

No. 33859-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

QUALAGINE A. HUDSON,

Appellant.

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STATE OF WASHINGTON
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ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable John A. McCarthy,
The Honorable Katherine M. Stolz, Judges

APPELLANT'S OPENING BRIEF

KATHRYN RUSSELL SELK
WSBA No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 3

 1. Procedural Facts 3

 2. Overview of facts 4

D. ARGUMENT 10

 1. THE CONVICTION FOR LEADING ORGANIZED CRIME WAS ENTERED IN VIOLATION OF APPELLANT’S STATE AND FEDERAL DUE PROCESS RIGHTS AND RIGHTS TO NOTICE 10

 2. THE EXCEPTIONAL SENTENCE MUST BE REVERSED 15

 a. Relevant facts 16

 b. The court exceeded its statutory authority and violated the doctrine of separation of powers and due process in imposing the exceptional sentence 17

 c. Neither RCW 2.28.150 nor CrR 6.16(b) granted the missing statutory authority and the flawed reasoning of *Davis* has already been rejected by the Supreme Court 28

 d. Mr. Hudson’s rights to equal protection and Fifth and Sixth Amendment rights were violated 36

 e. The notice was constitutionally insufficient 40

 3. THE COURT ERRED AND VIOLATED APPELLANT’S SIXTH AMENDMENT RIGHTS IN CALCULATING THE OFFENDER SCORE 46

 a. The court erred in calculating the range for the conspiracy and leading organized crime counts .. 47

 i. Relevant facts 47

ii.	<u>The court erred in calculating the ranges for two offenses</u>	48
b.	<u>Appellant's Sixth Amendment rights were violated</u>	52
i.	<u>Relevant facts</u>	52
ii.	<u>Mr. Hudson's Sixth Amendment rights were violated</u>	54
E.	<u>CONCLUSION</u>	62

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

Auburn v. Brooke, 119 Wn.2d 623, 836 P.2d 212 (1992) 45

Carrick v. Locke, 125 Wn.2d 129, 882 P.2d 173 (1994). 25

City of Sumner v. Walsh, 148 Wn.2d 490, 61 P.3d 1111 (2003) 38

In re Breedlove, 138 Wn.2d 298, 979 P.2d 417 (1999). 17

In re Cross, 99 Wn.2d 373, 662 P.2d 828 (1983). 31

In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004). 22

In re Personal Restraint of Moore, 116 Wn.2d 30, 803 P.2d 300
(1991) 17, 18, 23

In re Personal Restraint of Mota, 114 Wn.2d 465, 788 P.2d 538
(1990) 20

In re the Personal Restraint of Lavery, 154 Wn. 2d 249, 111 P.3d 837
(2005) 61

In re the Personal Restraint of West, 154 Wn.2d 204, 110 P.3d 1122
(2005) 20

Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997) 36

State Bar Ass'n. v. State, 125 Wn.2d 901, 890 P.2d 1047 (1995) 25

State v. Ackles, 8 Wash. 462, 36 P. 597 (1894) 10

State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, cert. denied, 479 U.S.
930 (1986) 25, 57

State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2005). 27

State v. Bobic, 140 Wn.2d 250, 996 P.2d 610 (2000). 50, 51

State v. Boone, 65 Wash 331,118 P. 46 (1911). 41

State v. Bowerman, 115 Wn.2d 794, 802 P.2d 116 (1990) 38, 39

State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995), cert. denied, 516 U.S.
1121, 116 S. Ct. 931 (1996), post conviction relief granted, 142 Wn.2d
868, 16 P.3d 601 (2001) 41

<u>State v. Coria</u> , 120 Wn.2d 156, 839 P.2d 890 (1992)	36
<u>State v. Dent</u> , 123 Wn.2d 467, 869 P.2d 392 (1994)	50
<u>State v. Eilts</u> , 94 Wn.2d 489, 617 P.2d 993 (1980)	35
<u>State v. Ermels</u> , 156 Wn.2d 528, 131 P.3d 299 (2006)	37
<u>State v. Ermert</u> , 94 Wn.2d 839, 621 P.2d 121 (1980)	25
<u>State v. Fernandez-Medina</u> , 141 Wn.2d 448, 6 P.3d 1150 (2000)	10
<u>State v. Frampton</u> , 95 Wn.2d 469, 627 P.2d 922 (1981)	19, 24, 33-35
<u>State v. Frazier</u> , 81 Wn.2d 628, 503 P.2d 1073 (1972)	41
<u>State v. Freitag</u> , 127 Wn.2d 141, 896 P.2d 1254, 905 P.2d 355 (1995) .	21
<u>State v. Fricks</u> , 91 Wn.2d 391, 588 P.2d 1328 (1979)	55
<u>State v. Furth</u> , 5 Wn.2d 1, 104 P.2d 925 (1940)	33
<u>State v. Goins</u> , 151 Wn.2d 728, 92 P.3d 181 (2004)	11
<u>State v. Hairston</u> , 133 Wn.2d 534, 946 P.2d 397 (1997).	30
<u>State v. Hill</u> , 83 Wn.2d 558, 520 P.2d 618 (1974)	56
<u>State v. Holt</u> , 104 Wn.2d 315, 704 P.2d 1189 (1985)	41
<u>State v. Hughes</u> , 154 Wn.2d 118, 110 P.3d 192 (2005) .	23, 24, 28-35, 56, 57, 61
<u>State v. Jacobs</u> , 154 Wn.2d 596, 115 P.3d 281 (2005).	51
<u>State v. Kincaid</u> , 103 Wn.2d 304, 692 P.2d 823 (1985)	43, 44
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).	43
<u>State v. Leach</u> , 113 Wn.2d 679, 782 P.2d 679 (1989).	40, 45
<u>State v. Lopez</u> , 147 Wn.2d 515, 55 P.3d 609 (2002)	55, 59
<u>State v. Martin</u> , 94 Wn.2d 1, 614 P.2d 164 (1980) ..	19, 23, 24, 27, 33-35
<u>State v. Nass</u> , 76 Wn.2d 368, 456 P.2d 347 (1969)	41, 42
<u>State v. Parker</u> , 132 Wn.2d 182, 937 P.2d 575 (1997).	46, 47

<u>State v. Peterson</u> , 133 Wn.2d 885, 948 P.2d 381 (1997)	10
<u>State v. Salas</u> , 127 Wn.2d 173, 897 P.2d 1246 (1995).	56
<u>State v. Sanchez</u> , 146 Wn.2d 339, 46 P.3d 774 (2002)	11
<u>State v. Schaaf</u> , 109 Wn.2d 1, 743 P.2d 240 (1987).	37
<u>State v. Shawn P.</u> , 122 Wn.2d 553, 859 P.2d 1220 (1993)	36
<u>State v. Smith</u> , 144 Wn.2d 665, 30 P.3d 1245 (2001).	48
<u>State v. Tongate</u> , 93 Wn.2d 751, 613 P.2d 121 (1980)	42
<u>State v. Vangerpen</u> , 125 Wn.2d 782, 888 P.2d 1177 (1995).	43
<u>State v. Varga</u> , 151 Wn.2d 179, 86 P.3d 139 (2004).	48
<u>State v. Ward</u> , 123 Wn.2d 488, 869 P.2d 1062 (1994)	37

WASHINGTON COURT OF APPEALS

<u>In re Personal Restraint of Jones</u> , 121 Wn. App. 859, 88 P.3d 424 (2004)	48, 49
<u>State v. Akin</u> , 77 Wn. App. 575, 892 P.2d 774 (1995)	35
<u>State v. Davis</u> , 2006 Wash. App. LEXIS 1043 (2006)	1, 28-31, 34
<u>State v. Doogan</u> , 82 Wn. App. 185, 917 P.2d 155 (1996)	10, 14
<u>State v. Garcia-Martinez</u> , 88 Wn. App. 322, 944 P.2d 1104 (1997), <u>review denied</u> , 136 Wn.2d 1002 (1998).	37
<u>State v. Giles</u> , 132 Wn. App. 738, 132 P.3d 1151 (2006)	60, 61
<u>State v. Gunther</u> , 45 Wn. App. 755, 727 P.2d 258 (1986), <u>review denied</u> , 108 Wn.2d 1013 (1987).	42, 44
<u>State v. Harris</u> , 123 Wn. App. 906, 99 P.3d 902 (2004), <u>overruled by State v. Hughes</u> , 154 Wn.2d 118, 110 P.3d 192 (2005).	32-35
<u>State v. Hochhalter</u> , 131 Wn. App. 506, 128 P.3d 104 (2006)	60, 62
<u>State v. Hunt</u> , 128 Wn. App. 535, 116 P.3d 450 (2005)	60, 61
<u>State v. Hunter</u> , 102 Wn. App. 630, 9 P.3d 872 (2000)	25

<u>State v. Jones</u> , 126 Wn. App. 136, 107 P.3d 755, <u>review granted</u> , 124 P.3d 659 (2005 Wash. LEXIS 908)	60-62
<u>State v. Labarbera</u> , 128 Wn. App. 343, 115 P.3d 1038 (2005).	55
<u>State v. Nelson</u> , 53 Wn. App. 128, 766 P.2d 471 (1988).	31, 32
<u>State v. Paine</u> , 69 Wn. App. 873, 850 P.2d 1369, <u>review denied</u> , 122 Wn.2d 1024 (1993)	35
<u>State v. Roy</u> , 126 Wn. App. 124, 107 P.3d 750 (2005).	26
<u>State v. Theroff</u> , 33 Wn. App. 741, 657 P.2d 800, <u>review denied</u> , 99 Wn.2d 1015 (1983)	36
<u>State v. Wiens</u> , 77 Wn. App. 651, 894 P.2d 569 (1995), <u>review denied</u> , 127 Wn.2d 1021 (1995)	32

FEDERAL CASELAW

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)	43, 54-56
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)	2, 16, 17, 21-23, 26, 29, 31, 33, 34, 37, 44, 52, 54-57, 59-61
<u>Braverman v. United States</u> , 317 U.S. 49, 63 S. Ct. 99, 87 L. Ed. 2d (1942)	50
<u>Dandridge v. Williams</u> , 397 U.S. 471, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970)	36
<u>Graham v. Richardson</u> , 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971)	38
<u>Hamling v. United States</u> , 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974)	43
<u>Harris v. United States</u> , 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2003).	43
<u>Hicks v. Oklahoma</u> , 447 U.S. 343, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980)	17, 27
<u>Jones v. United States</u> , 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999)	56

<u>Ring v. Arizona</u> , 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)	43, 44, 54
<u>Robtoy v. Kincheloe</u> , 871 F.2d 1478 (9 th Cir. 1989), <u>cert. denied</u> , 494 U.S. 1031 (1990).	38, 39
<u>Schmuck v. United States</u> , 489 U.S. 705, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989)	10
<u>Specht v. Patterson</u> , 386 U.S. 605, 18 L. Ed. 2d 326, 87 S. Ct. 1209 (1967)	41
<u>United States v. Jackson</u> , 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1967)	20, 21, 23, 38, 39

CONSTITUTIONAL PROVISIONS

Article I, § 12	36
Article I, § 21	1
Article I, §22	1, 10, 41, 43
Fifth Amendment	2, 16, 36, 38, 40
Fourteenth Amendment.	10, 28, 36, 41
Sixth Amendment ..	1, 2, 10, 16, 21, 36, 38-41, 43, 44, 46, 52, 54, 55, 59

RULES AND STATUTES

CrR 6.16(b)	28, 30-34, 39
D. Boerner, <i>Sentencing in Washington</i> , § 9.19 (1985)	42
<u>Former</u> RCW 10.94.020(2).	18, 19
<u>Former</u> RCW 9.94A.030(37) (2002)	50
<u>Former</u> RCW 9.94A.030(7) (2002).	59
<u>Former</u> RCW 9.94A.530(2)	23, 28
<u>Former</u> RCW 9.94A.535 (2003)	22, 23, 28-35, 37-39, 44-46
<u>Former</u> RCW 9A.32.040	18

<u>Former</u> RCW 9A.82.010(4) (2001)	12, 15
<u>Former</u> RCW 9A.82.010(4)(q) (2001)	12
<u>Former</u> RCW 9A.82.060 (2001)	11, 14, 51
Laws of 2002, ch. 107, § 4.	48
Laws of 2005, ch. 68, § 7.	22
McCormick, <i>Handbook of the Law of Evidence</i> , § 230, at 560 (2 nd ed. 1972)	55
RAP 2.5(a)	11
RCW 10.61.003.	10
RCW 10.61.006	10
RCW 2.28.150	28, 30-34
RCW 9.94A.345	51
RCW 9.94A.500(1)	55
RCW 9.94A.525(17)	59
RCW 9.94A.535 (2005)	22
RCW 9.94A.537 (2005)	22
RCW 9A.28.040	3, 50
RCW 9A.56.140	3
RCW 9A.56.150	3
RCW 9A.68.010(1)(a)	3
RCW 9A.82.020(12) (2001)	12
RCW 9A.82.050(2)	3
RCW 9A.82.060(1)	3

A. ASSIGNMENTS OF ERROR

1. Appellant's state and federal constitutional rights to due process were violated when the jury was allowed to convict him based on uncharged means.

2. The trial court erred in imposing an exceptional sentence without statutory authority, in violation of appellant's state and federal due process rights. State v. Davis, 2006 Wash. App. LEXIS 1043 (2006) was wrongly decided and should not control.

3. Appellant assigns error to the Findings of Fact and Conclusions of Law entered for the exceptional sentence. CP 397-399.

4. The trial court violated the doctrine of separation of powers in imposing the exceptional sentence.

5. The exceptional sentence violated appellant's state and federal constitutional rights to equal protection and due process.

6. The "notice of intention" to seek an exceptional sentence was insufficient to provide the constitutionally mandated notice.

7. The trial court erred in calculating the offender score for two offenses in violation of the rule of lenity.

8. Appellant's Sixth Amendment and Article I, § 21 and §22, rights to trial by jury were violated when the sentencing court made factual findings and then used those findings to increase the standard range.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Appellant was only charged with "leading organized crime" with the predicate felony of trafficking in stolen property. Were his due process rights violated when the jury was allowed to convict him based

upon other, uncharged predicate felonies, some of which could not serve as predicate felonies for the crime?

2. This case was tried after Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), but before the Legislature changed the exceptional sentencing scheme in light of that case. The only applicable statute did not authorize anyone but a trial judge to make factual findings to support an exceptional sentence. Did the trial court err and violate the doctrine of separation of powers and appellant's due process rights in exceeding its statutory authority and writing into the statute the authority for submitting the aggravating factors to the jury?

3. Under the trial court's interpretation of the relevant exceptional sentencing statute, a defendant could receive an exceptional sentence only if that person went to trial but could not receive such a sentence without their consent if they entered a plea. Did imposition of the exceptional sentence violate appellant's equal protection and due process rights and impermissibly burden the exercise of his Fifth and Sixth Amendment rights?

4. Under Blakely, an aggravating factor is an element of the aggravated crime the prosecution is seeking to prove, and must be pled with specificity. Is reversal required where the prosecution never charged Mr. Hudson with the aggravating factor by placing it in the information and the notice provided was constitutionally deficient?

5. Where there is a change in sentencing law which occurs during the time for a crime charged and the jury hears evidence that the crime occurred before and after the date of the change, does the rule of

lenity require the sentence to be based upon the more favorable law unless there is clear evidence that the jury only convicted based upon conduct occurring after the change?

6. Mr. Hudson challenged the state's evidence that he was the person named in all of the prior convictions, and that he was on community placement at the time of the offenses. Did the trial court err and violate Mr. Hudson's rights to trial by jury in making factual findings on these matters and increasing the punishment range Mr. Hudson faced as a result?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Qualagine A. Hudson was charged in Pierce County by amended information with two counts of trafficking in stolen property, two counts of first-degree possession of stolen property, two counts of bribery, a count of conspiracy to commit trafficking in stolen property in the first-degree, and a count of leading organized crime. CP 21-26; RCW 9A.28.040; RCW 9A.56.140; RCW 9A.56.150; RCW 9A.68.010(1)(a); RCW 9A.82.050(2); RCW 9A.82.060(1). The prosecution also filed a "notice of intention" to seek an exceptional sentence based upon the crime involving a "major economic offense or series of offenses." CP 57.

After motions heard before the Honorable Katherine Stolz on November 13, 2003, and October 7, 2004, trial was held before the

Honorable John A. McCarthy on April 29, May 2-5, 9-12, 2005.¹ Mr. Hudson was acquitted of one count of trafficking, and both counts of possession of stolen property, but found guilty on all other counts as charged. CP 203-210. The jury also entered a special verdict form stating that it found “the crime committed in Count VIII” was a “major economic offense or series of offenses.” CP 211.

After continuances on June 24, July 15 and August 26, 2005, sentencing was held on September 23, 2005, and Judge McCarthy imposed an exceptional sentence of 180 months in custody. See 3RP 1; 4RP 1; 5RP 1; 6RP 1, 52; CP 402-413. The judgment and sentence was signed on September 26, 2005. 7RP 1; CP 402-413. Mr. Hudson appealed, and this pleading follows. CP 414-25.

2. Overview of facts²

In 2001, a man named Devaughn Dorsey offered police information about a man named Qualagine Hudson or “Q,” in exchange for Mr. Dorsey getting a lighter sentence. 2RP 59, 67. Mr. Dorsey was described by one officer as a “known prolific car thief,” 2RP 594. The detective Mr. Dorsey talked to about Mr. Hudson went to a regional

¹The verbatim report of proceedings will be referred to as follows:
November 13, 2003, and October 7, 2004, “1RP;”
November 13, 2003 (volume 2), as “2RP;”
The 8 volumes containing the trial proceedings, as “2RP;”
June 24, 2005, as “3RP;”
July 15, 2005, as “4RP;”
August 26, 2005, as “5RP;”
September 23, 2005, as “6RP;”
September 26, 2005, as “7RP.”

²More detailed discussion of the facts relevant to the issues is contained in the argument section of this brief, *infra*.

meeting of agencies who meet monthly regarding car theft and gave them information about what he said. 2RP 61-63. Ultimately the investigation police started led them to the Fairwood Department of Licensing and two title clerks who had worked there, Shawn Bell and Angela Jametsky.

Mr. Bell and Ms. Jametsky testified that they had transferred titles and "altered" information about vehicles at Mr. Hudson's request, in exchange for money and other items. 2RP 270-77, 498-507. Ms. Jametsky did it several times and then left the job, after which Mr. Bell ended up doing it for a total of 6-10 cars. 2RP 270-78, 500-14, 527, 554. Mr. Hudson did not usually fill out the paperwork himself in front of them but came in with it filled out, sometimes after calling in advance to get information about VIN numbers and what paperwork he would need. 2RP 283, 287, 509. The documents all looked normal and were the same forms anyone would use. 2RP 531.

Ms. Jametsky admitted that a man named Tracey Holmes also came in a couple of times a week and would also call in advance. 2RP 294. She did not testify about whether Mr. Holmes also asked her to do the things she said Mr. Hudson asked. 2RP 283-290.

Tracey Holmes testified that he had a towing business and also took cars and replaced the VIN numbers on them after first pulling the windshields off. 2RP 310-11. He said he did this with several people, including Mr. Hudson. 2RP 313. He got started after Mr. Dorsey introduced him to Mr. Hudson and then brought Mr. Holmes to Mr. Hudson's house. 2RP 315. Mr. Hudson was inside the house when Mr. Holmes removed a windshield on a car and Mr. Dorsey replaced the VIN.

2RP 315.

According to Mr. Holmes, Mr. Hudson would call and say what he needed done, then would drop off a vehicle or Mr. Holmes would go get it. 2RP 317-18. He said he did between 20 and 25 total VIN plate switches, and Mr. Hudson gave him most of the VIN plates. 2RP 322, 332. Some of the cars were in perfect condition but some of them had "cracked" steering columns, which Mr. Holmes said thought meant the cars were stolen. 2RP 323. Mr. Hudson paid Mr. Holmes between \$350 and \$400 per car. 2RP 324.

Mr. Holmes admitted that he himself also stripped at least one car and sold the parts, believing the vehicle was stolen. 2RP 327. He had done VIN switches on other cars before meeting Mr. Hudson and did them for others, as well, but said most of his work was for Mr. Hudson. 2RP 316-40.

An officer with an "auto theft group" testified that he had seen Mr. Hudson driving a car and had written down the license plate number and called up the VIN. 2RP 624. It did not match for the year and type of vehicle that it was on, which meant the VIN number had been changed. 2RP 624.

A number of car dealers testified about cars that had gone missing from their lots in 2001 or 2002, and a woman named Khachee Sukhang testified that Mr. Hudson had sold her a 1999 Ford Expedition which turned out to have had the VIN number switched. 2RP 267-68, 308-309, 448-49, 549-51. The sale documents had a notary stamp in the name of Hans E. Johnson. 2RP 483.

An officer admitted that the stolen car sold to Ms. Sukhang was initially registered to a business that was in Mr. Holmes' name, and was then sold to someone known by Mr. Holmes, Jaison Johnson. 2RP 490. Several other cars with switched VIN numbers were registered to another business associated with Mr. Holmes, not Mr. Hudson. 2RP 79. An officer admitted that Mr. Holmes had a lot of vehicles registered to different companies, associates or addresses of his. 2RP 101.

When police searched Mr. Holmes' house, there were about 60 cars on the property. 2RP 106. One officer described the property as so large and the amount of vehicles "so extensive" that it took a very long time to conduct the search and people had to be specifically tasked to particular areas. 2RP 204. The cars on the property included a Corvette in the process of being disassembled and having its VIN changed in the garage, several flatbeds and many sport utility vehicles. 2RP 111-14. The VIN on one flatbed had been changed, as had the VIN numbers of many of the vehicles on the property. 2RP 207-242. At least one of the vehicles found on Mr. Holmes property which had been "re-VIN'd" had the stamp from Hans Johnson on the title. 2RP 242.

There were only two cars at Mr. Hudson's house and they were not stolen or "re-VIN'd." 2RP 148-49. A "re-VIN'd" vehicle was seen at the house during surveillance, however, and an officer testified that Mr. Qualagine was a "[k]nown auto thief." 2RP 152, 478-89. At the home, there were pictures of Mr. Hudson around "high-end SUVs," some vehicle registrations, some vehicle plates, VIN plates, titles to vehicles, and "VIN-altering equipment" found in the garbage and "strewn around the whole

entire home.” 2RP 103. The cars were all licensed to different addresses, including Mr. Hudson’s mother’s address. 2RP 249-59.

Mr. Hudson’s brother, Daniel Bailey, was living at their mother’s home but Mr. Hudson was not. 2RP 118, 120, 124-48. An officer admitted that Mr. Bailey was known to have sold a vehicle identified as one of those stolen, with a donor vehicle for the VIN found at Mr. Holmes’ house. 2RP 120-23. A notary stamp found in Mr. Bailey’s apartment had the name Hans E. Johnson on it, but Mr. Bailey said that a friend of Mr. Dorsey’s had left it. 2RP 129, 417-21.

Mr. Bailey testified that Mr. Holmes would always call Mr. Hudson’s mother’s house looking for Mr. Hudson and threatening to kick Mr. Hudson’s ass. 2RP 425. An auto wrecking place near Mr. Holmes’ house was determined to be the “primary supplier of the public VIN plates that were stolen and put on these vehicles.” 2RP 485. The police had no evidence that Mr. Hudson ever went there, but Mr. Holmes was there quite often. 2RP 490-91. Evidence was admitted that a man named Joseph Turegano pled guilty to an offense in relation to a car where the “donor vehicle” for the VIN was found on Mr. Holmes’ property. 2RP 672.

Lloyd Hull testified about buying cars several times from Mr. Holmes and one of those cars turning out to be stolen, although it did not have switched VIN numbers. 2RP 815-17. Torrance Holmes, Tracey’s brother, testified about Mr. Holmes buying lots of cars at auction and saying something on the phone once about everybody needing to be “in line on paying for something.” 2RP 690-702. Mr. Holmes often failed to make his payments on the property he was renting from his brother, but

had expensive cars on the property all the time. 2RP 704-706. Torrence Holmes remembered hearing his brother say to Mr. Hudson, "I did all this work for you. You mean to tell me I can't get paid?" 2RP 708.

Sheila Severson, Mr. Hudson's girlfriend, heard Mr. Holmes say something about needing to get all of his cars registered, and Mr. Hudson stated that he knew someone who worked at the "DMV" and could help. 2RP 721, 724-26. Later, around the beginning of 2002, Mr. Holmes started threatening Mr. Hudson, calling him "like a punk; he needs to be more of a man like he is," and threatening to beat Mr. Hudson's "ass" if he would not "do this shit" for Tracey. 2RP 732. There were quite a few threats, and they got more severe and frequent when Mr. Hudson told Mr. Holmes he no longer wanted to do things for him. 2RP 731-33. Mr. Holmes and his friend, Devaughn Dorsey, threatened Ms. Severson herself, saying she "better not" say anything or testify about Mr. Holmesy "or anything." 2RP 734-35. Ms. Severson had changed her cell phone number "quite a few times because" they kept getting her number to call and threaten her. 2RP 736.

A friend of Mr. Hudson's who had a child with him testified that she saw Mr. Holmes hand Mr. Hudson papers for something Mr. Hudson was going to "handle for Tracey." 2RP 758-60. She testified about hearing Mr. Holmes say, "[h]ere is the paperwork. You need to take care of this for me." 2RP 761. Mr. Holmes got "aggressive" with Mr. Hudson, saying he had "better do it." 2RP 761. The friend did not hear Mr. Holmes otherwise threaten Mr. Hudson but was herself threatened by Mr. Dorsey about telling anyone what he and Mr. Holmes had going on with

their “business.” 7RP 762.

D. ARGUMENT

1. THE CONVICTION FOR LEADING ORGANIZED
CRIME WAS ENTERED IN VIOLATION OF
APPELLANT’S STATE AND FEDERAL DUE PROCESS
RIGHTS AND RIGHTS TO NOTICE

The right to notice embodied in the state and federal constitutions is an “ancient doctrine,” which provides that criminal defendants “may be held to answer for only those offenses contained in the indictment or information.” State v. Fernandez-Medina, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000), quoting, Schmuck v. United States, 489 U.S. 705, 717-18, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989); see Article I, § 22; Sixth Amendment, Fourteenth Amendment. It is “reversible error to try a defendant under an uncharged statutory alternative because it violates the defendant’s right to notice[.]” State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996); see State v. Aho, 137 Wn.2d 736, 744, 975 P.2d 512 (1999). And “no one can legally be convicted of an offense not properly alleged.” State v. Peterson, 133 Wn.2d 885, 889, 948 P.2d 381 (1997), quoting, State v. Ackles, 8 Wash. 462, 464-65, 36 P. 597 (1894). Indeed, as early as 1894 the highest court in this state declared this principle “elementary and of universal application,” as well as “founded on the plainest principles of justice.” Ackles, 8 Wash. at 464-65. As a result, unless a charge is a lesser included or lesser degree offense of a charged offense, a conviction for an uncharged offense must be reversed. See Peterson, 133 Wn.2d at 889; RCW 10.61.006; RCW 10.61.003.

In this case, this Court should reverse the conviction for leading

organized crime, because the jury was allowed to convict based upon an uncharged alternative.

As a threshold matter, the issue is properly before the Court. Because a conviction on uncharged means is a clear violation of state and federal due process rights, it is manifest error affecting a constitutional right which can be raised for the first time on appeal under RAP 2.5(a). See, e.g., State v. Goins, 151 Wn.2d 728, 92 P.3d 181 (2004) (due process claim that verdicts were inconsistent raised for the first time on appeal); State v. Sanchez, 146 Wn.2d 339, 346, 46 P.3d 774 (2002) (due process violation is a manifest error affecting a constitutional right which may be raised if the facts are in the record and actual prejudice is shown). The record here is complete on this issue, and, as argued below, the error was prejudicial.

At the time Mr. Hudson was alleged to have committed the crime, former RCW 9A.82.060 (2001) provided, in relevant part:

(1) A person commits the offense of leading organized crime by:

(a) Intentionally organizing, managing, directing, supervising, or financing any three or more persons with intent to engage in a pattern of criminal profiteering activity; or

(b) Intentionally inciting or inducing others to engage in violence or intimidation with the intent to further or promote the accomplishment of a pattern of criminal profiteering activity.

To prove a “pattern of criminal profiteering activity,” the prosecution was required to prove the defendant engaged in “at least three acts of criminal profiteering” within a specific time and that the acts had “the same or similar intent, results, accomplices, principals, victims, or methods of

commission,” or were “otherwise interrelated by distinguishing characteristics including a nexus to the same enterprise,” and not isolated events. Former RCW 9A.82.020(12) (2001). Under former RCW 9A.82.010(4) (2001), “criminal profiteering” meant “any act, including any anticipatory or completed offense committed for financial gain, that is chargeable or indictable under the laws of the state in which the act occurred,” which is one of the listed predicate felonies. Those felonies included murder, robbery, kidnapping and theft, and also “trafficking in stolen property.” Former RCW 9A.82.010(4)(q) (2001).

In this case, Instruction 28, the “to convict” instruction for the leading organized crime offense provided, in relevant part:

To convict the defendant of the crime of Leading Organized Crime, as charged in Count VIII, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the period between the 1st day of April, 2002, and the 23rd day of January, 2003, the defendant intentionally organized, managed, directed, supervised, or financed any three or more persons;

(2) That the defendant acted with the intent to engage in a pattern of criminal profiteering activity; and

(3) That the acts occurred in the State of Washington.

CP 198. Instruction 18 provided:

A person commits the crime of Leading Organized Crime when he or she intentionally organizes, manages, directs, supervises, or finances any three or more persons with the intent to engage in a pattern of criminal profiteering activity.

CP 188. A “pattern of criminal profiteering activity” was defined in

Instruction 19, as follows:

Pattern of criminal profiteering activity means engaging in at least three criminal acts committed for financial gain within a

five year period.

In order to constitute a pattern, the three acts must have the same or similar intent, results, accomplices, principals, victims, or methods of commission, or be otherwise interrelated by distinguishing characteristics including a nexus to the same enterprise, and must not be isolated events.

CP 189.

In arguing that Mr. Hudson was guilty of leading organized crime, the prosecutor repeatedly argued that the jury should find a “pattern of criminal profiteering activity” based on finding that Mr. Hudson had “committed at least three crimes” for a profit. 2RP 838-43. He referred to all the crimes charged in the information as possible predicate crimes, including conspiracy, bribery, trafficking in stolen property and possession of stolen property. 2RP 842-43. The prosecutor told the jury that he had not just proved three crimes, he had proved “four per vehicle and you’ve got 21 vehicles. That’s 84.” 2RP 846.

Thus, the court’s instructions permitted the jury to convict Mr. Hudson of leading organized crime based upon having organized, managed, directed, supervised or financed any three or more persons with intent to engage in any of the charged crimes and a multitude of other crimes for each of the 21 vehicles about which the prosecution presented evidence. And the prosecutor’s argument encouraged them to do so.

But Mr. Hudson was not *charged* with committing the crime in all of those ways. The amended information claimed that Mr. Hudson,

during the period between the 1st day of January, 2002[,] and the 23rd day of January, 2003, did unlawfully, feloniously, and intentionally organize, manage, direct, supervise, or finance three or more persons with the intent to engage in a pattern of criminal profiteering activity, *to-wit: trafficking in stolen property*, contrary

to RCW 9A.82.060(1)(a).

CP 24 (emphasis added). Thus, the only way Mr. Hudson was accused of committing the crime was with the predicate offense of trafficking in stolen property. He was not charged with any other predicate, let alone the "84" felonies the prosecution argued the jury could use. CP 24.

Reversal is required. The error of instructing the jury it can find guilt on an uncharged means is prejudicial if it is possible that the jury might have convicted of the uncharged alternative. Doogan, 82 Wn. App. at 189. Thus, in Doogan, the defendant was charged with promoting prostitution by "profiting from prostitution," but the instructions allowed conviction based not only on that means but also on the uncharged alternative means of "advancing prostitution." 82 Wn. App. at 188. The error was prejudicial and reversible because the uncharged means covered a wider range of activity than the charged means and the jury heard evidence that would have proved the uncharged means and thus might have convicted on that basis.

Here, there is no question that the uncharged means covered a wider range of activity than the charged means. The only charged means was intentionally organizing, managing, directing, supervising or financing any three or more persons with the intent to engage in a pattern of trafficking in stolen property. The uncharged means included taking those acts with intent to engage in all of the crimes in the information - bribery, conspiracy, possession of stolen property - and even other crimes, the "four per vehicle x 21 vehicles" worth the prosecution touted.

Further, even if it were proper for the prosecution to rely on other

charged crimes as the predicate felony for leading organized crime without specifically charging them as part of that offense, neither conspiracy nor possession of stolen property is a predicate felony under former RCW 9A.82.010(4) (2001).

Finally, the evidence in this case was not limited to evidence solely of trafficking in stolen property, as evidenced by the convictions on other counts. Clearly, because the jury found Mr. Hudson guilty of a conspiracy, under the instructions and argument, it could easily have relied on that conspiracy as the required predicate felony element of the leading organized crime offense and thus convicted based upon a crime which does not even *exist*, let alone one that was not charged.

Mr. Hudson's state and federal due process rights were violated by his conviction for leading organized crime, because the jury was allowed to convict him based upon an uncharged means. Reversal of that conviction - and the exceptional sentence imposed for that count - is required.

2. THE EXCEPTIONAL SENTENCE MUST BE REVERSED

At sentencing, the judge imposed an exceptional sentence on the organized crime offense, and standard range sentences for all the others. See CP 405-408.³ This Court should reverse that sentence, because it was not statutorily authorized, its imposition violated Mr. Hudson's due process and equal protection rights, it was imposed in violation of the

³Mr. Hudson's argument that this calculation was erroneous and calculated in violation of his constitutional rights is contained *infra*.

separation of powers doctrine, and it violated Mr. Hudson's right to equal protection and improperly infringed on the exercise of his Fifth and Sixth Amendment rights.

a. Relevant facts

The incidents in this case all occurred between January 1, 2002 and January 23, 2003, and the first information was filed on August 25, 2003. CP 1-5, 21-26. When Mr. Hudson was originally charged and even when the amended information was filed, no aggravating factors were mentioned. CP 1-5, 21-26. It was only nearly two years after charging that the prosecution gave "notice" that it was intending to seek an exceptional sentence for a "major economic offense or series of offenses." CP 57.

At sentencing, counsel objected that the court did not have statutory authority to impose an exceptional sentence even though the jury had made a finding, because the "Blakely fix" statute had not yet become effective when any of the crimes occurred and the only exceptional sentencing scheme in the statutes was deemed unconstitutional in Blakely. 6RP 31-32.⁴

The prosecutor stated that there was "no direction" on what to do to impose an exceptional sentence in cases such as Mr. Hudson's, but opined that the procedure the court had followed was "constitutionally appropriate." 6RP 33.

The court stated that it was "not aware of any case law that says"

⁴Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

that there had to be “a procedure that would allow the jury to answer the question” of whether there was an aggravating factor after Blakely. 6RP 35. The court found it could “consider an aggravated sentence based on that finding of the jury,” and imposed an exceptional sentence of 180 months in custody, above the standard range. 6RP 35, 53. Findings of fact and conclusions of law were later entered. See CP 397-99.

- b. The court exceeded its statutory authority and violated the doctrine of separation of powers and due process in imposing the exceptional sentence

The exceptional sentence must be reversed, for several reasons. First, the trial court exceeded its statutory authority in imposing the exceptional sentence. A court may only impose those sentences authorized by statute. See In re Breedlove, 138 Wn.2d 298, 304, 979 P.2d 417 (1999). Where a sentence is not statutorily authorized, it is not simply error, it is a “fundamental defect” of the kind that will support relief even on collateral attack, normally a far more difficult method of seeking relief than direct appeal. In re Personal Restraint of Moore, 116 Wn.2d 30, 33, 803 P.2d 300 (1991). Indeed, failure to correct a sentence not authorized by statute will amount to a violation of due process. See Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980).

Thus, in Moore, the Supreme Court reversed this Court’s decision upholding a sentence of life without the possibility of parole where the defendant had pled guilty and agreed to such a sentence. 116 Wn.2d at 32-33. At the time of the plea, the relevant sentencing statute provided that “[i]f . . . the jury finds that there are one or more aggravating circumstances but fails to find that there are not sufficient mitigating circumstances to

merit leniency,” the sentence would be life in prison without the possibility of parole, and that “[i]n all other convictions” for first degree murder, the sentence was life in prison. 116 Wn.2d at 33-34, quoting, former RCW 9A.32.040 (emphasis added). Another statute provided an exception for a sentence of life in prison with the possibility of parole for a first degree murder conviction if the prosecutor had filed a death penalty request and the same jury as that which heard the trial was reconvened for a “separate special sentencing proceeding” to determine if the death sentence should be imposed. Moore, 116 Wn.2d at 34, quoting, former RCW 10.94.020(2).

On appeal, the prosecution argued that, despite the clear language of the statutes, a sentence of life without the possibility of parole was proper when a defendant entered a plea to first degree murder. 116 Wn.2d at 34-35. The Supreme Court rejected this argument. Because the statutes specifically required a *trial jury* to find aggravating or mitigating factors in order to impose such a sentence, the Court held, “[n]o provision is made in the statutes for any other means of establishing aggravating or mitigating circumstances,” including by agreement or stipulation. 116 Wn.2d at 36-37.

Further, the Court rejected the argument that the defendant had agreed to the sentence and thus was bound by that agreement. 116 Wn.2d at 38-39. Regardless of the agreement, the Court held, a plea bargain “cannot exceed the statutory authority given to the courts” and a defendant could not “agree to be punished more than the Legislature has allowed for” in the sentencing statutes. 116 Wn.2d at 38-39.

Similarly, in State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980), the Court addressed the argument that a defendant who pled guilty could receive a death sentence under the existing statutes at the time. The defendant had tried to enter a plea of guilty to first degree murder in order to avoid “the possible imposition of the death penalty resulting from a jury trial.” 94 Wn.2d at 2-3. The relevant statute specifically provided that “if the trial jury returns a verdict of murder in the first degree. . . the trial judge shall reconvene the same trial jury to determine” whether to impose a death penalty. 94 Wn.2d at 8, quoting, former RCW 10.94.020(2) (emphasis omitted). The prosecution argued, *inter alia*, that the defendant could still be subject to the death penalty if he entered a plea. 94 Wn.2d at 7-8.

The Court disagreed. The “statute’s mandate” was clear, and the Court refused to “imply the existence of a special sentencing procedure” not provided in the statute. 94 Wn.2d at 7-8. Because there was “no current statutory provision that authorizes the impaneling of a special jury to decide the death penalty when a capital defendant pleads guilty,” the Court rejected the prosecution’s claim. 94 Wn.2d at 7-8.

In so doing, the Court recognized - and resisted - the inherent seductiveness in the prosecution’s arguments:

Clearly the legislature did not anticipate the possibility that an accused might plead guilty to a charge of first degree murder. Thus, it simply failed to provide for that eventuality. *As attractive as the State’s proposed solution may be, we do not have the power to read into a statute that which we may believe the legislature has omitted, be it an intentional or inadvertent omission.*

94 Wn.2d at 8 (emphasis supplied). It rebuffed a similar argument in State

v. Frampton, 95 Wn.2d 469, 476-79, 627 P.2d 922 (1981), concluding that, regardless of the relative merit of the prosecution's proposals, the request must be directed to the Legislature, not the court).

More recently, in In re the Personal Restraint of West, 154 Wn.2d 204, 110 P.3d 1122 (2005), the Supreme Court reversed this Court in a case where the defendant had agreed to serve "flat time" without any right to earned early release credit and the sentencing court included that provision in the judgment and sentence. The relevant statute granted authority for determination or grant of early release time only to the "correctional agency having jurisdiction," not the court. 154 Wn.2d at 212. As a result, because there was no statutory authority for a court to restrict imposition of earned early release time, the sentence was not authorized by the SRA and the defendant was entitled to relief. 154 Wn.2d at 213. Regardless of whether the defendant had agreed to the sentence, the Court held, that fact "does not cure" the sentencing court's having "acted outside its authority." 154 Wn.2d at 214; see also, In re Personal Restraint of Mota, 114 Wn.2d 465, 478, 788 P.2d 538 (1990) (where statute granted authority for awarding good time only to the Department of Corrections, there was no authority for the trial court to do so).

Washington is not alone in this line of cases. No less than the U.S. Supreme Court has rejected a claim that a statute providing for imposition of the death penalty by "the jury" somehow permitted empaneling a jury to impose a death sentence when a defendant pled guilty. See United States v. Jackson, 390 U.S. 570, 571-72, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1967).

The Court rejected the government's claim that the statute could be so interpreted "without the slightest indication that Congress contemplated any such scheme" when it enacted the statute. 390 U.S. at 578. And the Court rejected the idea that the omission from the statute by Congress was "an oversight that the courts can and should correct." *Id.* Even if the omission could be assumed to be wholly inadvertent, the Court held, "it would hardly be the province of the courts to fashion a remedy." 390 U.S. at 578-79.

Applying those cases here, it is clear the trial court exceeded its statutory authority by submitting the aggravating factor to the jury and then imposing the exceptional sentence. In Washington, the superior court's authority to impose a sentence is controlled by the Sentencing Reform Act (SRA). *See State v. Freitag*, 127 Wn.2d 141, 144-45, 896 P.2d 1254, 905 P.2d 355 (1995). The crimes in this case were all committed prior to the decision in *Blakely*, but sentencing was held after that decision was issued. *See* CP 21-26; *Blakely*, 542 U.S. at 296 (June 24, 2004); 6RP 2. In *Blakely*, the Supreme Court struck down as unconstitutional the Washington state scheme of imposing an exceptional sentence. 542 U.S. at 304-305. The Court held that it violates a defendant's Sixth Amendment rights for a judge to make findings of fact by a preponderance of the evidence, and then rely on those findings to impose an exceptional sentence above the standard range which could have been imposed based only upon the jury's verdict. 542 U.S. at 302-305.

The Washington Legislature did not amend the exceptional

sentence scheme in Washington in response to Blakely until April 15, 2005. See Laws of 2005, ch. 68, § 7. On that date, amendments to the scheme became law. Id. Those amendments granted the authority for aggravating circumstances to be charged by the prosecutor and submitted to a jury, which must unanimously find the aggravating facts beyond a reasonable doubt and so indicate by a special interrogatory. RCW 9.94A.535 (2005), RCW 9.94A.537 (2005). For all but a very few aggravating circumstances, the judge's role in the new exceptional sentencing scheme is limited to determining whether, considering the purposes of the SRA, the aggravating factors found by the jury amount to "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535 (2005).

As the prosecution appears to have conceded below, however, this "Blakely fix" legislation is not applicable to this case. See 6RP 32-33. The legislation was not effective until well after the crimes, and cannot be applied retroactively without running afoul of the prohibitions against ex post facto laws. See, e.g., In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004).

Thus, for this case, the only statutory authority for imposition of an exceptional sentence was under the version of the statutory scheme specifically disapproved in Blakely. That scheme consisted of two statutes. Under former RCW 9.94A.535 (2003),

[t]he court may impose a sentence outside the standard range for an offense if it finds, considering the purposes of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(Emphasis added). The statute went on to list illustrative mitigating and aggravating factors the court could make such findings about, and to require written findings and conclusions detailing the court's reasons for imposing the sentence. See former RCW 9.94A.535(2) (2003). The second statute making up the exceptional sentencing scheme at the time was former RCW 9.94A.530(2) (2002), which allowed the "*trial court*" to make the factual findings to support an exceptional sentence based upon "a preponderance of the evidence." (Emphasis added).

Just as in Moore, Martin, Jackson and the other cases, here the statutes are clear. The aggravating factors are to be found by the *court*. The statutes do not authorize having those facts found by the jury, nor do they provide for submitting to the jury a special verdict form for that purpose. Thus, there was no statutory authority for the procedure used to impose an exceptional sentence in this case.

State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), is instructive. In Hughes, the Supreme Court addressed the proper remedy on remand from the reversal of an exceptional sentence based upon Blakely. Hughes, 154 Wn.2d at 146-50. Citing the very same language of former RCW 9.94A.535 (2003) applicable here, the Court held that the statute:

explicitly directs the trial court to make the necessary factual findings and does not include any provision allowing a jury to make those determinations *during trial, during a separate sentencing phase, or on remand*.

154 Wn.2d at 149 (emphasis added). The parties conceded that there was "no procedure" in place to allow convening a jury on remand or after

conviction to find aggravating factors. 154 Wn.2d at 149. Because the language of the statute was so clear, the Court refused to tread upon the legislative function by “imply[ing] a procedure. . . which would be contrary to the explicit language of the statute.” 154 Wn.2d at 149. Relying on Martin and Frampton, the Supreme Court held that the exceptional sentencing statutory scheme could not be rewritten by the Court in order to create a sentencing procedure not contained therein. Hughes, 154 Wn.2d at 150-51. Put plainly, the Court said:

This court will not create a procedure to empanel juries on remand to find aggravating factors because the legislature did not provide such a procedure and, instead, *explicitly assigned such findings to the trial court*. To create such a procedure out of whole cloth would be to usurp the power of the legislature.

154 Wn.2d at 152-53 (emphasis added).

Thus, Hughes establishes that the same statutory scheme authorizing exceptional sentences as here contained no provision for a jury to make the necessary findings to support an exceptional sentence. Although Hughes addressed only the question of the appropriate remedy on remand, the Court’s holdings regarding the provisions of the statute and the authority granted therein apply equally whether the jury is being empaneled on remand or given a special verdict form at trial. Hughes establishes that, at the time that the offenses occurred in this case, the exceptional sentence statutory scheme provided only for a judge, not a jury, to make the findings necessary to support an exceptional sentence. Under Hughes, Martin, Moore, Jackson and the other caselaw, neither the trial court nor this one can judicially amend the procedure set forth in the statute to support the exceptional sentence here.

This point is further supported by the doctrine of separation of powers. The founders of this country were concerned that one branch of the government might become too powerful, or try to usurp, encroach upon or somehow impair the power of another. See State Bar Ass'n. v. State, 125 Wn.2d 901, 907-909, 890 P.2d 1047 (1995). Hence the doctrine of “separation of powers,” described by the Washington Supreme Court as “one of the cardinal and fundamental principles of the American constitutional system, both federal and state.” Id. Under that doctrine, the independence of the judicial branch of government and constitutional limits on its power is ensured in part by preventing the judiciary from being “assigned or allowed” to do tasks which are more properly accomplished by another governmental branch. See Carrick v. Locke, 125 Wn.2d 129, 136, 882 P.2d 173 (1994).

It is well-settled that sentencing policy, establishing penalties for crimes, and indeed the very “determination of crime and punishment” itself is a legislative, not judicial, function. State v. Ermert, 94 Wn.2d 839, 847, 621 P.2d 121 (1980); State v. Smith, 93 Wn.2d 329, 337, 610 P.2d 869 (1980). Thus, in State v. Ammons, the Supreme Court rejected a claim that the SRA violated the doctrine of separation of powers by taking away judicial discretion at sentencing, because “[t]his court has consistently held that the fixing of legal punishments for criminal offenses is a legislative function” and sentencing judges only possessed such discretion at sentencing as the Legislature chose to give by statute. 105 Wn.2d 175, 179-80, 713 P.2d 719, cert. denied, 479 U.S. 930 (1986); see also, State v. Hunter, 102 Wn. App. 630, 636, 9 P.3d 872 (2000) (judicial

discretion granted by the Legislature must be exercised within statutory limits). Similarly, in State v. Roy, although not using the phrase “separation of powers” by name, the Court held that, where the Legislature had granted the authority to revoke a DOSA sentence only to the Department of Corrections, “the court cannot reserve authority for itself that has been specifically granted to DOC by the legislature.” State v. Roy, 126 Wn. App. 124, 128-29, 107 P.3d 750 (2005).

Here, the Legislature specifically placed the authority for making findings on aggravating factors in the court. It had not yet changed the relevant statutes to place that authority in a jury at the time of these crimes. The trial court’s actions below, the effect of which were to amend the exceptional sentencing statutes to remove the authority for finding aggravating factors from the court and place it with the jury, was a violation of the separation of powers doctrine.

For those few defendants like Mr. Hudson whose crimes were committed during the time between Blakely and the date the Legislature chose to enact and render effective the amendments to the exceptional sentencing statutes, the only statutorily authorized means of imposing an exceptional sentence was if a judge made findings on aggravating factors, based upon a preponderance of the evidence standard. Because Blakely struck down that procedure as unconstitutional, and because the Legislature chose not to provide another method of imposing such a sentence until after the crimes were committed in this case, the cases falls under a “statutory hiatus” during which there was no authority for a

contested exceptional sentence to be imposed.⁵ Just as in Martin, a court may find that hiatus “unfortunate.” 94 Wn.2d at 8. But as the Supreme Court held in Martin, “it would be a clear judicial usurpation of legislative power” to judicially rewrite the former statute in order to support a procedure the legislature specifically did not provide. 94 Wn.2d at 8.

In addition, the sentence was imposed in violation of due process. In Hicks, supra, the defendant received a sentence which was imposed by a judge, despite a statute providing that such a sentence would be imposed by a jury. 447 U.S. at 346-47. In reversing, the U.S. Supreme Court held that, by declaring that a jury would impose the sentence, the statute had created a liberty interest in that procedure, protected by the due process clause. 447 U.S. at 346-47. A statute will create a liberty interest if it imposes very specific limits on governmental action such as decisionmaking. See State v. Baldwin, 150 Wn.2d 448, 460, 461, 78 P.3d 1005 (2005). Thus, in Baldwin, the Court held that a defendant has no protected liberty interest in receiving a standard range sentence because the statutes creating the standard range give the trial court substantial discretion in whether to depart from that range, in contrast to statutes which contain a specific directive that, if a certain thing occurs, a certain result will follow. Id.

Here, the statutes authorizing the imposition of an exceptional sentence at the time of these offenses did not grant any discretion as to the

⁵There is no question that during the same time a defendant could agree to imposition of an exceptional sentence by knowingly and voluntarily waiving Blakely rights as part of a valid plea of guilty. See Blakely, 542 U.S. at 310.

identity of the statutorily authorized fact finder for any aggravating circumstances. Instead, those statutes provided that the judge would be the fact finder, in every circumstances. Former RCW 9.94A.530(2) (2002); former RCW 9.94A.535 (2003). Under Hicks, the procedure used here, outside the statutory authority of the court and in violation of the doctrine of separation of powers, was also a violation of Mr. Hudson's due process rights. This Court should reverse.

- c. Neither RCW 2.28.150 nor CrR 6.16(b) granted the missing statutory authority and the flawed reasoning of *Davis* has already been rejected by the Supreme Court

In response, the prosecution may urge this Court to rely on a case just ordered published in Division Three, State v. Davis, 2006 Wash. App. LEXIS 1043 (2006). In Davis, Division Three held that it was not error for a court to give the jury "an interrogatory" regarding an aggravating factor and impose an exceptional sentence in a case where the offense occurred in the same statutory hiatus as existed here.

Davis, however, does not help the prosecution, for several reasons. First, Davis improperly limited the relevance of Hughes by simply dismissing it as a case which only presented the question of the appropriate remedy on remand, rather than the question of "whether juries may be given special verdict forms or interrogatories to determine aggravating factors at trial." Davis, 2006 Wash. App. LEXIS 1043 at *15. There is no question that, in Hughes, the Court stated that it was only addressing the question of "the appropriate remedy on remand." Hughes, 154 Wn.2d at 149. But in reaching its conclusion in Hughes, the Supreme

Court specifically construed the very same statute at issue here and reached the conclusion that the statute, former RCW 9.94A.535 (2003), “explicitly directs the trial court to make the necessary factual findings and does not include any provision allowing a jury to make those determinations during trial, during a separate sentencing phase, or on remand.” 154 Wn.2d at 148-49.

That interpretation of the very same statute applicable to the situation here and in Davis is not suddenly irrelevant because the circumstances were different in Hughes, as the Davis Court seemed to believe. The same statutory language which the Hughes Court found unequivocally authorized only the trial judge to make findings on aggravating factors still only authorizes the trial judge to make such findings here.

Another holding of Hughes which transcends the limits of the facts of Hughes is the Court’s holding that former RCW 9.94A.535 (2003) presents a situation “distinct from those where a statute merely is silent or ambiguous on an issue and the court takes the opportunity to imply a necessary procedure.” 154 Wn.2d at 151. And yet a third holding of Hughes which is relevant to the issues here is the Court’s finding that former RCW 9.94A.535(2) (2003) provides for aggravating factors “so technical and legalistic that it is difficult to conceive that the legislature would intend or desire for lay juries to apply them.” 154 Wn.2d at 151. Although arguably the Legislature may now have indicated a contrary intent in enacting the Blakely fix legislation and allowing jurors to find many of those same aggravating factors, the point of this holding of

Hughes is still valid that, when it was crafted, the exceptional sentencing scheme was specifically designed to be based upon findings by the trained legal mind of a judge, as evidenced by the complexity and subtlety of many of the aggravating factors. That fact supported the Hughes Court and supports Mr. Hudson's position here because it further establishes that former RCW 9.94A.535 (2003) did not and was not intended to provide for a jury to make findings on aggravating factors.

Division Three's superficial limitation of Hughes to its specific facts in Davis ignored the most fundamental tenets of legal analysis: that a case which may not be directly precedential on all points can still be authoritative on others. And Division Three is bound by the Supreme Court's interpretations of the statute in Hughes, to the extent those interpretations apply here. See, e.g., State v. Hairston, 133 Wn.2d 534, 539, 946 P.2d 397 (1997).

Davis also erroneously relied on RCW 2.28.150 and CrR 6.16 as providing authority to go outside the statutory limits of former RCW 9.94A.535 (2003). RCW 2.28.150 provides:

When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given, and the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.

CrR 6.16 provides that a trial court "may submit to the jury forms for such special findings which may be required or authorized by law." In Davis, Division Three held that the trial court had the authority to "submit forms to the jury for special findings" under CrR 6.16 and that the procedure

used was proper under RCW 2.28.150 because “[a]t the time of Mr. Davis’s [sp] trial, there was no specific procedure for imposing an exceptional sentence” after Blakely, so the court could properly fashion one. Davis, 2006 Wash. App. LEXIS 1043 at *15-16.

The first problem with this reasoning is obvious just from the plain language of the statute and rule. The rule only allows the court to submit forms to the jury to make “such special findings which *may be required or authorized by law.*” CrR 6.16 (emphasis added). But there is no applicable law requiring or authorizing a jury to make findings on aggravating circumstances to support use of the rule here. Former RCW 9.94A.535 (2003) did not authorize submitting the issue to the jury. As the Hughes Court made clear, the language of that statute provided authority only for a judge to find aggravating factors. 154 Wn.2d at 151.

Further, RCW 2.28.150 specifically applies only if the “course of proceeding is not specifically pointed out by statute.” The statute only allows “the courts to adopt suitable procedures to effect their jurisdiction when no procedures are specifically provided.” In re Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983). Where the statute is being applied in a situation involving deprivation of a liberty interest, the statute is strictly construed. Id.; see State v. Nelson, 53 Wn. App. 128, 134, 766 P.2d 471 (1988).

Thus, in Nelson, the Court held that, although the superior court had jurisdiction to impose restitution, it could not rely on RCW 2.28.150 to order the defendant’s property sold to pay for it. 53 Wn. App. at 134-

35.⁶ RCW 2.28.150 did not apply, because the relevant restitution statutes specifically provided a “course of proceeding” by providing that a court could either confine a defendant or modify monetary payments or community service obligations. 53 Wn. App. at 135.⁷ The Court rejected the prosecution’s argument that RCW 2.28.150 could be used to support the additional proceeding of selling property when there was already a proceeding not including that option, specified in the statute. 53 Wn. App. at 135.

In this case, this Court need not decide whether former RCW 9.94A.535 (2003) already provided a “course of proceeding” so that RCW 2.28.150 does not apply. The Supreme Court already has. In Hughes, the Court specifically declared that the very same statutory scheme presented a “situation. . . distinct from those where a statute merely is silent or ambiguous on an issue and the court takes the opportunity to imply a necessary procedure.” 154 Wn.2d at 151.

Even further, the Hughes Court specifically declared its disagreement with Division One’s decision on this point in State v. Harris, 123 Wn. App. 906, 922-26, 99 P.3d 902 (2004), overruled by Hughes, 154 Wn.2d at 153 n. 16. In Harris, Division One had primarily relied on RCW 2.28.150 and CrR 6.16 - the same statute and rule Division Three relied on in Davis. Harris, 123 Wn. App. at 922-26. The Harris Court held that the

⁶After Nelson was decided, the Legislature amended the statute to add that authority. See State v. Wiens, 77 Wn. App. 651, 653, 894 P.2d 569 (1995), review denied, 127 Wn.2d 1021 (1995).

⁷The Court went on to find that, even if RCW 2.28.150 was applicable, executing against personal property in order to pay a restitution order was not “most conformable to the spirit of the laws,” as the statute also required. Nelson, 53 Wn. App. at 135-36.

statute and the rule “envison situations in which the superior courts will use procedures that are not specifically prescribed by statute.” 123 Wn. App. at 923-24. Next, it cited cases such as State v. Furth, 5 Wn.2d 1, 104 P.2d 925 (1940), in which the Supreme Court held that a statute which did not provide for a jury trial for determining “habitual criminal status” was unconstitutional. Harris, 123 Wn. App. at 925. According to Division One, Furth and similar cases indicated the authority of trial courts to “supply a jury procedure when it is constitutionally required.” 123 Wn. App. at 925.

Finally, the Harris Court found cases like Martin and Frampton inapplicable, because the statutes in those cases provided no procedure for imposing a death penalty on someone who pled guilty. 123 Wn. App. at 926 n. 57. In contrast, the Harris Court posited, the exceptional sentencing statutes “provide both a penalty and an implementing procedure.” Id. As a result, Division One found “no doubt here, as there was in Frampton and Martin, regarding the Legislature’s intent to provide a procedure.” Id. In effect, the Blakely decision was deemed to have rewritten the statute and eliminated the relevant procedure, which the court could then provide by using the general authority of RCW 2.28.150 and CrR 6.16. The Harris Court concluded that it was proper for a trial court to empanel a jury on remand under the statute and the rule, to consider aggravating factors set aside on appeal as invalid under Blakely. 123 Wn. App. at 926-27.

In specifically overruling Harris, the Hughes Court indicated that former RCW 9.94A.535 (2003) was not “silent or ambiguous” on the issue of whether the jury or judge was authorized to find aggravating factors to

support an exceptional sentence. 154 Wn.2d at 151. The Court went on:

We recognize that Division One of the Court of Appeals came to the opposite conclusion in State v. Harris. . . However, we disagree with that conclusion as well as the court's reasoning supporting it - that because there is nothing in the statute to prohibit the procedure and because trial courts have some inherent authority to imply procedures where they are absent, that we could do so here in the face of legislative intent to the contrary. We reach the opposite conclusion.

154 Wn.2d at 151 n. 16.

Thus, the highest court in this state has already rejected the very same reasoning used by Division Three in Davis. It has already rejected the idea that former RCW 9.94A.535 (2003) did not specifically point out a "course of proceeding" so that RCW 2.28.150 applies. It has also already implicitly rejected the idea that the fact that Blakely invalidated that "course of proceeding" as unconstitutional somehow removed the proceeding from the statute and created the authority for a court to act under RCW 2.28.150 and CrR 6.16.

Further, the highest court in this state has already held that Martin and Frampton and similar cases *are* relevant and applicable to interpretation of the scope of former RCW 9.94A.535 (2003). Hughes, 154 Wn.2d at 150-51. In contrast to Division One's claim in Harris, in Hughes the Supreme Court *specifically relied* on those cases and their holdings about the prohibition against judicial creation of procedure not contained in a statute "for the sole purpose of rescuing a statute from a charge of unconstitutionality." 154 Wn.2d at 150-51, quoting, Martin, 94 Wn.2d at 18 (Horowitz, J., concurring).

Notably, the Hughes Court's application of those cases, and its

rejection of the arguments in Harris, makes it clear that the holdings of Martin, Frampton and their progeny are not limited in their application to cases where a statute provided for a procedure but had a “hole” in it somewhere. Hughes establishes that those cases also apply where, as here, the procedure was all-encompassing but constitutionally infirm. In both situations, the Legislature has written a statute, either without anticipating a need or without anticipating that it would later be found unconstitutional. And in both situations, the court does not have the authority to add to or amend the statute to patch the hole, regardless whether that hole was created by Legislative oversight or subsequent judicial decision.

Former RCW 9.94A.535 (2003) simply did not provide a procedure to use in the event the procedure it required was found constitutionally infirm. And the statute clearly and unequivocally granted authority only to the trial court to make findings of fact regarding the aggravating factors necessary to support an exceptional sentence. Washington appellate courts have been repeatedly asked to expand the scope of a trial court’s authority beyond statutory limits and has repeatedly refused to do so, even in circumstances where exceptional sentences have been involved. See, State v. Eilts, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980) (reversing order because it exceeded the court’s statutory authority); State v. Akin, 77 Wn. App. 575, 892 P.2d 774 (1995) (reversing juvenile sentences where the court exceeded its statutory authority by recommending work ethic camp without statutory authority); State v. Paine, 69 Wn. App. 873, 850 P.2d 1369, review denied, 122 Wn.2d 1024 (1993) (reversing exceptional sentence because the court had

exceeded its statutory authority in ordering it); State v. Theroff, 33 Wn. App. 741, 657 P.2d 800, review denied, 99 Wn.2d 1015 (1983) (reversing the sentencing order requiring a payment to a charity as a condition of probation as outside the court's statutory authority). There was no statutory authority for the court to submit the aggravating factor to the jury for determination and then base an exceptional sentence on that finding. The trial court's use of such a statutorily unauthorized procedure here was improper, in violation of the separation of powers doctrine and due process. This Court should so hold and should reverse and remand for imposition of a standard range sentence, the only sentence which can be statutorily and constitutionally imposed.

d. Mr. Hudson's rights to equal protection and Fifth and Sixth Amendment rights were violated

In addition, the procedure used in this case violated Mr. Hudson's state and federal rights to equal protection and impermissibly infringed upon his exercise of the constitutional right to trial.

Both Article I, § 12, of the Washington constitution and the Fourteenth Amendment require that similarly situated individuals receive like treatment under the law. See Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997); Dandridge v. Williams, 397 U.S. 471, 518, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970).⁸ When conducting an equal protection analysis, the first step is to determine the appropriate standard of review. See State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). This is

⁸Washington courts have thus far construed the Washington clause as "substantial identical" to the federal clause, and use the same analysis. See State v. Shawn P., 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993).

done by looking at the nature of the interests or class affected. See State v. Garcia-Martinez, 88 Wn. App. 322, 326, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002 (1998). Where it is a fundamental right or a suspect class, “strict scrutiny” is applied. See State v. Ward, 123 Wn.2d 488, 516, 869 P.2d 1062 (1994); State v. Schaaf, 109 Wn.2d 1, 19-20, 743 P.2d 240 (1987).

Here, Mr. Hudson is in that class of people whose cases arose in the short window of time after Blakely and before the effective date of the Blakely fix statute. Under the trial court’s analysis of former RCW 9.94A.535 (2003), the members of that class who exercise their constitutional right to trial, like Mr. Hudson, can be subjected to an exceptionally long sentence without their consent because the jury already empaneled for trial has the authority to decide aggravating factors to support that sentence. But those who did not exercise the constitutional right to trial and instead pled guilty cannot be subjected to an exceptional sentence without their consent. See, e.g., State v. Ermels, 156 Wn.2d 528, 539-40, 131 P.3d 299 (2006). Because no jury is empaneled in their case, the only way an exceptional sentence could be imposed upon them would be if they knowingly, voluntarily and intelligently waived their Blakely rights. See id.

Applying “strict scrutiny” here, the prosecution cannot meet its burden of proving that the different treatment received by defendants in the class who pled guilty versus defendants in the class who went to trial was constitutional. A law must be narrowly drawn and necessary to further compelling governmental interests to meet that standard. See

Graham v. Richardson, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971); City of Sumner v. Walsh, 148 Wn.2d 490, 505, 61 P.3d 1111 (2003). By definition, the different treatment of risking an exceptional sentence is based solely upon the exercise of the fundamental constitutional right to have a jury trial.

Thus, interpreting former RCW 9.94A.535 as the trial court did here resulted in a violation of Mr. Hudson's Fifth and Sixth Amendment rights. Under the Fifth Amendment, a defendant has a right not to plead guilty, while the Sixth Amendment guarantees the right to jury trial. See State v. Bowerman, 115 Wn.2d 794, 802, 802 P.2d 116 (1990). Where a statute is interpreted as providing a maximum penalty which is lesser for those who plead guilty and greater for those who go to trial, that statute imposes an impermissible burden upon the Fifth and Sixth Amendment rights. See United States v. Jackson, 390 U.S. at 571-71; Robtoy v. Kincheloe, 871 F.2d 1478 (9th Cir. 1989), cert. denied, 494 U.S. 1031 (1990).

In Jackson, the Supreme Court addressed the constitutionality of the death penalty portion of the Federal Kidnapping Act, which imposed the death penalty only on people who were convicted by a jury. 390 U.S. at 571-72. Under the Act, the Court noted, "the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed," while the defendant "ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die." 390 U.S. at 582. As a result, the Court struck down that portion of the statute, because:

The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional.

Jackson, 390 U.S. at 581. Even if the procedure set forth in the Act was not “inherently coercive,” it need not be in order to “impose an impermissible burden upon the assertion of a constitutional right.” 390 U.S. at 583.

Similarly, in Robtoy, the 9th Circuit held impermissible a statutory scheme which set the maximum for those who entered pleas as life with the possibility of parole while setting the maximum for those who went to trial at life *without* that possibility. 871 F.2d at 1481. As the Washington Supreme Court has held, the Robtoy Court declared that, “due to the qualitative difference between the penalties, imposing a sentence of life without possibility of parole only on those who are found guilty by a jury also violates the defendant’s right to a jury trial.” Bowerman, 115 Wn.2d at 802. These cases all “stand for the principle that a statutory scheme that punishes people charged with the same offense differently, depending upon whether they plead guilty or have a jury trial, is unconstitutional.” Bowerman, 115 Wn.2d at 803.

Here, under the trial court’s interpretation of former RCW 9.94A.535 (2003), Mr. Hudson was subject to an exceptional sentence only because he exercised his constitutional right to jury trial. And someone who was charged with the very same offense but pled guilty would not be subject to such a sentence involuntarily, as Mr. Hudson was,

because that person would have to agree to imposition of an exceptional sentence in order for one to be imposed. Clearly, the statutory scheme, as interpreted by the trial court and applied here, punishes people who exercise their right to trial more severely, because only those people could be involuntarily ordered to serve an exceptional sentence. There can be no compelling governmental interest which would support such punishment under the equal protection clause.

Because the imposition of the exceptional sentence here violated Mr. Hudson's rights to equal protection, his Fifth Amendment right not to plead guilty, and his Sixth Amendment right to a jury trial, reversal is required.

e. The notice was constitutionally insufficient

In addition, even if it were proper for the prosecution and court to effectively write into the statute a new procedure which is contrary to the procedure the Legislature had provided, reversal would still be required because the notice the prosecution filed was constitutionally insufficient. As a threshold matter, counsel requested a bill of particulars below. CP 87-94. That request was based upon the language of the information and amended information, neither of which contained any mention of an aggravating factor. CP 1-5, CP 21-26. Instead, the aggravating factor was set forth in a separate "notice of intention." CP 57.

By moving for a bill of particulars, Mr. Hudson specifically challenged the sufficiency of the charging document and preserved this issue for review. See State v. Leach, 113 Wn.2d 679, 697, 782 P.2d 679 (1989). In any event, where a charging document omits an essential

element, that issue may be raised at any time, even for the first time on appeal and even if no bill of particulars is requested. State v. Holt, 104 Wn.2d 315, 320-21, 704 P.2d 1189 (1985). This is because a bill of particulars is “not a part of the information and can in no way aid an information which is fundamentally defective.” See State v. Boone, 65 Wash 331, 336, 118 P. 46 (1911).

On review, this Court should reverse. Article I, § 22, the Sixth Amendment and the Fourteenth Amendment guarantee the right for a defendant to be properly notified of the case he is facing at trial. See State v. Brett, 126 Wn.2d 136, 154, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931 (1996), post conviction relief granted, 142 Wn.2d 868, 16 P.3d 601 (2001); Specht v. Patterson, 386 U.S. 605, 18 L. Ed. 2d 326, 87 S. Ct. 1209 (1967). In State v. Frazier, 81 Wn.2d 628, 503 P.2d 1073 (1972), the Supreme Court held that these rights were violated when a firearm enhancement was not charged in the information but was imposed at sentencing. The Court first rejected the idea that the enhancement was a “necessary unwritten element” of the underlying crime or itself a separate “crime.” 81 Wn.2d at 631-32. But the information “failed to charge that the appellant, by her actions, was subject to the added penalty” of the firearm enhancement “and further failed to allege specific acts were committed, in the words of the statute, to bring her under that portion of the statute’s added penalties.” 81 Wn.2d at 633. Thus, due process was violated.

Similarly, in State v. Nass, 76 Wn.2d 368, 370, 456 P.2d 347 (1969), the Court noted the “rule that, where a factor aggravates an offense

and causes the defendant to be subject to greater punishment than would otherwise be imposed,” the issue must be presented only “upon proper allegations” so that the relevant fact “must be alleged” in the information. Because there were no allegations in the information regarding a fact which would support imposition of an enhanced penalty, the Court reversed the sentence and ordered “ a sentence consonant with the allegations contained in the information [to] be imposed.” 76 Wn.2d at 372; see also State v. Tongate, 93 Wn.2d 751, 754, 613 P.2d 121 (1980) (same).

In the past, where the sentencing court had the authority to find aggravating facts and decide to impose an exceptional sentence, Washington courts have held that due process did not require the prosecution to “inform a defendant prior to trial that it will seek a sentence beyond the presumptive range or be barred from requesting anything outside that range.” State v. Gunther, 45 Wn. App. 755, 757, 727 P.2d 258 (1986), review denied, 108 Wn.2d 1013 (1987). The reason for this holding was that, under the then-existent exceptional sentencing scheme, the judge *always* had the authority to impose an exceptional sentence, even if the state did not request one. 45 Wn. App. at 758. To require notice of that “ever-existent potentiality would be redundant. . . The possibility of an exceptional sentence always exists, and notice of that fact is inherent in the statutory provisions which create the possibility.” 45 Wn. App. at 758, quoting, D. Boerner, *Sentencing in Washington*, § 9.19 (1985).

This holding also reflects the understanding of the nature of aggravating circumstances and the law on “elements” which prevailed at

the time. Under the Sixth Amendment and Article I, § 22, a charging document was required to include all essential elements of the crime, even if the elements were nonstatutory. See Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); State v. Kjorsvik, 117 Wn.2d 93, 101-102, 812 P.2d 86 (1991). This “‘essential elements rule’ has long been settled law in Washington and is based on the federal and state constitutions and on court rule.” State v. Vangerpen, 125 Wn.2d 782, 787-88, 888 P.2d 1177 (1995).

Under that theory, aggravating factors were not “elements” of the offense. See State v. Kincaid, 103 Wn.2d 304, 309, 692 P.2d 823 (1985). Instead, they were “aggravation of penalty” factors. 103 Wn.2d at 307. Thus, in Kincaid, the court held that statutory aggravating factors which enhanced a punishment were not “elements” because they simply “provide for an increased penalty where the circumstances of the crime aggravate the gravity of the offense.” 103 Wn.2d at 312.

Now, however, it is clear that facts which provides for such an increased penalty, which this state has called “aggravating factors,” *are* elements, regardless how they are labeled. See Ring v. Arizona, 536 U.S. 584, 602, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Further, the Supreme Court has explicitly declared that “those facts settling the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for purposes of the constitutional analysis.” Harris v. United States, 536 U.S. 545, 557-57, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2003). Aggravating factors are now clearly defined as elements of the

aggravated crime the prosecution is seeking to prove, because they permit the judge to impose a sentence above the standard range. Ring, 536 U.S. at 609 (aggravating circumstances that make a defendant eligible for increased punishment “operates as the functional equivalent of an element of a greater offense”).

Thus, the foundation for the holding that aggravating factors need not be alleged in the information no longer exists. Aggravating factors *are* elements, not simple “aggravation of penalty” facts. Further, under Blakely, a defendant is no longer on “notice” that every case may involve an exceptional sentence, and that assumption is no longer true. A judge no longer has the discretion to spontaneously make factual findings on an aggravating factor and impose an exceptional sentence in every case because it would run afoul of the Sixth Amendment under Blakely. Only if a factual aggravating factor is proven to a jury beyond a reasonable doubt can such a sentence be imposed. 542 U.S. at 302-305.

With the developments in the law, the holdings of Gunther, Kincaid, and similar cases no longer retain any currency. Under the law as it now exists, an aggravating factor must, like all other elements, be pled with specificity in the information. In this case, those requirements were not met. Neither the initial nor the amended information contained anything about aggravating factors, thus it was not pled. CP 1-5, 21-26. And the “notice of intention” filed almost two years after the information provided only that the state would “seek an exceptional sentence based on [former] RCW 9.94A.535(2)(d) (‘major economic offense or series of offenses’)”. CP 57.

The right to notice includes not only the right to notice of the specific elements of the prosecution's case but also of "the specific *conduct* of the defendant which allegedly constituted" those elements. Auburn v. Brooke, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992) (emphasis added). The specificity is required because of the constitutional rights of the defendant to be apprised "with reasonable certainty of the nature of the accusations against him." State v. Leach, 113 Wn.2d 679, 694-95, 782 P.2d 552 (1989). It is not sufficient for the prosecution to simply cite to a statute, because defendants are not required to "search for the rules or regulations they are accused of violating." Auburn, 119 Wn.2d at 635. And the Supreme Court has held that it is not enough to simply name an offense; the information "must state the acts constituting the offense in ordinary and concise language." Id.

Here, the aggravating factor was that the crime was a major economic offense or series of offenses. Former RCW 9.94A.535(2)(d) (2003) authorized use of that factor when

The current offense was a major economic offense or series of offenses, so identified by consideration of any of the following factors:

- (i) The current offense involved multiple victims or multiple incidents per victim;
- (ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;
- (iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or
- (iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

Nothing in the notice of intention gave any indication which way the prosecution was planning to prove the aggravating factor. It did not specify which means it was going to use - multiple victim or high degree of sophistication, for example. More importantly, nothing in the notice gave Mr. Hudson any indication of the conduct he was supposed to have committed which would support a finding on the aggravating factor. CP 57.

The prosecution did not charge an essential element of its case in the information, and thus failed to provide constitutionally sufficient notice. Further, the notice given was insufficient. Reversal of the exceptional sentence is required.

3. THE COURT ERRED AND VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHTS IN CALCULATING THE OFFENDER SCORE

Even if former RCW 9.94A.535 (2003) had authorized having the jury decide the aggravating factor, reversal of the sentence would still be required, because the court did not properly calculate Mr. Hudson's offender score and violated Mr. Hudson's Sixth Amendment rights.

A court deciding whether to impose an exceptional sentence must "first consider the presumptive punishment as legislatively determined for an ordinary commission of the crime," because it cannot "adjust up or down to account for the compelling nature of the aggravating or mitigating circumstances of a particular case" without knowing where to start. State v. Parker, 132 Wn.2d 182, 187, 937 P.2d 575 (1997). To make that determination, the court is required to have first properly calculated the standard range. Id. Otherwise, the court has failed to properly determine

the sentence. Id.

Thus, an error by a sentencing court in calculating the standard range sentence is reversible even if the judge ultimately departs from the erroneous standard range to impose an exceptional sentence. Id. The only exception is if the record “clearly indicates the sentencing court would have imposed the same sentence anyway.” Parker, 142 Wn.2d at 189. Proving such an indication is difficult, as the Supreme Court has stated that it “cannot imagine” many situations in which it could be shown that the same sentence would have been imposed. 132 Wn.2d at 192-93.

In this case, this Court should reverse, because the trial court erred in calculating the standard range sentence, in several ways.

- a. The court erred in calculating the range for the conspiracy and leading organized crime counts
 - i. Relevant facts

Some of the conduct and crimes charged occurred prior to a legislative amendment which now permitted counting juvenile convictions in an adult offender score. 6RP 17. At sentencing, the prosecutor asked the court to count the juvenile convictions not only in the cases where the crime occurred after the effective date of the amendment but also in crimes the prosecutor stated involved conduct which occurred both before and after the amendments. 6RP 17-18. As a result, the offender scores for the conspiracy and leading organized crime offenses would be far higher. 6RP 17-18. Counsel objected, arguing that the law was ambiguous as to which sentencing scheme to apply in this situation, so that the court should apply the “rule of leniency” and use the lesser offender score of 4. 6RP 30, 31.

The court apparently agreed with the prosecutor and calculated the standard ranges based upon an offender score of 7 for all counts except count 5 (bribery), which was calculated using an offender score of 4. CP 405. The standard ranges as calculated by the court were:

<u>Count</u>	<u>Score</u>	<u>Standard range</u>
1 (trafficking)	7	43-57 months
5 (bribery)	4	31-41 months
6 (bribery)	7	57-75 months
7 (conspiracy)	7	32.25-42.75 months
8 (leading org. crime)	7	108-144 months

See CP 405.

ii. The court erred in calculating the ranges for two offenses

Until 1997, prior juvenile adjudications of guilt were not counted in an adult offender score if those offenses occurred before the defendant was 15, or were not felonies, or if the prior conviction was for a class B or C felony or serious traffic offense and the defendant was less than 23 at the time of the current crime. See State v. Smith, 144 Wn.2d 665, 670-71, 30 P.3d 1245 (2001). After several attempts at amendments, the Legislature finally rewrote the statutory scheme so that juvenile offenses could be included in calculation of an offender score. See State v. Varga, 151 Wn.2d 179, 192-93, 86 P.3d 139 (2004). Those amendments were effective on June 13, 2002, and by their terms, only apply to crimes committed after that date. 151 Wn.2d at 184; Laws of 2002, ch. 107, § 4.

Thus, for current adult offenses committed after June 13, 2002, all juvenile offenses are included in the offender score. In re Personal Restraint of Jones, 121 Wn. App. 859, 871, 88 P.3d 424 (2004). If the

current offense was committed before that date but after July 1, 1997, and the prior juvenile offense is not a sex offense, serious violent offense, or class A felony committed while 15 or older, the prior juvenile adjudication does not count if the defendant committed the offense before age 15 and was 15 before July 1, 1997. Jones, 121 Wn. App. at 871.

In this case, the relevant dates for the current offenses were declared by the court below as

01/01/03-01/23/03	trafficking offense (count 1)
05/24/02	bribery (count 5)
07/26/02	bribery (count 6)
04/01/02-01/21/04	conspiracy (count 7)
04 of 2002-01/23/03	leading organized crime (count 8).

See 6RP 37-38. Clearly, the trafficking and second bribery occurred after the 2002 amendments, and all juvenile offenses therefore count in sentencing for those crimes. Just as clearly, the first bribery occurred before the amendments and the trial court properly did not count juvenile offenses in sentencing on that crime.

For the two remaining counts, the court erred in including a number of the juvenile offenses in the calculation. In the judgment and sentence, the prior convictions the court found were listed as follows:

<u>Crime</u>	<u>Sentenced</u>	<u>Date of crime</u>	<u>Juvenile/Adult</u>
BURGLARY 2	06/12/91	03/05/91	J
BURGLARY 2	10/02/91	07/18/91	J
BURGLARY 2	11/06/91	09/10/91	J
MAL MIS 1	11/06/91	09/10/91	J
TMVWOP	02/24/93	10/12/92	J
TMVWOP	07/17/95	10/12/92	J
ATT ELUDE	07/17/95	10/27/94	J
TMVWOP	04/20/95	11/10/94	J
TMVWOP	07/17/95	03/08/95	J
PSP 2	02/22/02	07/25/01	A

CP 405.⁹ According to the amended information, Mr. Hudson was born on December 18, 1978. CP 21. He was therefore 15 on December 18, 1993. None of these offenses is a sex offense or serious violent offense. Former RCW 9.94A.030(37) (2002). As a result, all but the three final juvenile crimes (the attempt to elude and 1995 TMVWOPs) should not be counted in an offender score for a crime committed prior to June 13, 2002, the effective date of the 2002 amendments.

Here, the trial court erroneously included those offenses in the offender score for both the conspiracy and the leading organized crime counts. Conspiracy is defined in RCW 9A.28.040(1), which provides:

A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

This statute creates an inchoate crime, the essence of which is the agreement to commit an unlawful act. See State v. Dent, 123 Wn.2d 467, 476, 869 P.2d 392 (1994). The focus of the crime is “on the conspiratorial agreement, not the specific criminal object or objects.” State v. Bobic, 140 Wn.2d 250, 265, 996 P.2d 610 (2000). Further, even if the object of the agreement amounting to conspiracy is to

commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.

140 Wn.2d at 264-65; quoting with approval, Braverman v. United States,

⁹An additional TMVWOP sentenced 11/02/92, was dropped from the criminal history because the prosecution found it was not correct. 6RP 13.

317 U.S. 49, 63 S. Ct. 99, 87 L. Ed. 2d (1942). Thus, it is the “agreement, not the criminal object” which is at issue in a charge of conspiracy. Bobic, 140 Wn.2d at 265.

In this case, the conspiracy was charged as happening “during the period between the 1st of January, 2002, and the 21st day of January, 2003.” CP 24. The jury instruction reflected these dates. CP 197. And the jury heard evidence about conduct which occurred both before and after June 13, 2002.

Similarly, the jury heard evidence regarding the “leading organized crime” count which indicated conduct both before the effective date of the statute and after. And a person is guilty of the crime under former RCW 9A.82.060 (2001), when they take any act “organizing, managing, directing, supervising, or financing” three or more people with intent to engage in a pattern of criminal profiteering activity, defined here by the charging document as “trafficking in stolen property.” CP 23-24.

RCW 9.94A.345 requires that “[a]ny sentence imposed under this chapter shall be determined *in accordance with the law in effect when the current offense was committed.*” (Emphasis added). It is not clear under the statute whether an offense is “committed” on the first date which the prosecution alleges that it occurred, or the last, or all of the days included in the dates charged. As a result, the rule of lenity requires interpreting the statute in favor of Mr. Hudson and a lesser sentence. See e.g., State v. Jacobs, 154 Wn.2d 596, 601-602, 115 P.3d 281 (2005). That interpretation would be that an offense is deemed “committed” on the first date unless the jury was asked to make a specific finding as to the relevant

date of the crime, or unless there is no evidence from which a reasonable jury could have found the crime occurred prior to the cut-off date in question.

Here, the jury was not asked to make findings as to the dates. And the jury heard evidence of agreements (i.e. bribes and VIN activity) which occurred prior to the effective date of the statutory amendments. The rule of lenity required the court to apply the law in effect prior to the 2002 amendments under the facts of this case. The court erred in failing to apply the rule of lenity and in determining the standard range. Reversal is required.

b. Appellant's Sixth Amendment rights were violated

Reversal is also required because the trial court violated Mr. Hudson's Sixth Amendment rights under Blakely by making factual findings regarding identity and whether Mr. Hudson was on community placement, then relying on those findings to increase the punishment range.

i. Relevant facts

Sentencing proceedings were continued several times so that the prosecution could get evidence it needed to prove the offender score. 3RP 2, 4RP 2. On July 15, 2005, about two months after trial, the prosecution asked for a second continuance because Mr. Hudson was not sure which prior convictions actually belonged to him, because his brother uses his name and gets in trouble. 4RP 2-3. He had filed a sentencing memo challenging the documentation of the prior convictions because of the question of identity, and stating "that he was on community custody at the

time of the offense, stating it was “unproven.” CP 222-25.

At the July 15 hearing, the court asked whether the state had to prove the prior convictions belonged to Mr. Hudson “by a preponderance of the evidence,” and whether that required fingerprint analysis, booking photos, or other evidence. 4RP 3-4. The judge said he could look at the documents and file and “compare signatures,” and that somebody could get Mr. Hudson’s brother’s signature for the judge to compare as well, but that any such “evidentiary hearing” would not be handled right then, on the motion docket. 4RP 5. He also said, “you’ve put the State on their burden, and they will accept that, and I will accept that request, but I am not going to do it today.” 4RP 6.

The court continued the matter, then told Mr. Hudson that, at the future hearing, he would “have an opportunity to present evidence,” including his testimony. 4RP 6-7. After another continuance, sentencing hearing was finally held on September 23, 2005. 5RP 3, 6RP 2. At that hearing, the prosecution presented what he called “certified judgments and sentences” with Mr. Hudson’s name on them. 6RP 13; CP 321-89. The prosecutor declared that the signature on the adult conviction “[m]atches” those on the other cases was sufficient proof of identity, as was the fact that the same unique name was on the documents and the same birthday. 6RP 15. The prosecutor also argued that the fact that one of the prior judgments and sentences had a listing of the same prior convictions that were alleged here, as further proof of identity. 5RP 15.

Mr. Hudson told the court that one of the burglaries was not his, noting that the document on that count had no signature or set of

fingerprints. 6RP 26. He began indicating some of the other convictions were not his when the court said that, because the prosecution had presented some evidence, Mr. Hudson needed to present some evidence “in some sort of a proper legal fashion, either by way of statement or testimony from your client.” 6RP 27. Mr. Hudson decided not to take the stand because he was not “specifically sure” which convictions were his and could not testify with certainty about it. 6RP 27-28.

In deciding that the prior convictions were all Mr. Hudson’s, the court relied on the fact that all but the June 12, 1991, offense had “an attestation by a deputy clerk” that the fingerprints on it were of Mr. Hudson. 6RP 32-33. The court applied the standard of preponderance of the evidence and concluded that the evidence presented was sufficient. 6RP 33.

Also in calculating the offender score, the court included a point based upon its determination that Mr. Hudson had committed the offense while on community placement. CP 405.

ii. Mr. Hudson’s Sixth Amendment rights were violated

Under Blakely, the Sixth Amendment requires that any fact which increases the punishment a defendant would face based solely upon the jury’s verdict must be proved to a jury, beyond a reasonable doubt. 542 U.S. at 303-305. The protections described in Blakely and its ancestor, Apprendi, apply to such facts regardless whether they are labeled “sentencing factors” or something else. See Ring, 536 U.S. at 602. So long as a fact serves to increase the punishment the defendant faces, it

matters not if the fact is called an “aggravating factor” or a “sentencing factor” or even a “non-element;” it is still an element and under the Sixth Amendment must be proved to a jury beyond a reasonable doubt. Id.; see Apprendi, 530 U.S. at 471-90. It is the *effect* the fact has on punishment, regardless of what it is called, which is dispositive. Apprendi, 530 U.S. at 484. In this case, Mr. Hudson’s Sixth Amendment rights were violated in two ways.

First, the trial court violated his rights under Blakely by making a factual determination about identity and then relying on that determination in increasing his offender score by including all of the prior convictions in that calculation. Under RCW 9.94A.500(1), the prosecution has the burden of proving a defendant’s criminal history for sentencing purposes, by a preponderance of the evidence. A certified copy of a judgment and sentence is the “best evidence” of a prior conviction, but other “comparable documents of record or transcripts of prior proceedings” may also be introduced, provided the prosecution show “that the writing is unavailable for some reason other than the serious fault of the proponent.” State v. Fricks, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979), quoting, McCormick, *Handbook of the Law of Evidence*, § 230, at 560 (2nd ed. 1972); State v. Labarbera, 128 Wn. App. 343, 347, 115 P.3d 1038 (2005). A defendant has no duty to disclose any prior convictions, unless he or she is convicted pursuant to a plea agreement. State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002).

Because prior convictions were obtained after proof to a jury beyond a reasonable doubt, the U.S. Supreme Court has created an

exception for Blakely where all that is being proved is that the prior conviction exists. Apprendi, 530 U.S. at 490. The exception is construed narrowly, and only applies to the fact of whether a prior conviction exists, not other facts. See Apprendi, 530 U.S. at 490; Jones v. United States, 526 U.S. 227, 248-29, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999). The reason for the exception is that the fact of the prior conviction was “entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilty beyond a reasonable doubt.” Apprendi, 530 U.S. at 496.

The question here, however, was not whether the prior convictions *existed* but whether they were committed by the same man who was before the court for sentencing. The question was therefore one of identity. To make its determination, the court was required to examine more than just a record; it had to make factual findings on such things as whether the fingerprints looked the same, whether it appeared the same signature was on the various documents, among others. It is well settled that identity is a question of fact. See State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974); State v. Salas, 127 Wn.2d 173, 185, 897 P.2d 1246 (1995).

Thus, like a finding of “rapid recidivism,” the finding that Mr. Hudson was the same person as the person who had all of the prior convictions required more than just proof that those prior convictions existed. It required examination of other facts and circumstances and a conclusion regarding identity of a person, not simply whether a prior conviction exists. See e.g., Hughes, 154 Wn.2d at 141-42 (rapid recidivism, while related to the question of prior convictions, was not

covered under the narrow “prior conviction” exception as it required proof of other facts).

Before Blakely, the Supreme Court had held that the prosecution was only required to prove identity by a preponderance of the evidence, that the court could make factual findings on identity. Ammons, 105 Wn.2d at 186. In addition, in Ammons, the Court held that the fact that the defendant and the person named in the prior conviction had the same “identity of names” sufficient evidence to satisfy the burden unless the evidence was “rebutted” by sworn testimony from the defendant that some of the convictions were not his. Ammons, 105 Wn.2d at 189-90. If the defendant presented such evidence, that would

suspend the use of the prior conviction in assessing the presumptive standard sentence range until the State proves by independent evidence, for example, fingerprints . . . that the defendant before the court for sentencing and named in the prior conviction are the same.

105 Wn.2d at 189-90.

Since Blakely, however, it appears that no Washington court has addressed the question of whether Ammons retains any currency at all. It does not. Decided well before Blakely, Ammons was based upon an understanding of the nature of what constituted a “fact” and an “element” and what the Sixth Amendment required at the time. Now it is clear that any fact which increases the punishment the defendant faces beyond that which he faced based solely upon the jury trial must be proved to a jury, beyond a reasonable doubt. Blakely, 542 U.S. at 302-305.

Here, the jury trial only established that Mr. Hudson was the person who committed the *current* crimes. It did not establish that he was

the same person mentioned in the documents the prosecution presented as supporting criminal history.

Indeed, the factual nature of this question was made clear by the court's rulings below. In granting one of the continuances after Mr. Hudson raised the question of identity regarding the alleged prior convictions, the court recognized that there would have to be an "evidentiary hearing" on the issue, that it would require comparing of signatures and other things, and that Mr. Hudson would "have an opportunity to present evidence," including his testimony, on the issue. 4RP 5-7.

Further, in ruling on the issue, the court specifically looked at each document submitted by the prosecution and made factual findings as to whether the person to whom the document referred was, in fact, Mr. Hudson and not someone else. The prosecutor argued that the Court should compare signatures on the documents, and should note that the criminal history was similar on one of the judgments and sentences to what was currently alleged to belong to Mr. Hudson. 6RP 14-15. In ruling, the court said it would "accept as evidence" the documents submitted by the prosecution and that it was now time for Mr. Hudson to present evidence in response. 6RP 27. The court then relied on the fact it found from looking at the documents, that they all, save one, had "an attestation by a deputy clerk or fingerprint on the particular document that they belonged to "Qualagine Hudson." 6RP 33. The court made its finding that the person named was the same based upon those attestations and apparently the identity of names, by a "preponderance of the

evidence.” 6RP 33.

Thus, the court made specific factual findings about disputed issues of identity by a lesser standard than required by Blakely, and made those findings itself, rather than to a jury, as required under Blakely, in violation of Mr. Hudson’s Sixth Amendment rights. Mr. Hudson agrees that he acknowledged the existence of two prior convictions for burglary, on the record and those were properly considered. 6RP 25; see Lopez, 147 Wn.2d at 519. As to the other burglary and the other offenses, the court erred and reversal is required. On remand, because Mr. Hudson specifically objected to the proof of identity below, the prosecution is not entitled to another opportunity to meet its burden of proof, and Mr. Hudson must be sentenced based upon only the two prior offenses which he agreed were his. See, Lopez, 147 Wn.2d at 520-21.

Mr. Hudson’s Sixth Amendment rights were also violated by the trial court’s finding that he was on community placement at the time of the current offense and then relying on that finding to increase the offender score and thus the standard range. Under RCW 9.94A.525(17), an offender score can be increased by one point if the current offense was committed “while the offender was under community placement.” “Community placement” is defined as “that period during which the offender is subject to the conditions of community custody and/or postrelease supervision.” Former RCW 9.94A.030(7) (2002).

This Division is split on the issue of whether the fact that the defendant was still on community placement at the time of the current offense must be proved to a jury under Blakely. In State v. Giles, 132 Wn.

App. 738, 132 P.3d 1151 (2006),¹⁰ the Court held that “judicial fact-finding is permitted when establishing recommended standard range sentences” under Blakely and thus it is not a violation of the Sixth Amendment to have the court make a factual finding in order to determine that standard range. 132 Wn. App. at 742. In contrast, in State v. Hochhalter, 131 Wn. App. 506, 128 P.3d 104 (2006), the majority held that there was a right to have that fact submitted to the jury. See also State v. Jones, 126 Wn. App. 136, 107 P.3d 755, review granted, 124 P.3d 659 (2005 Wash. LEXIS 908).¹¹

This Court should follow Hochhalter and Jones because those cases, unlike Giles and the case it relied on, State v. Hunt, 128 Wn. App. 535, 116 P.3d 450 (2005), properly construe the relevant Supreme Court holdings and do not depend upon an artificial distinction based solely upon labels. In Jones, for example, the Court examined the nature of the narrow “prior conviction” exception to Blakely, then noted that the determination of whether someone was on community placement at the time of the current offense did not fall under that exception as that fact “cannot be determined [solely] from the fact of a prior conviction.” Instead, the Court noted, there are too many “variables,” such as credit for time served, good conduct credit, when the community custody was scheduled to end, and other matters. 126 Wn. App. at 143-44.

In contrast, in Giles and Hunt, the Courts held that Blakely did not

¹⁰Counsel for Mr. Giles filed a petition for review on May 19, 2006.

¹¹The Supreme Court heard oral argument on Jones on February 7, 2006. See http://www.courts.wa.gov/appellate_trial_courts/supreme/calendar.

apply to the calculation of the offender score because Blakely only applies to “exceptional sentences.” See Giles, 132 Wn. App. at 742; Hunt, 128 Wn. App. at 541. Because the factual finding only resulted in a higher standard range, the Courts held, Blakely did not apply. Giles, 132 Wn. App. at 742-42; Hunt, 128 Wn. App. at 541-42.

In Giles this holding was *dicta*, because the defendant’s standard range for his drug conviction was the same regardless whether the point was added for community placement. Giles, 132 Wn. App. at 744.

Further, Giles and Hunt mistake the scope of the protections of Blakely and the “prior conviction” exception to those protections, in conflict with the conclusions of the Supreme Court. Contrary to Giles and Hunt, in In re the Personal Restraint of Lavery, 154 Wn. 2d 249, 111 P.3d 837 (2005), the Supreme Court specifically held that Blakely *does* apply to determinations of facts about a prior conviction. And in Hughes, *supra*, the Court distinguished between the fact of whether a prior conviction *existed* and other facts relating to that prior conviction, such as whether such an offense shows “rapid recidivism,” or is part of an “[o]ngoing pattern of same criminal conduct.” 154 Wn.2d at 141-42. Construing the “prior conviction” exception narrowly, the Hughes Court held, “[t]he conclusions go well beyond merely stating Hughes’ prior convictions. .. The finding at issue here involve new factual determinations and conclusions” which cannot be made by the trial court after Blakely. 154 Wn.2d at 141-42.

This Court should not follow Giles and Hunt and should instead follow the well-reasoned, sound decisions in Hochhalter and Jones. Under

that reasoning, the trial court here erred in adding an extra point to the offender scores based upon the court's own factual determination about whether Mr. Hudson was still serving community placement at the time of the offense.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 12th day of July, 2006.

Respectfully submitted,



KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Pierce County Prosecuting Attorney's Office, 946 County City Building, 930 Tacoma Avenue S., Tacoma, Washington, 98402;

to Mr. Qualagine A. Hudson, DOC 801003, WCC, P.O. Box 900, Shelton, WA. 98584.

DATED this 12th day of July, 2006.


KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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