

No. 34600-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JERRY UTANIS,

Appellant.

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

The Honorable Frederick W. Fleming, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed flagrant, prejudicial misconduct at trial and sentencing.

2. Appellant was deprived of his rights to effective assistance of counsel.

3. The exceptional sentence was not statutorily authorized.

4. RCW 2.28.150 and CrR 6.16(b) did not grant authority for the jury to find aggravating factors and State v. Davis, 2006 Wash. App. LEXIS 1043 (2006), was wrongly decided.

5. Appellant's rights to equal protection and Fifth and Sixth amendment rights to jury trial were violated.

6. Appellant's due process rights were violated by use of a procedure other than the one set forth in the statute.

7. 2005 amendments to the exceptional sentencing scheme are not retroactive and cannot apply to appellant's 2004 crimes without violating the prohibition against ex post facto legislation and judicially rewriting RCW 9.94A.345.

8. The trial court violated the doctrine of separation of powers and RCW 9.4A.345 in imposing the exceptional sentence.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. For the attempted murder charge, the only issue was whether Mr. Utanis had intended to kill or just harm the victim. The prosecution's theory was that he was so crazed with love for the victim that her rejection angered him enough to make him want to kill her. During closing, the prosecutor described Mr. Utanis' phone call with the

victim shortly before the incident, claiming that Mr. Utanis had both
1) declared that he still loved the victim, and 2) demanded to know why
she did not love him back.

Was this argument flagrant, prejudicial misconduct where there
was no evidence Mr. Utanis made any such statements and the
prosecutor's misstatements directly supported the prosecution's case?
Further, was counsel ineffective in failing to object and attempt to mitigate
the damage wrought by these serious misstatements?

2. The crime in this case occurred in October of 2004, after
Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403
(2004). was decided but before the Washington Legislature changed this
state's sentencing statutes to reflect the requirements of Blakely.

a. The statute in effect at the time of the crime
only authorized the court to make factual findings to support an
exceptional sentence. Did the court err in submitting the aggravating
factor to a jury for special verdict where there was no statutory authority to
do so?

b. RCW 2.28.150 only permits a judge to create a new
procedure not specifically authorized by statute in cases where a statute is
silent. CrR 6.16(b) only authorizes submitting a special verdict to a jury
which is supported by the law.

Do the statute and the rule fail to authorize the procedures used
here where the Supreme Court has held that the relevant statute is not
"silent" and has overturned a case relying on that rule to authorize a nearly
identical procedure to the one used here?

c. Were appellant's equal protection rights and rights to trial by jury violated when an exceptional sentence was imposed on him which could not be imposed on others similarly situated solely because they chose not to exercise their constitutional right to trial?

d. Was due process violated where the statute providing the procedure mandated a judge to perform the required fact-finding and appellant was deprived of that right by the procedure used here?

e. In crafting 2005 amendments to the exceptional sentencing scheme, the Legislature chose to make them effective on April 15, 2006, and made no indication of an intent to apply them to crimes committed before that effective date. Further, there is a presumption against retroactivity of statutes, and application of the amendments would violate constitutional protections against ex post facto laws. Is reversal required for the court's reliance on the 2005 amendments as supporting the procedure used to impose the exceptional sentence in this case where the crime was committed in 2004?

f. Was counsel ineffective in 1) failing to object when the aggravating factors were charged against his client even though his client could not lawfully or constitutionally be subjected to an exceptional sentence, 2) failing to object when the aggravating factors were submitted to the jury without any statutory authority to do so and even though that submission violated his client's constitutional rights, 3) failing to make himself at least minimally aware of the relevant law applicable to his client's case, 4) failing to prepare to adequately represent his client, and 5)

failing to object to heinous prosecutorial misconduct which urged the court to impose an exceptional sentence based upon an uncharged, unproven aggravating factor, even though the prosecutor's invitation would have resulted in violations of his client's due process rights to notice and all of his rights enunciated in Blakely?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Jerry Utanis was charged by amended information with first-degree attempted murder and first-degree burglary, alleged to have been "domestic violence" crimes committed within the sight or sound of the victim's minor children. CP 1-4, 23-25; RCW 9.94A.535(g)(i); RCW 9A.28.030; RCW 9A.28.090; RCW 9A.32.030(1)(a); RCW 9A.52.020(1)(b); RCW 10.99.020.

Pretrial proceedings were held on June 7, August 10 and October 6, 2005, before, respectively, the Honorable Lisa Worswick, the Honorable Vicki Hogan, and the Honorable Kathryn Nelson, and trial was held on January 3- 4, 9-13, and March 3, 2006, before the Honorable Frederick Fleming. 1RP 1, 2RP 1, 3RP 1, RP 1.¹ Mr. Utanis was found guilty as charged. CP 167-70.

On March 3, 2006, the court ordered an exceptional sentence above the standard range for the attempted murder and a standard range sentence

¹The verbatim report of proceedings will be referred to as follows:
June 7, 2005, as "1RP;"
August 10, 2005, as "2RP;"
October 6, 2005, as "3RP;"
the volumes of proceedings containing the trial of January 3- 4, 9-13 and sentencing of March 3,2006, as "RP."

for the burglary. CP 175-87. Mr. Utanis appealed, and this pleading follows. See CP 197-210.

2. Facts relating to the offense

Erin Williams and Jerry Utanis dated for about a month and a half after she moved into an apartment very close to his. RP130, 134. He often stayed the night, hung out with her kids, watched TV and made dinner. RP 133-35. In fact, her children called him “daddy.” RP 136, 144, 172. Ms. Williams admitted that her relationship with Mr. Utanis was a good one and that they did not argue much and never really fought. RP 136, 144, 172.

When she started dating Mr. Utanis, it had been about five months since Ms. Williams had broken up with her boyfriend of four years, Paul Cardenas. RP 132. She had a child with Mr. Cardenas and, according to Ms. Williams, Mr. Utanis was not happy about her ongoing relationship with him. RP 135.

In October of 2004, Ms. Williams decided she did not want to be in a relationship any more, and told Mr. Utanis so. RP 138-39. He seemed “okay” with it. RP 138-39. Ms. Williams admitted that she then saw Mr. Utanis “[p]robably every day” after that. RP 138-41. She explained that they lived really near to each other and that he would come over when she was home. RP 138-41. She also conceded that, in fact, during that time they were giving the relationship another try. RP 139.

After about a week, she changed her mind and, on Thursday, October 14, 2004, she broke up with Mr. Utanis again. RP 139. The next day, they were together in the evening playing cards and she again told

him she did not want to see him anymore. RP 140. He seemed upset by this and kicked the small plastic children's table with the cards on it. RP 140-41. At some point before he left that night, she claimed, she saw him plugging her telephone in, and he said he had unplugged it because he feared that she would call the police. RP 141. After he left that night, she looked outside a lot and saw him sitting on his back porch. RP 143.

On Saturday morning, without her asking him to do so, Mr. Utanis came to Ms. Williams' door with a package of toilet paper, which she needed, and some coffee. RP 143. He requested the ability to say a final goodbye to her children, and she agreed. RP 141-46. Ms. Williams thought Mr. Utanis looked "drawn out," which she attributed to "lack of sleep." RP 143-46. Most of the rest of the day, she thought he was on the back porch, although she did not watch him during the time she was gone for a birthday party, until about 4 or 5 that night. RP 144-46.

After she got home, Ms. Williams did not see Mr. Utanis until, at about 7 that night, when he came over to borrow the phone briefly, then left. RP 145-46. Later, about 11:30 p.m., he called *her* on the phone from somewhere and asked what was "going on" and if she loved him. RP 146. She said no. RP 146. They spoke for only about five minutes, and he did not say anything about loving her and did not ask her to "explain" or anything similar. RP 146.

At about midnight, Mr. Cardenas called Ms. Williams and told her he had received a phone call from Mr. Utanis. RP 147, 287-89. Mr. Utanis had asked Mr. Cardenas if Ms. Williams had said anything about why she had broken up with Mr. Utanis. RP 147, 287-89. According to

Mr. Cardenas, Mr. Utanis also asked if Mr. Cardenas was dating Ms. Williams again. RP 147, 287-89. Mr. Cardenas called Ms. Williams again at about 2:30 in the morning after drinking several beers, because he had a "gut instinct" concern about her. RP 303-304. She was fine. RP 147-48.

Ms. Williams testified that, after the phone call, she went into the bathroom and smoked a cigarette. RP 147-17. As she got back into bed, she heard pounding on a sliding door into her apartment and "knew" it was Mr. Utanis. RP 149-50. She got back into bed, planning to pretend she had not heard anything. RP 149. A few moments later, however, she heard her front door break in and Mr. Utanis was in her bedroom, saying "[w]hat the fuck is going on?" RP 149-52.

Mr. Utanis grabbed Ms. Williams, put her in a headlock, and punched the left side of her head several times. RP 150-51. At some point she was thrown onto the bed and felt around on the phone buttons to try to call the police emergency telephone number, 9-1-1. RP 152. She was face down on the bed when he grabbed the phone from her and threw it. RP 152-53, 159. At that point, he had his right hand on her throat, tight, so that she could not breathe. RP 153.

After a few moments, Mr. Utanis pulled Ms. Williams down onto the floor, in "the same hold," and she was starting to "black out" so she asked about her kids. RP 154. He responded, "I'm not gonna hurt your kids. Just you." RP 154. Ms. Williams remembered losing control of her bladder and then passing out. RP 155.

Ms. Williams was sure that Mr. Utanis had his jacket on during the

assault, and described feeling it muffling her face at one point. RP 161. She was also sure that he still had the jacket on when she passed out. RP 174. His coat and hat were found on the bed by police, who responded to the 9-1-1 call which had actually gone through and had recorded Ms. Williams' screams. RP 151, 160.

When officers arrived at about 2:50 a.m., they found the front door open and damaged, so they announced themselves and, when a male voice responded, demanded that the person inside come out. RP 177-204. Mr. Utanis did so, his hands in the air at the officers' request. RP 182, 204, 222. According to the officers, Mr. Utanis said, "[t]ake me to jail," and "I killed her. I almost did. I think I killed her," and that "she," later identified by police as Ms. Williams, was in the bedroom, "dead or unconscious." RP 182, 204, 222. When Mr. Utanis was read his rights, he also reportedly said something like, "I tried to choke her to death" and then, "I came here knowing what I was doing." RP 224-25. One officer said that Mr. Utanis said, once, that a voice in his head told him to kill Ms. Williams. RP 225.

Mr. Utanis made a statement, in which he said he had gotten angry when Mr. Cardenas claimed Ms. Williams had said she still loved Mr. Cardenas. RP 234. Ms. Williams had denied making that statement but Mr. Utanis thought she was lying. RP 234. In his statement, Mr. Utanis said he thought about whether he was "going to hurt her or not," then "went and did it." RP 234.

Mr. Utanis' statement had some large differences from Ms. Williams' version of events. Mr. Utanis recalled finding Ms. Williams

right next to the front door, at the washer and dryer, when he first entered. RP 234. His statement never explained how they ended up in the bedroom. RP 234. Ms. Williams was clear that nothing happened at the washer near her front door. RP 173.

Also, in his statement, Mr. Utanis said he was trying to break Ms. Williams' neck and had made up his mind while in the apartment that he wanted to kill Ms. Williams. RP 234. He said he choked her until he heard someone coming, which turned out to be the police. RP 234. This did not explain the fact that, at some point, he must have actually stopped what he was doing long enough to take off the coat and hat that Ms. Williams was positive he had on when she passed out. RP 161, 174-75.

Ms. Williams did not suffer any life-threatening injuries, but had some bruising on her face, ear, shoulders and leg. RP 166, 170, 312-17, 367-77. Although she testified about continuing difficulties with speaking and breathing, all of the experts who examined her saw no damage to her throat and not even all the usual injuries and swelling that are associated with attempted strangulation. RP 170, 312-17, 367-77, 396-419. When paramedics arrived, although Ms. Williams complained of difficulty breathing and head and neck pain, her breathing was not labored, she had full circulation and full oxygenation of her blood, and her motor functions were all fine. RP 312-17. She had no obstructive swelling of the airway at all, and no immediate life-threatening symptoms of any kind, but was taken to the hospital to ensure nothing developed. RP 319-27. The emergency doctor who examined her testified that whatever had struck her on the head had not hit her hard enough to cause certain common blunt

force injuries or tenderness in the face. RP 367-77.

Ms. Williams testified that Mr. Utanis had been studying martial arts for a short time and had shown her some moves, including some “holds.” RP 137. He never did any of them on her but just demonstrated them and told her that he could “take someone out with one hold.” RP 137. She did not think he meant anything about her personally. RP 137. She agreed that the hold he had her in at the time of the incident was similar to one he had shown her which he said could kill very quickly. RP 172. RP 172. During the incident, Mr. Utanis only said he was going to “hurt” her but never mentioned killing. RP 174.

D. ARGUMENT

1. THE PROSECUTOR COMMITTED FLAGRANT,
PREJUDICIAL MISCONDUCT AND COUNSEL WAS
INEFFECTIVE

As quasi-judicial officers, prosecutors have special duties, which require them to seek justice and ensure the accused receive a fair trial. See State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993); State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). When a prosecutor fails in these duties, the result is a trial at which the defendant is deprived of the rights guaranteed by the Sixth and Fourteenth Amendments, and Article I, § 3, of the Washington constitution. Charlton, 90 Wn.2d at 664-65.

In this case, the prosecutor committed flagrant, prejudicial misconduct in arguing facts not in evidence, and then relying on those “facts” as evidence to prove its case. Further, counsel was ineffective in

his handling of the misconduct.

a. Relevant facts

The prosecution's theory was that Mr. Utanis had attacked Ms. Williams and likely tried to kill her because he was still madly in love obsessed and wanted her to "pay" for rejecting him. RP 527-28. The prosecutor described the phone call that Mr. Utanis had made to Ms. Williams at 11:30 the night of the incident, declaring:

[Mr. Utanis] then calls Erin around 11:30 at night. What does he call her about? Do you love me? *I still love you. He wants an answer. He wants it to work out. Another sign of rejection.* She tells him, no, I don't love you.

RP 528 (emphasis added). Counsel did not object. RP 528.

The prosecutor repeated the theme of Mr. Utanis being guilty of the attempted murder because he wanted to "make her pay for rejecting him," and, a few moments later, again described the phone call as involving Mr. Utanis saying to Ms. Williams, "I love you. Why don't you love me?" RP 530, 533-34. The prosecutor portrayed Mr. Utanis as essentially so obsessed with Ms. Williams that he could not leave her alone even after the initial breakup. RP 533-34. The prosecutor faulted Mr. Utanis for these allegedly overstrong feelings after a relationship that lasted only a month and a half. RP 533-34. Counsel did not object.

b. The arguments were misconduct

It was misconduct for the prosecutor to repeatedly misstate the facts in an effort to bolster its case. The maxim that no attorney is permitted to "mislead the jury" about the evidence in closing argument is "especially true of the prosecutor." State v. Reeder, 46 Wn.2d 888, 892,

285 P.2d 884 (1955). This is because, by misstating the facts, the prosecutor effectively becomes an unsworn witness against the accused, implicating the defendant's rights to confrontation and a fair trial. See State v. Belgarde, 110 Wn.2d 504, 507-510, 755 P.2d 174 (1988). The duty to refrain from making statements unsupported by the record is grounded in the prosecutor's duty to seek justice and not risk an improper conviction. See State v. Ray, 116 Wn.2d 531, 550, 806 P.2d 1220 (1991); State v. Grover, 55 Wn. App. 923, 936, 780 P.2d 901 (1989), review denied, 114 Wn.2d 1008 (1990). Further, it is clearly misconduct for a prosecutor to encourage a jury to base its verdict on facts not in evidence. State v. O'Neal, 126 Wn. App. 395, 421, 109 P.3d 429, review granted in part on other grounds by, 155 Wn.2d 1024 (2005).²

Here, at trial, Ms. Williams was asked by the prosecution if, during the phone call, Mr. Utanis had said anything about loving her. RP 146. She testified that she *did not recall* any such comments. RP 146. The prosecutor also elicited testimony from Ms. Williams that Mr. Utanis *did not* ask for an "explanation" and that the phone call was brief, only about five minutes. RP 146.

Thus, nothing in the testimony supported the "facts" that Mr. Utanis had declared his love and demanded to know why Ms. Williams did not return it. Yet the prosecutor repeatedly argued these "facts" to the jury as evidence that Mr. Utanis had committed attempted murder, rather than a lesser included offense.

²Review was granted solely on the issue of whether the defendant was legally armed with a firearm. 155 Wn.2d 1021 (2005).

Indeed, these false “facts” were a crucial part of the prosecutor’s case, because they were essential to support the claim that Mr. Utanis was madly, unreasonably in love with Ms. Williams, so confused and anguished about why she did not love him and angry about the breakup that he grew homicidally enraged. More disturbing, the false “facts” were part of an overall picture painted by the prosecution of Mr. Utanis as a dangerous, obsessive man - a picture designed to scare the jury and sway them against the defendant. By arguing facts unsupported by the evidence, the prosecutor committed misconduct. Reversal is required. Even without objection, a prosecutor’s misconduct will compel reversal where it is so flagrant and prejudicial that it could not have been cured by instruction. Stith, 71 Wn. App. at 18. The misconduct here meets that standard.

The “facts” the prosecutor improperly added to the mix were facts specifically likely to invoke strong emotions against the defendant. These “facts” were crucial to claiming the kind of emotional turmoil necessary to explain why someone might want to kill, and they were also likely to incite the jury against Mr. Utanis by portraying him as dangerously obsessive and pathetically focused on a woman who did not love him. These were not the kind of comments that could have been cured by an instruction, because of their strong emotional impact.

Without the false “facts,” it is highly unlikely that the jury would have found Mr. Utanis guilty of attempted murder, rather than a lesser included offense. Mr. Utanis *admitted* that he had assaulted Ms. Williams. The only question was whether he did so with intent to murder or just to harm. Absent the misstatements, it is questionable whether the jury would

have found guilt for the higher crime, rather than a lesser, because there was significant evidence on *both* sides in this very close case.

More specifically, evidence that Mr. Utanis only intended to hurt Ms. Williams and never intended to kill her included 1) his threatening only to “hurt” her, 2) that he did not kill her, despite his martial arts skill and ability to do so, 3) that the “hold” he used was one he could have easily used to kill her but did not, and 4) that his coat and hat were on the bed when the police arrived just after the incident and he had been wearing them when she blacked out. This latter evidence proved that Mr. Utanis must have taken time, while Ms. Williams was helpless, to remove the hat and coat, thus removing the pressure from her neck deliberately and not killing her or taking advantage of her helplessness to do so.

In addition, the state’s evidence purporting to support finding intent to kill had some serious weaknesses, not the least of which is that the “confession” of that intent was contained in the same statement which had the assault beginning in front of the washer, just inside the front door, when Ms. Williams was sure it had not.

Because the prosecutor committed flagrant, prejudicial misconduct which could not have been cured by instruction, this Court should reverse.

c. Counsel was ineffective

In the alternative, if this Court finds that this misconduct could have been remedied by objection and curative instruction, reversal is required because of counsel’s ineffectiveness. While the decision whether to object is usually considered “trial tactics,” in egregious circumstances or regarding important testimony a failure to object can be ineffective

assistance under both the Sixth Amendment and Article 1, § 22. See State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); see also State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). In such cases, counsel is ineffective if 1) there is no legitimate tactical reason for the failure to object, 2) an objection would likely have been sustained, and 3) an objection would likely have affected the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

All three of these requirements are met here. There could be no legitimate tactical reason for counsel to fail to object to the prosecutor's misstatements. If it was possible to cure the misstatements by objecting, what would have been the reason not to do so? The false "evidence" had already done its damage in supporting the prosecutor's case, and could not have been more "emphasized" already. An objection would hardly have drawn undue attention. And because the prosecutor *was* misstating the evidence, any objection would likely have been sustained.

Finally, an objection would likely have had an effect on the outcome of the trial. Assuming that the misconduct could have been cured by an instruction, objection and a request for instruction was especially crucial here, where the misconduct went directly to the heart of what the jury had to decide. There was conflicting and significant evidence on both sides regarding the issue of whether Mr. Utanis had intended murder. Given the importance of the misstatements to the prosecution's case, an objection and instruction could easily have tipped the balance in Mr. Utanis' favor for conviction of a lesser offense. Counsel's failures clearly

had a significant effect on the verdict.

This case was extremely close. The misconduct went to the heart of the only issue the jury had to decide. Yet counsel sat mute and let the jury be misled about the facts supporting the prosecution's case and the strength of the evidence against his client. Reversal is required for counsel's ineffectiveness even if the misconduct alone does not compel reversal.

2. THE EXCEPTIONAL SENTENCE MUST BE REVERSED

The incident in this case occurred on October 17, 2004, and Mr. Utanis was first charged the next day. CP 1-4. More than a year later, on the first day of trial, without defense objection, the prosecutor filed an amended information adding charges of "aggravating factors" for both crimes, that "the offense occurred within sight or sound of the victim's or the offender's minor children" under 18. CP 23-25. Later, again without defense objection, the jury was instructed on and found by special verdict that the prosecution had proven that factor for the crimes. CP 168-71. Based upon those findings, the court imposed an exceptional sentence of 300 months in prison for the attempted murder, higher than the 203.25-270.25 standard range. CP 211-14.

This exceptional sentence does not withstand review.

a. There was no statutory authority for imposition of an exceptional sentence

First, reversal is required because the exceptional sentence was not statutorily authorized. Courts have no inherent power to impose a sentence and their authority to do so is confined to that which the

Legislature grants by statute. In re Breedlove, 138 Wn.2d 298, 304, 979 P.2d 417 (1999). This principle stems from the very limits of judicial power and applies even where it appears that the Legislature may have intended to write a statute differently or simply made an error in drafting. See In re Personal Restraint of Moore, 116 Wn.2d 30, 33, 803 P.2d 300 (1991).

Thus, in Moore, the Supreme Court reversed this Court and a sentence of life without the possibility of parole. 116 Wn.2d at 36-37. The defendant had pled guilty to first-degree murder and the prosecution wanted to seek of a sentence of life without the possibility of parole (“LWOP”) under the law then in effect. At that time, however, the statutes providing authorization to impose such a sentence provided that it could be imposed only if “the *jury*” found both that there were “aggravating circumstances” and that there were “not sufficient mitigating factors to merit leniency.” 116 Wn.2d at 33-34 (quoting former RCW 9A.32.040 (emphasis added)). It was further required that the trial judge “shall reconvene” the guilt-phase jury to “determine in a separate special sentencing proceeding” whether to impose an LWOP sentence or the presumptive sentence of unrestricted “life.” Moore, 116 Wn.2d at 34, quoting, former RCW 9A.32.040 and former RCW 10.94.020(2).

On appeal in Moore, the prosecution argued that an LWOP sentence could be imposed despite the mandates of the statutes, because the defendant had agreed to such a sentence with his plea. Moore, 116 Wn.2d at 32-33. The Supreme Court was not swayed. The clear language of the statutes specifically required a *trial jury* to find aggravating or

mitigating factors in order to impose such a sentence, the Court held, and “[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. As a result, the sentence was imposed without using the method required by the Legislature, was unauthorized and had to be reversed. Id.

Further, the Moore Court held, it was irrelevant that the defendant had agreed to the sentence. 116 Wn.2d at 38-39. 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. Id. Regardless of the agreement, courts have a limit on their authority and must impose only those sentences authorized by statute. 116 Wn.2d at 38-39. Indeed, the Moore Court said, the failure to set aside an unauthorized sentence directly implicates due process protections. 116 Wn.2d at 33-34.

The Supreme Court applied the same principles and reached a similar conclusion in State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980). In that case, 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 should still be eligible to receive the death

penalty if he entered a plea. 94 Wn.2d at 7-8.

The Supreme Court disagreed. The “statute’s mandate” was clear that the “*trial jury*” had to reach the verdict in order for the sentence of death to be imposed. 94 Wn.2d at 7-8 (emphasis added). 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 authoriz[ed] the impaneling of a special jury to decide the death penalty when a capital defendant pleads guilty,” the Court held, the death penalty could not be imposed on a defendant who entered a plea instead of going to trial. 94 Wn.2d at 7-8.

The U.S. Supreme Court, applying the same principles, has reached the same conclusion. See United States v. Jackson, 390 U.S. 570, 571-72, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1967) (it is not “the province of the courts to fashion a remedy” even if a legislative omission was assumed to be wholly inadvertent).

More recently, in In re the Personal Restraint of West, 154 Wn.2d 204, 110 P.3d 1122 (2005), the Washington Supreme Court reversed this Court’s decision upholding an agreement for a defendant to serve “flat time” without any right to earned early release credit. The relevant statute granted authority for determination or grant of early release time only to the “correctional agency having jurisdiction.” 154 Wn.2d at 212. As a result, there was no statutory authority for the trial court to restrict imposition of earned early release time. 154 Wn.2d at 213. As in Moore, it did not matter whether the defendant had agreed to the unauthorized sentence, because that agreement did not “cure” the sentencing court’s

having “acted outside its authority.” West, 154 Wn.2d at 214; see also, In re Personal Restraint of Mota, 114 Wn.2d 465, 478, 788 P.2d 538 (1990) (where the statute granted authority for awarding good time only to the Department of Corrections, trial court has authority to do so).

Like in Moore, Martin, West and Jackson, here, the Legislature clearly set forth the limits of the trial court’s authority to impose an exceptional sentence. The authority to impose such sentence is controlled by the Sentencing Reform Act (SRA) as it was in effect at the time of the current offense. See State v. Freitag, 127 Wn.2d 141, 144-45, 896 P.2d 1254, 905 P.2d 355 (1995); RCW 9.94A.345.³ As a result, it is the law in effect at the time of the crime which is presumptively used in any sentencing.

In this case, the crimes were committed on October 17, 2004. CP 1-4. The sentencing statutes then in effect authorized imposition of an exceptional sentence only if “the court” found that there were “substantial and compelling reasons justifying” such a sentence, considering the purposes of the SRA. Former RCW 9.94A.535 (2003). Aggravating and mitigating factors which could be considered by the court in reaching its conclusion were listed in the statutes, and there was also a provision requiring “the court” to enter written findings and conclusions detailing the court’s reasons for imposing an exceptional sentence. See former RCW 9.94A.535(2) (2003). It was the “trial court” which was the

³The meritlessness of the prosecution’s likely argument that recent amendments to the sentencing scheme should apply even though enacted well after the crimes in this case is addressed in more detail, *infra*.

factfinder, required to use the “preponderance of the evidence” standard for determining the relevant facts relating to the exceptional sentence. Former RCW 9.94A.530(2) (2002). It was “the trial court” which was limited by the “real facts” doctrine. Former RCW 9.94A.530 (2002). And it was “the court” which the statutes tasked to “consider” the aggravating and mitigating factors and make factual findings on whether those factors existed (former RCW 9.94A.535 (2003)).

Thus, at the time of the crimes, the statutory scheme in effect provided authority only for the *court* to make factual findings regarding aggravating and mitigating factors, by a preponderance of the evidence, in order to impose an exceptional sentence. State v. Hughes, 154 Wn.2d 118, 148-49, 110 P.3d 192 (2005). In contrast, nothing in the statutes provided for “the jury” or “a jury” to make factual findings on whether aggravating factors existed. Id. Nor was there any authorization for the court to submit aggravating factors to the jury as a factfinder and have them render special verdicts on those claims. See id.

As a result, there was no statutory authority for the imposition of the exceptional sentence here, and reversal is required.

- b. 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 recently 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 on that basis where the offense, like here, occurred when the statutes only authorized the judge to make the required findings for imposition of an exceptional sentence.

Id.

Davis, however, was wrongly decided, for many reasons. First, Davis improperly limited the relevance of Hughes, supra. In Davis, Division Three dismissed Hughes as a case which only presented the question of the appropriate remedy on remand when an exceptional sentence was reversed on Blakely grounds on appeal. According to Davis, Hughes was inapplicable because it did not involve 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.

This limited view of Hughes is simply wrong. While, in Hughes, the Court stated that it was only addressing the question of “the appropriate remedy on remand, to reach its conclusion on that point, it specifically construed the very same statutory scheme at issue here. See Hughes, 154 Wn.2d at 149. And Hughes held that the pivotal 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 (emphasis added). This holding is not suddenly irrelevant because of the factual differences between Hughes and Davis. Indeed, the Hughes Court found that the exceptional sentence statutes in this state unequivocally authorized only

the trial judge to make findings on aggravating factors “during trial, during a separate sentencing phase, or on remand.” 154 Wn.2d at 148-49.

Another holding of Hughes which transcends the limits of the facts of Hughes is the Court’s holding that the pivotal exceptional sentencing statute, 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.

Division Three ignored this clear holding its haste to find authority for the exceptional sentence in Davis. It declared such authority found in RCW 2.28.150 and CrR 6.16. It was wrong. RCW 2.28.150 provides that when a court has constitutional jurisdiction, “any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws” in situations where “the course of proceeding is not specifically pointed out by statute.” 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.” To apply the statute and the rule, in Davis, Division Three relied on the fiction that the Blakely opinion had somehow erased the existing statutory provisions it found unconstitutional, so that “[a]t the time of Mr. Davis’s [sp] trial, there was no specific procedure for imposing an exceptional sentence.” 2006 Wash. App. LEXIS 1043 at *15-16. Because there was thus “no course of proceeding,” Division Three reasoned, RCW 2.28.150 could be used to create one and CrR 6.16 to facilitate it. Davis, 2006 Wash. App. LEXIS 1043 at *15-16.

Davis cannot be squared with the Supreme Court’s clear holding,

in Hughes, that the exceptional sentence statutes were not “silent or ambiguous” at all. Hughes, 154 Wn.2d at 151. Further, the plain language of the statute and rule belie Division Three’s attempts to conform them to the situation presented in Davis and here. CrR 6.16 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, as noted, infra, there was no applicable law requiring or authorizing a jury to make findings on aggravating circumstances. See Hughes, 154 Wn.2d at 151.

Similarly, 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 134-35.⁴ RCW 2.28.150 did not apply, because the relevant restitution statutes specifically provided a “course of proceeding” by authorizing a court to

⁴After 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).

either confine a defendant or modify monetary payments or community service obligations. 53 Wn. App. at 135.⁵ 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.

Given the limits of RCW 2.28.150, it is not surprising that the Supreme Court has rejected its application to the former exceptional sentencing scheme applicable here. See Hughes, 154 Wn.2d at 151. More than simply declaring that the situation did *not* involve a "silent" or "ambiguous" statute, the Court specifically overruled a case in which Division One had relied on RCW 2.28.150 and CrR 6.16, State v. Harris, 123 Wn. App. 906, 922-26, 99 P.3d 902 (2004), reversed by Hughes, supra. 154 Wn.2d at 153 n. 16. In Harris, Division One held that RCW 2.28.150 and CrR 6.16 "envison situations in which the superior courts will use procedures that are not specifically prescribed by statute" and likened the situation of the exceptional sentencing scheme after Blakely as just such a situation. Harris, 123 Wn. App. at 923-24. According to Division One, trial courts have the authority to "supply a jury procedure when it is constitutionally required." 123 Wn. App. at 925.

Division One tried to distinguish cases such as Moore and Martin, supra, which seemed to contradict Division One's reasoning, by declaring

⁵The 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.

that such cases involved situations where there was no procedure at all set forth in the statutes and thus was no indication the Legislature intended to permit any procedure at all. 123 Wn. App. at 925. Because the Legislature *had* created “both a penalty and an implementing procedure” for exceptional sentence, Division One found “no doubt” the Legislature wanted exceptional sentences imposed and thus it was proper to do so even if it could not be done in the way the Legislature chose in the statute. 123 Wn. App. at 925.

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 the exceptional sentencing scheme was somehow automatically rewritten by the U.S. Supreme Court’s Blakely decision and the offending portions of the statutes erased, rather than simply rendered unconstitutional. It has already rejected the idea that the exceptional sentencing scheme did not provide a “course of proceeding” once Blakely

was decided so that RCW 2.28.150 would have thus provided the authority to create one. Further, the Supreme Court has rejected the attempt to distinguish between the situation created by Blakely and the one at issue in cases like Moore, by specifically *applying Moore* and cases like it to interpreting the very same statutory scheme applicable here. Hughes, 154 Wn.2d at 150-51. Indeed, Hughes embraced the reasoning of cases like Martin and Moore, accepting and reaffirming their holdings that a court may not create procedures 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).

Division Three’s superficial limitation of Hughes to its specific facts 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).

In sum, former RCW 9.94A.535 (2003) and the exceptional sentencing statutory scheme, simply did not provide authority for imposition of an exceptional sentence in this case. And the statute clearly and unequivocally granted authority only to the trial court to make the necessary findings of fact. 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 an 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 imposition of the exceptional sentence in this case. This Court should so hold and should reverse.

c. Imposition of the exceptional sentence violated appellant's rights to equal protection and Fifth and Sixth Amendment rights

There is also a serious equal protection problem with the exceptional sentence. 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, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970).⁶ 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

⁶Washington 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).

If the exceptional sentence in this case is allowed to stand, it will be a violation of appellant’s equal protection rights. Mr. Utanis 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.⁷ But he is being treated differently than others in the class. As noted above, for all those in the class, there was no statutory authority to impose an exceptional sentence. But here Mr. Utanis was subjected to an exceptionally long sentence without his consent because he exercised his constitutional right to trial by jury and a jury was thus already empaneled, deemed to have the authority to find aggravating factors without any statutory provisions to support it. Those who did not exercise the constitutional right to trial and instead pled guilty, however, could not 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.

⁷Whether that statute can or should apply is discussed in more detail, *infra*.

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, imposition of the exceptional sentence here resulted in a violation of Mr. Utanis’ 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 penalty only on people 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, Mr. Utanis 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. Utanis was, because that person would have to agree to imposition of an exceptional sentence in order for one to be imposed. Clearly, if the statutory scheme is interpreted as it was in Davis, that will punish 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.

d. Imposition of the sentence violated due process

Reversal is also required because the sentence was imposed in violation of due process. In Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980), 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. 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.

The same is true here. 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. Id. In contrast, in statutes which contain a specific directive that, if a certain thing occurs, a certain result will follow, create a liberty interest in that procedure. 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 identity of the statutorily authorized fact finder for any aggravating circumstance. 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 and Baldwin, the procedure used here was also a violation of Mr. Utanis' due process rights, and this Court should reverse.

- e. 2005 amendments do not and cannot constitutionally apply retroactively to this 2004 crime

In response, the prosecution may argue that the imposition of an exceptional sentence in this case was proper because of 2005 amendments to the exceptional sentencing scheme. Those amendments were made in response to the Supreme Court's decision in Hughes, supra. Blakely had been decided in 2004, holding it was a violation of the constitutional right to trial by jury to have a judge making factual findings on aggravating factors by a preponderance of the evidence. As noted above, in Hughes,

the Court followed Moore and similar cases and refused the prosecutor's invitation to tread upon the legislative function by "imply[ing] a procedure" for empaneling a jury to make the required findings, "contrary to the explicit language of the statute." Hughes, 154 Wn.2d at 149. The Court recognized, to create such a procedure "would be to usurp the power of the legislature" in defining the court's sentencing authority. 154 Wn.2d at 152-53.

Shortly thereafter, the Legislature passed SB 5477 (the "Act"), amending the exceptional sentencing statute to mandate that a jury, not a judge, will now determine the existence of all factually-based aggravating factors, not by a preponderance of the evidence but by proof beyond a reasonable doubt. See Laws of 2005, ch. 68. Further, under the new scheme, the prosecutor now has more authority and can charge aggravating factors and present them to the jury at the trial on guilt. Id.

The Act does not, and cannot, apply to this case. RCW 9.94A.345 provides that, "[a]ny sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." Further, there is a strong presumption against retroactive application of a statute. That presumption is "an essential thread in the mantle of protection that the law affords the individual citizen." State v. Cruz, 139 Wn.2d 186, 190, 985 P.2d 385 (1999), quoting, Lynce v. Mathis, 519 U.S. 433, 439, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997). Further, it is "deeply rooted in our jurisprudence." Id., quoting, Landsgraf v. USA Film Prods., 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

Here, as noted above, the law in effect at the time of the crimes did not authorize the sentence. Nor did the 2005 Amendments. In § 7, the Legislature provided that the Act “takes effect immediately.” Laws of 2005, ch. 68, § 7. Such language establishes the effective date of the statute. In re the Personal Restraint Petition of Stewart, 115 Wn. App. 319, 331, 75 P.3d 521 (2003). Because the statute was enacted on April 15, 2005, that is its effective date. See Laws of 2005, ch. 68.

Thus, the Act would have to be applied retroactively to apply here. The presumption against retroactive application may be overcome only if 1) the Legislature clearly intended a statute to operate retroactively, 2) the statute is “curative,” or 3) the statute is remedial; *and* the retroactive application of the statute does not “run afoul of any constitutional prohibition.” Cruz, 139 Wn.2d at 191, citing, In re F.D. Processing, Inc., 119 Wn.2d 452, 460, 832 P.2d 1303 (1992). The Act does not meet any of these limited exceptions.

First, there was *no* indication by the Legislature of an intent for retroactive application. Such intent usually must be indicated by “clear, strong, and imperative” language mandating retroactivity. Landsgraf, 511 U.S. at 268; Cruz, 139 Wn.2d at 191. In addition, under RCW 10.01.040, the “savings clause,” amendments to a statute cannot affect “penalties or forfeitures incurred” while the previous version of the statute was in effect, “unless a contrary intention is expressly declared in the amendatory or repealing act.”

Nothing in SB 5477 indicated an intent for retroactivity. The bill, a copy of which is attached as Appendix A, includes 7 sections. Section 1

contains the Legislature's "intent" in enacting the amendments, which was to "conform the sentencing reform act" to comply with the ruling in Blakely, and to create "a new criminal procedure for imposing greater punishment than the standard range or conditions." Laws of 2005, ch. 68, § 1. Section 2 amended the "real facts" statute to make it clear that the doctrine applies only to those sentences "other than a sentence above the standard range." Laws of 2005, ch. 68, § 2. In addition, section 2 permits a court to consider facts proven pursuant to the new procedures in determining any sentence not above the standard range. Id. Finally, section 2 mandates that the court "shall follow the procedures" newly created "in determining any sentence above the standard sentence range." Id.

Section 3 substantially amended RCW 9.94A.535, the statute which permitted imposition of an exceptional sentence if the court found "substantial and compelling reasons justifying an exceptional sentence." Laws of 2005, ch. 68, § 3. With section 3, the Legislature established that "[f]acts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined" pursuant to the new procedures set forth in the Act. Id. In addition, section 3 amended the portions of the statute referring to mitigating factors, making it clear such factors need only be established by a preponderance of the evidence and are still to be determined by the court. Id.

For aggravating factors, in section 3, the Legislature added provisions permitting imposition of an exceptional sentence without a trial to a jury on the relevant facts in certain circumstances, including

stipulation by the parties. Id. Section 3 also listed “an exclusive list of factors that can support a sentence above the standard range” which had to be determined by a jury using the new procedures. Id. The section deleted certain “factors” now assigned solely to the court, such as that the standard range was “clearly too lenient,” and codified several additional previously non-statutory or new aggravating factors, including that the offense involved “an invasion of the victim’s privacy.” Id.

Section 4 of the Act contains the procedures, requiring proof of most aggravating circumstances to a jury beyond a reasonable doubt and authorizing submitting the issue to the jury by “special interrogatory.” Id., at (2). It also adds authority for the prosecution to charge aggravating factors and requires giving proper “notice.” Laws of 2005, ch. 68, § 4. The section also provides for eventualities such as what to do if a jury was waived. Id., at (2), (3), and (4).

Under section 4, there is now authority to present evidence at trial to support aggravating factors even when the evidence otherwise would be inadmissible or irrelevant, except in very limited situations. Id. Finally, the section provides the authority for the court to impose up to the statutory maximum, if it finds that the facts found by the jury are substantial and compelling reasons justifying the exceptional sentence. Id., at 5.

Section 5 of the Act directs the Sentencing Guidelines Commission to draft legislation designed to address limits on judicial discretion perceived to have been caused by Blakely, providing a deadline. Laws of

2005, ch. 68, §5. Section 6 provides the “severability” clause for the legislation, and section 7 declares the act “necessary for the immediate preservation of the public peace, health or safety, or support of the state government and its existing public institutions,” so that it “takes effect immediately.”

Nowhere in those sections is there any indication of an intent to apply to crimes committed *before* the Act’s effective date. Nor was there anything indicating that the Legislature was even attempting to do so. Compare, In re Brooks, 145 Wn.2d 275, 36 P.3d 1034 (2001), reversed in part on other grounds by In re Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003) (the legislature expressly provided for retroactive application where it provided that the act “applies to all cases” which arose “either on, before, or after the effective date of this act”) (quotations omitted). Thus, the language of the Act makes it clear the Legislature did not intend the Act to apply to crimes committed before April 15, 2005, the Act’s effective date.

Retroactive application of the amendments also cannot be justified on the grounds that the amendments were somehow “curative” or “remedial.” An amendment is only “curative” if it “clarifies or technically corrects an ambiguous statute.” State v. Smith, 144 Wn.2d 665, 674, 30 P.2d 1245 (2001), superseded by statute in part and on other grounds as noted in State v. Varga, 151 Wn.2d 179, 86 P.3d 139 (2004). If an amendment does not meet this definition, it is not “curative” but rather constitutes a substantive change in the law which may not be applied retroactively. See F.D. Processing, 119 Wn.2d at 462.

Nothing in the former statutory scheme was ambiguous. It was not “technically corrected” by the amendments - it was completely rewritten. The amendments were not “curative.”

Nor were they remedial. A remedial amendment is one that relates only “to practice, procedures, or remedies, and does not affect a substantive or vested right.” F.D. Processing, 119 Wn.2d at 462-63. Changes in the criminal code (RCW Title 9 and 9A) are presumed substantive, not remedial, unlike changes in the code defining criminal procedure (RCW Title 10). See Cruz, 139 Wn.2d at 192, citing Ward, 123 Wn.2d at 499. Further, statutory amendments are substantive, not remedial, when they affect a substantive right by “altering the standard of punishment which existed under prior law or makes more burdensome the punishment for the crime.” In re the Personal Restraint of Sapperfield, 92 Wn. App. 729, 740-41, 964 P.2d 1204 (1998).

Here, clearly, the amendments altered the standard of punishment which existed under prior law. Under prior law, an exceptional sentence *could not* have been imposed on Mr. Utanis, or, because of Blakely, on *anyone* whose conviction was not final prior to the Blakely decision. See State v. Evans, 154 Wn.2d 438, 449, 457, 114 P.3d 627 (2005) (Blakely applies to all cases in which the direct appeals were not yet final on the date Blakely was decided). As there was no constitutionally valid authorization for imposition of an exceptional sentence contained in the former law, clearly, the amendments altered the punishment and made it more burdensome - they authorized a sentence which could not previously have been imposed..

Even if this Court were to ignore the complete absence of any indication of intent for retroactivity or the fact that the amendments were not remedial or curative, retroactive application would still be improper because it would clearly violate constitutional prohibitions. Article I, § 10, of the United States constitution and Article I, § 23, of the state constitution both forbid ex post facto legislation. See Ward, 123 Wn.2d at 496; Collins v. Youngblood, 497 U.S. 37, 45, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990). A law violates that prohibition if it is 1) substantive, 2) retrospective, and 3) disadvantages the person affected. State v. Hennings, 129 Wn.2d 512, 525, 919 P.2d 580 (1996).

Application of the 2005 amendments to the 2004 crimes in this case would violate the prohibition against ex post facto laws. At the outset, it cannot be questioned that retroactive application would increase the punishment. As the Supreme Court held in Hughes, former RCW 9.94A.535 did not provide a statutory basis for having a jury decide aggravating factors. 154 Wn.2d at 151-52. Thus, the only exceptional sentence which was statutorily authorized was one imposed by the trial court. Under Blakely, however, that sentencing scheme was unconstitutional. As a result, the only sentence which could be imposed on defendants who committed crimes prior to the statutory amendments was a standard range sentence, unless an exceptional sentence was not based on “factual” findings.

Here, the Act is substantive, not procedural. An act which “fundamentally alters the sentencing scheme” is substantive. See In re Personal Restraint of Stanphill, 134 Wn.2d 165, 170, 949 P.2d 365 (1998).

In addition, here, the Act would be applied “retrospectively.” A law is “retrospective” if it applies to events which occurred before its enactment. Hennings, 129 Wn.2d at 525. The crimes for which Mr. Utanis was being punished occurred in 2004. The amendments did not occur until 2005.

Finally, it obviously disadvantages a defendant to spend more time in prison than he would have under the law in effect at the time of his crime. Application of the 2005 Act would violate the prohibition against ex post facto laws, in addition to requiring judicial rewriting of the Act to make it retroactive.

In sum, the 2005 amendments do not, and cannot, apply to the 2004 crimes and thus do not support the exceptional sentence in this case.

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

Reversal is also required because the trial court violated the separation of powers doctrine in imposing the exceptional sentence. The doctrine stems from the founders’ concern 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). Under the doctrine, the independence of the judicial branch and constitutional limits on its power are 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 setting penalties for crimes,

creating sentencing policy, and the “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 1986, the Supreme Court rejected a claim that the SRA violated the doctrine of separation of powers by taking away judicial discretion at sentencing. State v. Ammons, 105 Wn.2d 175, 179-80, 713 P.2d 719, cert. denied, 479 U.S. 930 (1986). Instead, the Court held, “the fixing of legal punishments for criminal offenses is a legislative function” and sentencing judges only possessed such discretion at sentencing as the Legislature chooses to give by statute. 105 Wn.2d at 179-80; see also, State v. Hunter, 102 Wn. App. 630, 636, 9 P.3d 872 (2000), review denied, 142 Wn.2d 1026 (2001) (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,” 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 made the decision not to amend the exceptional sentencing statutes until April of 2005 even though the Blakely decision came down in 2004. Regardless whether that choice made sense, or was wise policy, it was the Legislature’s choice to make.

Either by judicially rewriting the law in effect in 2004, or by retroactively applying amendments the Legislature chose not to make retroactive, the court usurped the legislative function and violated the doctrine of separation of powers.

No court, trial or appellate, may engage in such a “clear judicial usurpation of legislative power.” See Martin, 94 Wn.2d at 8. This is true no matter how “unfortunate” a “hiatus” of statutory authority to impose a certain type of sentence may be. Martin, 94 Wn.2d at 8 (standing by this principle even where the result was depriving the state of the opportunity to seek the death penalty in an egregious murder case). The court’s actions in this case violated the doctrine of separation of powers, and this Court should so hold and should reverse.

- g. Counsel was utterly ineffective in his handling of the entire proceedings regarding the exceptional sentence

Reversal is also required based upon counsel’s complete ineffectiveness in relation to the exceptional sentence. Counsel is ineffective when, despite a strong presumption of competence, his performance falls below an objective standard of reasonableness and there is a reasonable probability that, but for the deficient performance, the outcome of the proceeding would have differed. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

It would be difficult to conceive of how counsel could have been *more* ineffective in relation to the exceptional sentence, with the possible exception of conceding that the sentence should be imposed. Despite the

clear mandate of RCW 9.94A.345 that the law in effect at the time of the crime controls, counsel did not raise a single objection that the law applicable to his client's case did not authorize the sentence. He did not object on that basis when the information was amended. He did not object when the jury was instructed. Even when the court was about to impose the unauthorized sentence, counsel raised no objection and simply asked the court not to do so based on the facts and discretion, not law.

More egregious, counsel raised no objection to the trial court applying the 2005 amendments retroactively, despite the well-settled, extremely strong presumption against such application and the patently obvious constitutional problems. Even when the court was about to sentence his client based upon a law not in effect at the time of the crime, counsel did not mention that there might be any problem with doing so.

Indeed, it appears that counsel did not even *recognize* these issues. At sentencing, counsel's only comment about statutory authority was "we are new on this law with Blakely and everything." RP 647-48. He also appealed to the court's "discretion" and urged the court to decline to impose an exceptional sentence or to impose a shorter sentence than the prosecution sought. RP 648.

Thus, counsel clearly was aware that the law being applied was new, but apparently made no effort to determine if it applied to his client's case, let alone whether it *should*. And instead of raising any of the relevant legal objections, he left the fate of his client to the court's discretion.

Counsel's performance was seriously deficient. Because he failed

to even raise the relevant issues, his client was subjected not only to a sentence which was not statutorily authorized but also to multiple violations of his constitutional rights. And as a result of counsel's inexplicable failures, Mr. Utanis was ordered to spend years more in jail than was legally and constitutionally allowed. There could be absolutely no tactical reason behind these failures. See Reichenbach, 153 Wn.2d at 130 (where an argument is available to counsel to challenge an invalid search warrant and counsel failed to raise it, that failure "cannot be explained as a "legitimate tactic").

Notably, counsel's ineffectiveness in relation to the exceptional sentence extended even further. At sentencing, although Mr. Utanis was only charged with and the jury only found the "sight or sound" aggravating factor, the prosecutor argued that the court should impose an exceptional sentence on an uncharged, unproven aggravating factor of "lack of remorse." CP 23-25; RP 635-36. The prosecutor claimed Mr. Utanis had exhibited such a lack by not calling 9-1-1, not trying to "assist" Ms. Williams after the assault and not doing "anything to exhibit that he was remorseful or concerned for the safety of the victim after his actions." RP 635-36. And the prosecutor relied on statements made during the competency evaluation as proving "lack of remorse," even though the prosecutor admitted it was improper to rely on those statements for an exceptional sentence. RP 637-38. Counsel's only response to these wholly improper arguments was to argue the facts of whether the evidence indicated lack of remorse or whether a person in a competency statement might be trying to prove they were crazy by saying "crazy" things. RP

645.

Counsel's performance in relation to this misconduct by the prosecutor is unfathomable. At a minimum, counsel should have noted that his client's due process rights to notice would be violated by imposition of an exceptional sentence based upon an uncharged, unproven aggravating factor. See Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999) (due process right to notice of any fact other than a prior conviction which may increase the maximum penalty). More significantly, of course, reliance on "lack of remorse" would have been a serious and clear violation of Mr. Utanis' constitutional rights to trial by jury under Blakely, as that factor was neither submitted to the jury nor proved at trial beyond a reasonable doubt.

Further, again, counsel's failure to know the relevant law was exposed, given that "lack of remorse" is clearly set forth in the 2005 amendments as an aggravating factor which must be proven to a jury, beyond a reasonable doubt. RCW 9.94A.535(3)(q). It is only because the court exercised restraint and declined the prosecutor's wholly improper suggestion to violate Mr. Utanis' rights in this way that such violations did not occur.

Counsel's performance was, in a word, appalling. It is fundamental that an attorney should at least be familiar with the relevant law applicable to his client's case. See, e.g., Reichenbach, supra. And an attorney who fails to adequately prepare to represent his client is worse than no attorney at all. See State v. Jury, 19 Wn. App. 256, 576 P.2d 1302 (1978). Indeed, the presumption of competent, while strong, falls in the

face of evidence that “counsel failed to conduct appropriate investigations, either factual or legal, to determine what matters of defense were available, or failed to allow himself enough time for reflection and preparation for trial.” 19 Wn. App. at 163. Where, as here, an attorney’s lack of preparation causes him “to overlook obvious legal issues and arguments at trial,” that lack of preparation obviously prejudices the defendant. 19 Wn. App. at 265.

Given the extreme notoriety of the Blakely decision, there could hardly be an attorney practicing criminal law in this state who is unaware that there are potential Blakely issues any time an exceptional sentence is sought. Nor could any attorney be unaware of the fundamental constitutional rights against ex post facto laws and that those rights are implicated any time a statutory change is sought to be applied to conduct which occurred before its enactment.

At a minimum, any reasonably competent counsel in the same situation would at least have investigated the law relevant to his client’s case. Even a cursory investigation would have revealed to counsel the many serious statutory and constitutional issues presented by the entire process used to impose an exceptional sentence here.

There can be no question that counsel’s performance in relation to the exceptional sentence was seriously deficient and prejudiced his client. Mr. Utanis was constitutionally entitled to counsel who was prepared to advocate vigorously on his client’s behalf. Instead he got counsel whose lack of preparation and investigation of the relevant law guaranteed that he would serve an unlawful, unconstitutional sentence. The exceptional

sentence must be reversed.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for a new trial based upon misconduct and ineffectiveness or, at the least, for imposition of a standard range sentence.

DATED this 21st day of November, 2006.

Respectfully submitted,



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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, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Mr. Jerry Utanis, DOC # 767756, Washington State
Penitentiary, 1313 N. 13th, Walla Walla. WA.99362.

DATED this 21st day of November, 2006.



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2005 WA S.B. 5477

WASHINGTON 59TH FIRST REGULAR SESSION

SENATE BILL 5477

CERTIFICATION OF ENROLLMENT

SENATE BILL 5477

CHAPTER 68, LAWS OF 2005

59TH LEGISLATURE

2005 REGULAR SESSION

SENTENCING REFORM ACT

EFFECTIVE DATE: 4/15/05

BY SENATORS KLINE, BRANDLAND, HARGROVE, ESSER, FAIRLEY, KASTAMA, SHIN,
PRIDEMORE, WEINSTEIN, HAUGEN, BERKEY, PRENTICE AND ROCKEFELLER
READ FIRST TIME 01/26/2005. REFERRED TO COMMITTEE ON JUDICIARY.

BILL TRACKING REPORT: 2005 Bill Tracking WA S.B. 5477

2005 Bill Text WA S.B. 5477

VERSION: Enacted

VERSION-DATE: April 15, 2005

SYNOPSIS: AN ACT Relating to sentencing outside the standard sentence range; amending RCW 9.94A.530 and 9.94A.535; adding a new section to chapter 9.94A RCW; creating new sections; and declaring an emergency.

NOTICE: [A> UPPERCASE TEXT WITHIN THESE SYMBOLS IS ADDED <A]
[D> Text within these symbols is deleted <D]

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

NEW SECTION. Sec. 1 The legislature intends to conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in *Blakely v. Washington*, 542 U.S. ... (2004). In that case, the United States supreme court held that a criminal defendant has a Sixth Amendment right to have a jury determine beyond a reasonable doubt any aggravating fact, other than the fact of a prior conviction, that is used to impose greater punishment than the standard range or standard conditions. The legislature intends that aggravating facts, other than the fact of a prior conviction, will be placed before the jury. The legislature intends that the sentencing court will then

decide whether or not the aggravating fact is a substantial and compelling reason to impose greater punishment. The legislature intends to create a new criminal procedure for imposing greater punishment than the standard range or conditions and to codify existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances. The legislature does not intend the codification of common law aggravating factors to expand or restrict currently available statutory or common law aggravating circumstances. The legislature does not intend to alter how mitigating facts are to be determined under the sentencing reform act, and thus intends that mitigating facts will be found by the sentencing court by a preponderance of the evidence.

While the legislature intends to bring the sentencing reform act into compliance as previously indicated, the legislature recognizes the need to restore the judicial discretion that has been limited as a result of the Blakely decision.

Sec. 2 RCW 9.94A.530 and 2002 c 290 s 18 are each amended to read as follows:

(1) The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard sentence range (see RCW 9.94A.510, (Table 1) and RCW 9.94A.517, (Table 3)). The additional time for deadly weapon findings or for [D] those offenses enumerated [D] [A] OTHER ADJUSTMENTS AS SPECIFIED [A] in RCW 9.94A.533 [D] (4) that were committed in a state correctional facility or county jail [D] shall be added to the entire standard sentence range. The court may impose any sentence within the range that it deems appropriate. All standard sentence ranges are expressed in terms of total confinement.

(2) In determining any sentence [A] OTHER THAN A SENTENCE ABOVE THE STANDARD RANGE [A], the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing [A], OR PROVEN PURSUANT TO SECTION 4 OF THIS ACT [A]. Acknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence [A], EXCEPT AS OTHERWISE SPECIFIED IN SECTION 4 OF THIS ACT. [A]

[A] (3) IN DETERMINING ANY SENTENCE ABOVE THE STANDARD SENTENCE RANGE, THE COURT SHALL FOLLOW THE PROCEDURES SET FORTH IN SECTION 4 OF THIS ACT [A]. Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided for in RCW 9.94A.535(2) (d), (e), (g), and (h).

Sec. 3 RCW 9.94A.535 and 2003 c 267 s 4 are each amended to read as follows:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. [A] FACTS SUPPORTING AGGRAVATED SENTENCES, OTHER THAN THE FACT OF A PRIOR CONVICTION, SHALL BE DETERMINED PURSUANT TO THE PROVISIONS OF SECTION 4 OF THIS ACT. [A]

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence [D] unless it is imposed on an offender sentenced under RCW 9.94A.712. An exceptional sentence imposed on an offender sentenced under RCW 9.94A.712 shall be to a minimum term set by the court and a maximum term equal to the statutory maximum sentence for the offense of conviction under chapter 9A.20 RCW [D].

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

[D] The following are illustrative factors which the court may consider in the exercise of its discretion to impose an exceptional sentence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences. [D]

(1) Mitigating Circumstances [A> - COURT TO CONSIDER <A]

[A> THE COURT MAY IMPOSE AN EXCEPTIONAL SENTENCE BELOW THE STANDARD RANGE IF IT FINDS THAT MITIGATING CIRCUMSTANCES ARE ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE. THE FOLLOWING ARE ILLUSTRATIVE ONLY AND ARE NOT INTENDED TO BE EXCLUSIVE REASONS FOR EXCEPTIONAL SENTENCES. <A]

- (a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.
- (b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.
- (c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.
- (d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.
- (e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.
- (f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.
- (g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.
- (h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(2) Aggravating Circumstances [A> - CONSIDERED AND IMPOSED BY THE COURT <A]

[A> THE TRIAL COURT MAY IMPOSE AN AGGRAVATED EXCEPTIONAL SENTENCE WITHOUT A FINDING OF FACT BY A JURY UNDER THE FOLLOWING CIRCUMSTANCES: <A]

[A> (A) THE DEFENDANT AND THE STATE BOTH STIPULATE THAT JUSTICE IS BEST SERVED BY THE IMPOSITION OF AN EXCEPTIONAL SENTENCE OUTSIDE THE STANDARD RANGE, AND THE COURT FINDS THE EXCEPTIONAL SENTENCE TO BE CONSISTENT WITH AND IN FURTHERANCE OF THE INTERESTS OF JUSTICE AND THE PURPOSES OF THE SENTENCING REFORM ACT. <A]

[A> (B) THE DEFENDANT'S PRIOR UNSCORED MISDEMEANOR OR PRIOR UNSCORED FOREIGN CRIMINAL HISTORY RESULTS IN A PRESUMPTIVE SENTENCE THAT IS CLEARLY TOO LENIENT IN LIGHT OF THE PURPOSE OF THIS CHAPTER, AS EXPRESSED IN RCW 9.94A.010. <A]

[A> (C) THE DEFENDANT HAS COMMITTED MULTIPLE CURRENT OFFENSES AND THE DEFENDANT'S HIGH OFFENDER SCORE RESULTS IN SOME OF THE CURRENT OFFENSES GOING UNPUNISHED. <A]

[A> (D) THE FAILURE TO CONSIDER THE DEFENDANT'S PRIOR CRIMINAL HISTORY WHICH WAS OMITTED FROM THE OFFENDER SCORE CALCULATION PURSUANT TO RCW 9.94A.525 RESULTS IN A PRESUMPTIVE SENTENCE THAT IS CLEARLY TOO LENIENT. <A]

[A> (3) AGGRAVATING CIRCUMSTANCES - CONSIDERED BY A JURY - IMPOSED BY THE COURT <A]

[A> EXCEPT FOR CIRCUMSTANCES LISTED IN SUBSECTION (2) OF THIS SECTION, THE FOLLOWING CIRCUMSTANCES ARE AN EXCLUSIVE LIST OF FACTORS THAT CAN SUPPORT A SENTENCE ABOVE THE STANDARD RANGE. SUCH FACTS SHOULD BE DETERMINED BY PROCEDURES SPECIFIED IN SECTION 4 OF THIS ACT. <A]

- (a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.
- (b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance [D> due to extreme youth, advanced age, disability, or ill health <D] .

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(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a 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.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) [D] The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010. <D]

[D] (j) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010. <D]

[D] (k) <D] The offense resulted in the pregnancy of a child victim of rape.

[D] (l) <D] [A] (J) <A] The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

[D] (m) <D] [A] (K) <A] The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

[D] (n) <D] [A] (L) <A] The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

[A] (M) THE OFFENSE INVOLVED A HIGH DEGREE OF SOPHISTICATION OR PLANNING. <A]

[A] (N) THE DEFENDANT USED HIS OR HER POSITION OF TRUST, CONFIDENCE, OR FIDUCIARY RESPONSIBILITY TO FACILITATE THE COMMISSION OF THE CURRENT OFFENSE. <A]

[A] (O) THE DEFENDANT COMMITTED A CURRENT SEX OFFENSE, HAS A HISTORY OF SEX OFFENSES, AND IS NOT AMENABLE TO TREATMENT. <A]

[A] (P) THE OFFENSE INVOLVED AN INVASION OF THE VICTIM'S PRIVACY. <A]

[A] (Q) THE DEFENDANT DEMONSTRATED OR DISPLAYED AN EGREGIOUS LACK OF REMORSE. <A]

[A] (R) THE OFFENSE INVOLVED A DESTRUCTIVE AND FORESEEABLE IMPACT ON PERSONS OTHER THAN THE VICTIM. <A]

[A] (S) THE DEFENDANT COMMITTED THE OFFENSE TO OBTAIN OR MAINTAIN HIS OR HER MEMBERSHIP OR TO ADVANCE HIS OR HER POSITION IN THE HIERARCHY OF AN ORGANIZATION, ASSOCIATION, OR IDENTIFIABLE GROUP. <A]

[A] (T) THE DEFENDANT COMMITTED THE CURRENT OFFENSE SHORTLY AFTER BEING RELEASED FROM INCARCERATION. <A]

[A] (U) THE CURRENT OFFENSE IS A BURGLARY AND THE VICTIM OF THE BURGLARY WAS PRESENT IN THE BUILDING OR RESIDENCE WHEN THE CRIME WAS COMMITTED. <A]

[A] (V) THE OFFENSE WAS COMMITTED AGAINST A LAW ENFORCEMENT OFFICER WHO WAS PERFORMING HIS OR HER OFFICIAL DUTIES AT THE TIME OF THE OFFENSE, THE OFFENDER KNEW THAT THE VICTIM WAS A LAW ENFORCEMENT OFFICER, AND THE VICTIM'S STATUS AS A LAW ENFORCEMENT OFFICER IS NOT AN ELEMENT OF THE OFFENSE. <A]

[A] (W) THE DEFENDANT COMMITTED THE OFFENSE AGAINST A VICTIM WHO WAS ACTING AS A GOOD SAMARITAN. <A]

[A] (X) THE DEFENDANT COMMITTED THE OFFENSE AGAINST A PUBLIC OFFICIAL OR OFFICER OF THE COURT IN RETALIATION OF THE PUBLIC OFFICIAL'S PERFORMANCE OF HIS OR HER DUTY TO THE CRIMINAL JUSTICE SYSTEM. <A]

[A] (Y) THE VICTIM'S INJURIES SUBSTANTIALLY EXCEED THE LEVEL OF BODILY HARM NECESSARY TO SATISFY THE ELEMENTS OF THE OFFENSE. THIS AGGRAVATOR IS NOT AN EXCEPTION TO RCW 9.94A.530(2). <A]

NEW SECTION. Sec. 4 A new section is added to chapter 9.94A RCW to read as follows:

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

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

(3) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y), shall be presented to the jury during the trial of the alleged crime, unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the

probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

(4) If the court conducts a separate proceeding to determine the existence of aggravating circumstances, the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.

(5) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

NEW SECTION. Sec. 5 (1) The sentencing guidelines commission shall review the sentencing reform act as it relates to the sentencing grid, all provisions providing for exceptional sentences both above and below the standard sentencing ranges, and judicial discretion in sentencing. As part of its review, the commission shall:

- (a) Study the relevant provisions of the sentencing reform act, including the provisions in this act;
- (b) Consider how to restore the judicial discretion which has been limited as a result of the Blakely decision;
- (c) Consider the use of advisory sentencing guidelines for all or any group of crimes;
- (d) Draft proposed legislation that seeks to address the limitations placed on judicial discretion in sentencing as a result of the Blakely decision; and
- (e) Determine the fiscal impact of any proposed legislation.

(2) The commission shall submit its findings and proposed legislation to the legislature no later than December 1, 2005.

NEW SECTION. Sec. 6 If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 7 This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.

Approved by the Governor April 15, 2005. Filed in Office of Secretary of State April 15, 2005.

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