or group - 9.94A.535(3)(aa)	4
Defendant showed no remorse. 9.94A.535(3)(q)	3
Drug offense - quantity substantially larger than personal use (dealing). 9.94A.535(3)(e)(ii)	3
Current offense is a burglary and its victim was present in the building or residence crime committed	2
Vehicular Homicide/Assault DUI with child passenger under sixteen	2
A law enforcement officer was either the victim or injured as a result of the offense. 9.94A.535(3)(v)	1
The crime was gang related - 9.94A.535(3)(s)	1
Other aggravating factor.	1
Crime injured/harmed a person other than the victim. 9.94A.535(3)(g)	1
Part of an ongoing pattern of sexual abuse of the same victim under 18. 9.94A.535(3)(g)	1
Multiple victims or multiple incidents per victim (not an economic offense).	1
The multiple offense policy results in a clearly lenient presumptive sent. 9.94A.535(2)(c)	1
The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense This aggravator is not an exception to RCW 9.94A.530(2)	1
A domestic violence offense in which the offender's conduct was deliberately cruel, or intimidated the victim. 9.94A.535(3)(h)(iii)	1
The offense was a violent offense and the defendant knew the victim was pregnant. 9.94A.535(3)(c)	1
Total Aggravated Reasons:	630
Total Aggravated Sentences:	532
Total Reasons Per Case:	1.2

APPENDIX C

CASENUM.	LASTNAME	FIRSTNAME	FY	CAUSE	OFFENSE	FullSentDate	County	lowrange	total	highrang	EPTIONEPTION
1999070049	BLACKBEAR	HERBERT	2000	98-1-07490-2	NO CONTACT ORDER-DV PR	02-Jul-99	King	0	24	12	152
1999070068	DOYE	MAX	2000	99-1-00308-6	NO CONTACT ORDER-DV PR	02-Jul-99	King	0	24	12	53
1999090912	GONZALES	DONDI	2000	99-1-00106-4	BURGLARY 1	10-Sep-99	Benton	87	120	116	152
1999091498	ELLIS	BRIAN	2000	99-1-00061-3	ROBBERY 2	22-Sep-99	King	9.0225	24	10.5	152
1999121849	BRADLEY	REG	2000	99-1-00094-3	ASSAULT 3 - POST 7/1/88	09-Dec-99	Clark	1	5	3	152
2000010797	WESTWOOD	KEVIN	2000	99-1-07985-6	NO CONTACT ORDER-DV PR	21-Jan-00	King	0	12.03	12	163
2000010976	ENGELHARDT	ROBERT	2000	99-1-01388-1	NO CONTACT ORDER-DV SEI	31-Jan-00	Kitsap	0	7	12	10
2000030061	BARREIRO	MELVIN	2000	94-1-00146-2	ASSAULT 2 - POST 7/1/88	24-Mar-00	Benton	3	18	9	155
2000030889	ROSECRANS	JOHN	2000	99-1-50475-1	NO CONTACT ORDER-DV SEI	31-Mar-00	King	0	12	12	10
2000050172	RUND	BRUCE	2000	99-1-01549-5	BURGLARY 1	12-May-00	Clark	67	240	89	142
2000051871	PAGE	KEVIN	2000	00-1-00407-2	PROTECT ORDR-DV CIVIL (R)	16-May-00	Thurston	0	15	12	152
2000061331	ANDREWS	VICTOR	2000	00-1-00094-4	ROBBERY 1	29-Jun-00	Mason	27	72	36	152
2000101436	PASCO	ANGEL	2001	00-1-03526-4	ASSAULT OF A CHILD 3	27-Oct-00	King	1	24	3	40
2000111225	BLAKELY	RALPH	2001	98-1-00610-5	KIDNAP 2	13-Nov-00	Grant	13	90	17	40
2001020748	REITER	EDWARD	2001	00-1-01041-9	RAPE OF A CHILD 1 (7/90 - 7	02-Feb-01	Clark	159	360	211	152
2001021351	RAMIREZ	CARLOS	2001	00-1-05878-7	INCEST 1	09-Feb-01	King	31	120	41	72
2001040139	RODRIGUEZ	MICHAEL	2001	00-1-02123-2	ASSAULT 3 - POST 7/1/88	09-Apr-01	Clark	4	13	12	72
2001052034	ANDERSON	WILLIAM	2001	01-1-00078-4	ASSAULT 2 - POST 7/1/88	21-May-01	Thurston	15	60	20	72
2001061298	DILLON	CRISTINA	2001	00-1-10112-7	NO CONTACT ORDER-DV SEI	08-Jun-01	King	0	36	12	153
2001080045	LINDAHL	PETER	2002	00-1-04870-1	MURDER 2 (POST 7/24/99)	08-Aug-01	Pierce	123	330	220	71
2001081709	CONLAN	JAMES	2002	01-1-00735-0	RESIDENTIAL BURGLARY-PO	13-Aug-01	Kitsap	13	30	17	153
2001091059	PALMER	DARRYL	2002	01-1-00698-0	ASSAULT 1-POST 7/1/90(NE	21-Sep-01	King	138	220	184	152
2002031252	NGUYEN	SANG	2002	01-1-02568-8	MANSLAUGHTER 1 (POST 7/	15-Mar-02	Pierce	86	260	114	152
2002051133	HALE	RAYMOND	2002	02-1-00223-1	DOMESTIC VIOLENCE CT OR	14-May-02	Cowlitz	22	40	29	53
2002061055	ISIDRO	ALBERTO	2002	02-1-00214-8	ASSAULT 3 - POST 7/1/88	24-Jun-02	Grays Har	1	12	3	152
2002101296	BRAND	STEVEN	2003	02-1-01372-9	DOMESTIC VIOLENCE CT OR	23-Oct-02	Snohomis	6	16	12	152
2002111810	BRYANT	PONDEXTE	2003	91-1-00534-1	RAPE 1 (7/90 - 7/26/97)	05-Nov-02	Snohomis	119.25	187	158.25	40
2003010829	STOUT	JERRY	2003	02-1-02924-0	MURDER 1 (POST 7/24/99)	24-Jan-03	Pierce	240	500	300	152
2003051523	AZNOE	DANNY	2003	02-1-05027-9	MANSLAUGHTER 2 (POST 7/	05-May-03	San Juan	21	60	27	152
2003052162	BRUNDAGE	JAMES	2003	02-1-01327-7	RAPE 1 (POST 8/31/01) (.71	16-May-03	Kitsap	300	498	378	53
2003070625	LUCERO	LOUIS	2004	03-1-00176-7	ASSAULT 2 - POST 7/1/88	17-Jul-03	Mason	15	40	20	152
2004061848	DRAKE	DARRIS	2004	03-1-00976-2	ASSAULT 2 - POST 7/1/88	11-Jun-04	Snohomis	18	36	24	152
2005011808	DICK	SCOT	2005	04-1-00191-3	DOMESTIC VIOLENCE CT OR	10-Jan-05	Stevens	12.03	24	14	152
2005020850	TUFTON	DAVID	2005	04-1-02479-0	ASSAULT 3 - POST 7/1/88	14-Feb-05	Clark	3	16	8	152
2005052407	OSORIO	NELSON	2005	93-1-01500-9	MURDER 2 (7/1/90-7/24/99	24-May-05	Yakima	144	240	192	40
2005102007	ALEXANDER	JAMES	2006	05-1-00023-7	HOMICIDE BY ABUSE (7/1/9	12-Oct-05	Island	343	400	456	41
2006114050	BOBENHOUSE	PHILLIP	2007	05-1-00210-9	RAPE OF A CHILD 1 >17 (PO	01-Nov-06	Asotin	240	600	318	53
2007081467	WRIGHT	JERRY	2008	07-1-02470-7	ASSAULT 2 - POST 7/1/88	24-Aug-07	King	3	36	9	152

40	2007100768	RORIE	SEGHON	2008 06-1-03984-1	ASSAULT 2 - POST 7/1/88	26-Oct-07	Pierce	63	180	84	152	-
41	2007121112	WELLS	LAWTUAN	2008 07-1-04374-4	ASSAULT 2 - POST 7/1/88	07-Dec-07	King	3	12	9	152	-
42	2008020095	MENUY	CHRISTOPH	2008 05-1-00566-1	ASSAULT 2 - POST 7/1/88	01-Feb-08	Skagit	6	72	12	152	72
	2008030232	DOIDGE	SHAWNA	2008 07-1-00241-3	MANSLAUGHTER 2 (POST 7/1/88)	03-Mar-08	Mason	21	48	27	152	72
44	2008070728	COOK	JOHN	2009 07-1-01020-7	RESIDENTIAL BURGLARY-PO	17-Jul-08	Benton	6	12.03	12	152	-
45	2008072314	JOHNSON	WILLIE	2009 07-1-08480-7	ASSAULT 2 - POST 7/1/88	11-Jul-08	King	6	45	12	72	152
	2008091108	JONES	JOHN	2009 07-1-01849-7	ASSAULT 2 - POST 7/1/88	22-Sep-08	Snohomis	33	120	43	152	-
	2008121249	BROWN	CARLOS	2009 08-1-00263-3	ASSAULT 2 - POST 7/1/88	15-Dec-08	Island	3	15	9	72	152
48	2008121708	GALINDO-REYES	ESAU	2009 08-1-02284-2	ASSAULT 2 - POST 7/1/88	05-Dec-08	King	3	36	9	152	-
	2009012075	MUIR	DAVID	2009 08-1-04882-5	BURGLARY 1	13-Jan-09	King	15	22	20	152	-
	2009021590	CAMPBELL	QUENTIN	2009 08-1-04695-4	ASSAULT 2 - POST 7/1/88	13-Feb-09	King	13	74	17	152	-
	2009031764	RODRIGUEZ	NOEL	2009 08-1-12153-1	INCEST 1	06-Mar-09	King	36	84	48	152	-
52	2009041236	JONES	RAYMOND	2009 09-1-00183-3	DOMESTIC VIOLENCE CT OR	22-Apr-09	Snohomis	6	18	12	152	-
	2009041626	GLENN	MAURICE	2009 08-1-13093-9	DOMESTIC VIOLENCE CT OR	10-Apr-09	King	12.03	38	14	152	-
	2009041849	SMITHEMAN	KENNETH	2009 08-1-12435-1	ASSAULT 3 - POST 7/1/88	17-Apr-09	King	4	17	12	152	-
	2009061999	RAMSEY	JERODE	2009 09-1-02236-1	ASSAULT 2 - POST 7/1/88	12-Jun-09	King	13	30	17	152	-
	2009081667	FLINT	TYLER	2010 09-1-02744-3	ASSAULT 3 - POST 7/1/88	31-Aug-09	King	1	9	3	152	72
57	2009081679	JERRY	DEREK	2010 09-1-02349-9	ASSAULT 2 - POST 7/1/88	21-Aug-09	King	12.03	39	14	152	-
	2009091906	WILLIAMS	LEROY	2010 07-1-04418-0	ASSAULT OF A CHILD 2	04-Sep-09	King	46	75	61	152	-
	2009101685	DIAZ-GALVIN	CARLOS	2010 08-1-07619-5	ASSAULT 1-POST 7/1/90(NE)	02-Oct-09	King	93	240	123	152	155
	2009110091	RAMIREZ	JESUS	2010 08-1-01861-5	RAPE 1 (POST 8/31/01) (.71)	04-Nov-09	Yakima	93	147	123	152	-
	2010021442	FORT	ISIAH	2010 09-1-07259-7	ASSAULT 2 - POST 7/1/88	12-Feb-10	King	6.03	20.5	18	152	-
	2010071081	CALDERON	EDILBERTO	2011 09-1-03395-8	RAPE 3	16-Jul-10	King	12.03	38	14	152	-
	2010071115	NYSTA	DAVEN	2011 09-1-05558-7	RAPE 1 (POST 8/31/01) (.71)	23-Jul-10	King	240	450	318	86	152
	2010081322	MARTINEZ	EDWARD	2011 10-1-01050-1	ASSAULT 2 - POST 7/1/88	20-Aug-10	King	22	33	29	152	-
	2010091268	GELIN	MILORD	2011 09-1-06880-8	ASSAULT 1-POST 7/1/90(NE)	03-Sep-10	King	120	300	160	152	-
	2010100087	LANE	DOUGLAS	2011 02-1-01658-5	INDECENT LIB DD VICTM (P)	06-Oct-10	Cowlitz	26	72	34	153	152
	2010110352	ESPINOZA	AARON	2011 10-1-01379-8	HARASSMENT	12-Nov-10	Yakima	12.03	24	16	152	-
	2011031394	ZARATE-CORIA	ARNOLDO	2011 10-1-06036-3	BURGLARY 1	25-Mar-11	King	26	72	34	152	153
	2011031418	RILEY	DEVEN	2011 10-1-06817-8	UNLAWFUL POSSESSION OF	25-Mar-11	King	57	85	75	152	-
	2011031534	MILLER	DONALD	2011 10-1-09668-6	HARASSMENT	10-Mar-11	King	1	6	3	152	153
	2011041182	GOMEZ	REYNALDO	2011 11-1-01211-1	ASSAULT OF A CHILD 3	01-Apr-11	King	1	9	3	152	-
72	2011070762	VILLANUEVA-G	MIGUEL	2012 11-1-00544-5	ASSAULT 2 - POST 7/1/88	27-Jul-11	Clark	6	18	12	152	-
	2011071459	HOSKIN	EDWARD	2012 11-1-02462-4	DOMESTIC VIOLENCE CT OR	15-Jul-11	King	15	0	20	152	-
	2011080846	AQUININGOC	ANTHONY	2012 11-1-00439-5	ASSAULT 2 - POST 7/1/88	22-Aug-11	Whatcom	63	102	84	153	152
	2011081344	WILLIAMS	KIRKI	2012 09-1-07479-4	RAPE 2 (POST 8/31/01) (.71)	18-Aug-11	King	120	240	158	153	152
	2011101640	HOLLINS	JOSEPH	2012 10-1-09948-1	ASSAULT 2 - POST 7/1/88	07-Oct-11	King	33	65	43	152	-
	2012011512	YELLOWOWL	BILLY	2012 11-1-03134-5	ASSAULT 2 - POST 7/1/88	11-Jan-12	King	12.03	36	14	40	152
	2012021327	GILCHRIST	CORTEZ	2012 11-1-05903-7	HARASSMENT	24-Feb-12	King	3	26	8	152	-

code	Exceptional Reason
1	Victim was an initiator, willing participant, aggressor, or provoker. 9 94A 535(1)(a)
2	Before detection, the defendant compensated victim, or made effort. 9 94A.535(1)(b)
3	Crime committed under duress, coercion, threat, or compulsion. 9.94A 535(1)(c)
4	With no apparent predisposition, was induced by others to participate. 9 94A.535(1)(d)
5	Capacity to appreciate the wrongfulness was significantly impaired.9.94A 535(1)(e)
6	Offense principally accomplished by another, defendant caution or concern. 9.94A.535(1)(f)
7	The multiple offense policy results in a clearly excessive presumptive sentence 9 94A.535(1)(g)
8	Offense is response to victim's abuse of defendant or defendant's children.9.94A.535(1)(h)
9	Confession before apprehension
10	Exceptional Sentence is within the presumptive range
11	If given credit for good time, sentence is already served.
12	Small quantity of drugs involved.
13	To make frugal use of the state's resources.
14	Exceptional sentence is one day less than range.
15	The first time offender range is not adequate
16	Exceptional sentence is more appropriate/is in the interests of justice.
17	All parties agreed to mitigated sentence.
18	Isolated incident.
19	Defendant should be sentenced according to agreed range (clerical error)
20	Nature of the offense.
21	For defendant's rehabilitation or treatment.
22	Defendant's age.
23	Prison would be detrimental.
24	Defendant is remorseful.
25	Assisted law enforcement/agreed to help in prosecution of codefendant.
26	Victim or family requests lower sentence.
27	No prior convictions or they are remote in time
28	Defendant's physical condition
29	Defendant is addressing psychological problem.
30	Defendant is a battered woman.
31	Defendant's actions did not intend crime or harm.
32	Defendant poses no threat to the community
33	Equivalent sentence with that given codefendant.
34	No injury to the victim
35	Relationship with the victim.
36	Defendant is addicted to drugs or alcohol.
37	Strong relationship between drug or alcohol addiction and criminal activity.
38	Defendant is making an effort to change criminal behavior or demonstrates a desire to do so.
39	Other mitigating factor.
40	Deliberate cruelty to the victim. 9.94A 535(3)(a)
41	Victim was particularly vulnerable 9.94A.535(3)(b)
42	Major economic offense involving multiple victims or multiple incidents 9.94A.535(3)(d)(i)
43	Major economic offense substantially greater than typical for the offense.9.94A.535(3)(d)(ii)
44	Major economic offense - high sophistication, planning, long time period 9 94A.535(3)(d)(iii)
45	Major economic offense - used position of trust, confidence, responsibility.9.94A 535(3)(d)(iv)
46	Drug offense involved at least three separate transactions (dealing).9.94A.535(3)(e)(i)
47	Drug offense - quantity substantially larger than personal use (dealing). 9.94A.535(3)(e)(ii)
48	Drug offense - manufacture of controlled substances for use by others.9.94A 535(3)(e)(iii)
50	Drug offense - offender occupied a high position in distribution hierarchy. 9 94A.535(3)(e)(iv)
51	Drug offense - high sophistication, planning, long time period, broad area. 9.94A 535(3)(e)(v)
52	Drug offense - used position or status to facilitate offense. 9 94A.535(3)(e)(vi)
53	The multiple offense policy results in a clearly lenient presumptive sent 9.94A.535(2)(c)
70	Defendant is a threat to the community.
71	Seriousness of the offense/more egregious than the typical circumstances of the crime.
72	Defendant agreed to prison, greater sentence, or treatment. 9 94A.535(2)(a)
73	Defendant is not amenable to treatment. 9.94A 535(3)(o)
74	Defendant was in a position of trust (not an economic or drug offense). 9 94A.535(3)(n)
75	Sophisticated and well planned methods (not an economic or drug offense) 9 94A.535(3)(m)
76	Multiple victims or multiple incidents per victim (not an economic offense)
77	No resources in the community
78	Factors in criminal record
79	The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense Th


- 80 Continuing criminal activity after arrest or while on probation or parole.
- 81 Greater treatment available in prison/hospital.
- 82 Sentence to be combined with pre-SRA prison sentence.
- 83 Additional incidents which, if charged, would result in higher range.
- 84 Part of an ongoing pattern of sexual abuse of the same victim under 18. 9.94A.535(3)(g)
- 85 For defendant's rehabilitation or treatment, not in prison.
- 86 Criminal history score greater than 9 points.
- 87 Defendant showed no remorse. 9.94A 535(3)(q)
- 88 Defendant violated zone of privacy. 9.94A.535(3)(p)
- 89 Sentence will promote respect for the law
- 90 Crime injured/harmed a person other than the victim 9 94A.535(3)ⓐ
- 91 Defendant does not accept responsibility for actions, blames others
- 92 Weapons were present.
- 93 Excessive alcohol or drug use.
- 94 Conduct was premeditated.
- 99 Other aggravating factor
- 101 Defendant has community or family support.
- 102 Defendant is providing support to dependents.
- 103 Defendant is employed, in school, or has had commendable employment record or military service
- 104 Defendant paid restitution or accepts responsibility for paying it.
- 105 The delay in filing the case was lengthy
- 106 The defendant's role was minor.
- 107 The reasons were discussed in chambers and justify leniency.
- 108 The defendant played an accomplice role.
- 109 The defendant's mental condition
- 110 The defendant is addressing an alcohol problem.
- 111 Defendant was sentenced to the Work Ethic Camp.
- 112 Defendant to be deported or released into the custody of INS
- 113 Multiple drug offenses were initiated by law enforcement.
- 114 The current offense was less serious than similar crimes of this nature.
- 115 Part of Plea Agreement.
- 116 Suffers from Post Traumatic Stress Syndrome.
- 117 Offender's plea allowed the victim to avoid testimony at trial.
- 118 For the purpose of a DOSA sentence.
- 119 Blakely
- 141 The crime caused extreme emotional damage to the victim
- 142 The defendant committed the crime with sexual motivation 9 94A.535(3)(f)
- 143 The defendant played a leadership role in the commission of the crime
- 144 The crime was gang related - 9.94A.535(3)(s)
- 145 The defendant has a pattern of escalating violence
- 146 The defendant threatened victim
- 147 A law enforcement officer was either the victim or injured as a result of the offense 9.94A.535(3)(v)
- 148 The defendant committed the offense to cover up other criminal behavior
- 149 The defendant's behavior constituted an act of random violence.
- 151 The willful and deliberate exposure to the HIV virus.
- 152 A domestic violence offense that occurred in sight or sound of victims children under age 18. 9.94A:535(3)(l)**
- 153 A domestic violence offense that was a part of an ongoing pattern of psychological, physical, or sex abuse of victim
- 154 A domestic violence offense in which the offender's conduct was deliberately cruel, or intimidated the victim. 9 94A :
- 155 The offense was a violent offense and the defendant knew the victim was pregnant. 9 94A 535(3)(c)
- 156 Financial impact to victim or victim's family.
- 157 The offense was a hate crime
- 158 The sentence was the result of a plea agreement in exchange for a reduced charge.
- 159 The defendant is in need of Domestic Violence treatment.
- 160 The sentence will allow the defendant to participate in the Work Ethic Program
- 161 The defendant had a significantly higher blood alcohol level than allowed by law
- 162 Domestic Violence against a family member of household member
- 163 Rapid recidivism 9.94A 535(3)(t)
- 164 For the purpose of a DOSA Sentence
- 165 To extend the supervision portion for reasons of treatment and /or other conditions.
- 166 Inability to conform conduct to requirements of law (PSD).
- 167 Blakely

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of: Appellant's Opening Brief, upon the following attorney of record and the Defendant at the addresses shown, by depositing the same in the mail of the United States Postal Service at Vancouver, Washington, on the 28th day of August, 2015 with postage prepaid, or by hand delivery (prosecutor's copy)

Dated this 28th day of August, 2015



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