

NO. 34632-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

FRANK EARL,

Appellant.

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

The Honorable D. Gary Steiner, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in admitting exhibit 2A relating statements by Charlene McGinnis and Donna Woods.

2. The court erred in admitting the testimony of Marco Scarpetta as to statements made by Charlene McGinnis and Donna Woods.

3. The court erred in admitting the testimony of Becky McMahan as to statements made by K.G.

4. The court erred in submitting aggravating factors to the jury by special verdict.

5. The court erred in imposing an exceptional sentence.

Issues Pertaining to Assignments of Error

1. Was appellant denied his Sixth Amendment right to confront the witnesses against him when 1) two lab employees signed a chain of custody form certifying under penalty of perjury that they had drawn blood from the complaining witness and her daughter and placed the samples in the mail, 2) the lab director testified based on the chain of custody, which was admitted as an exhibit but the employees did not testify at trial, and 3) a nurse relayed statements by the complaining witness naming appellant as the father of her child, but the complaining witness also did not testify at trial?

2. Did the trial court have the authority to submit aggravating factors to the jury by special verdict and impose an exceptional sentence when appellant's crime was committed prior to the enactment of RCW 9.94A.537, the so-called "Blakely-fix" legislation?

B. STATEMENT OF THE CASE

1. Procedural History

The Pierce County Prosecutor charged appellant Frank Earl with two counts of third degree rape of a child and two counts of incest in the first degree. CP 1-3. The first three counts were alleged against his younger daughter A.G., and count IV against his older daughter K.G. CP 1-3. A second amended information filed on May 27, 2005, also alleged the aggravating circumstance of abuse of trust on all four counts. CP 41-43. The jury found Earl guilty of one count of rape of a child in the third degree and two counts of incest. CP 106-108. By special verdicts, the jury also found that the aggravating circumstance of abuse of trust facilitated the commission of each count. CP 109-111. Count II (the second alleged rape of A.G.) was dismissed for insufficient evidence and was not submitted to the jury. RP 728. Count I (the first alleged rape of A.G.) was not sentenced because the statute of limitations had run. RP 827. The judgment and sentence was final on March 16, 2006. CP 137.

Earl was sentenced to 102 months, the top of the standard range, for each count. CP 140, 143. The court found substantial and compelling reasons justifying an exceptional sentence and ordered the two sentences to be served consecutively. CP 143-44; RP 837.

2. Substantive Facts

K.G. was born May 14, 1983, and A.G. was born February 25, 1985. RP¹ 105-107. Their mother's relationship with Earl, a member of the Puyallup Tribe, ended a few months after A.G.'s birth. RP 111-12. After that, the girls had no significant contact with Earl until 1995. RP 142. During this time, Lora Gribben and her daughters lived in Ohio, while Earl lived in Pierce County. RP 142-45. In 1995, A.G. and K.G. were enrolled in the Puyallup tribe and began receiving checks for \$219 every month, clothing and school stipends, and yearly bonuses. RP 204-205.

The alleged acts occurred while the girls were in Washington during the summer of 1999 to visit their father. RP 294-309. K.G. had visited Earl and his wife in Pierce County once before, and encouraged A.G. to come with her. RP 148. Towards the end of the summer, A.G. called Lora Gribben crying and saying she was afraid and wanted to come

¹ There are fifteen volumes of Verbatim Reports of Proceedings referenced as follows: IRP – 8/6/04, 11/9/04; RP – 4/15/05-3/17/06 (fourteen volume consecutively paginated set).

home. RP 150-52. A.G. wouldn't discuss further what had happened, but after she returned home, Jolene LaPointe, a Child Protective Services worker from the Puyallup tribe called and informed Gribben that A.G. had been raped. RP 152-54.

A.G. testified that on her first day in Washington, Earl tried to kiss her and, later in the summer, raped her. RP304, 307-309. Some time later, K.G. called her mother to say that she was pregnant. RP 161. She, too, returned home, and later revealed that Earl was the father of her unborn child. RP 163.

K.G. did not testify at trial. Becky McMahon, the county health nurse who tended to K.G. on her first two pre-natal visits, testified that K.G. identified her biological father as the father of her child and stated that the child was conceived through non-consensual sex. RP 269-70. At the time of her first visit, K.G. was approximately ten weeks pregnant. RP 271. She questioned K.G. about the paternity of her child at the direction of Jolene LaPointe, a Child Protective Services worker from the Puyallup Tribe. RP 288. She understood this request to be coming from the prosecuting authority in Washington. See RP 283.

Detective Douglas Johns testified that he heard from other officers that K.G. had named a local teenage boy as the father of her child. RP 374, 394.

Lora Gribben testified that in 2001, she accompanied K.G. and K.G.'s young daughter, Winter Star, to the lab to submit blood samples for DNA testing. RP 177. However, she did not enter the room and was not there when the blood was drawn. RP 177. The chain of custody form produced by the lab indicates the blood was drawn by Charlene McGinnis and mailed to the Pierce County Sheriff's Office by Donna Woods. Ex. 2A; RP 461-62. Each of them certified under penalty of perjury that they had properly drawn the blood from K.G. and Winter Star and mailed it. RP 472-73. However, neither of them testified at trial. Lab director Marco Scarpetta testified regarding the chain of custody of the blood samples based on the chain of custody document. RP 465. As lab director, he regularly testifies in court on the basis of the chain of custody documents produced by the lab. RP 456. However, he had no personal knowledge of these events. RP 464.

In 2004, Earl's blood was also tested. RP 512. The DNA expert testified at trial that it was 36,000 times more likely to find these DNA profiles if Earl was K.G.'s father than if he was a person selected at random. RP 627. For Winter Star, the likelihood ratio was 640,000 to one. RP 634.

C. ARGUMENT

1. THE ADMISSION OF TESTIMONIAL HEARSAY VIOLATED EARL'S RIGHT TO CONFRONTATION.

a. Statements by Charlene McGinnis and Donna Woods were admitted in violation of the Sixth Amendment.

The Sixth Amendment's Confrontation Clause guarantees a criminal defendant's right to be confronted with the witnesses against him or her. U.S. Const. amend. VI. Regardless of reliability, a testimonial statement by a declarant who does not testify at trial is inadmissible unless 1) the declarant is unavailable and 2) the defendant had a previous opportunity to cross-examine the declarant. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 1364, 158 L. Ed. 2d 177 (2004). Here, it is undisputed that Earl had no opportunity to cross examine Charlene McGinnis, who drew K.G.'s and Winter Star's blood for the DNA analysis. Nor could he cross examine Donna Woods, who mailed the samples to the Pierce County Sheriff's Office. Therefore, the only remaining issue is whether those statements were testimonial such that Crawford applies.

Earl's Sixth Amendment right to confront the witnesses against him was violated when the state presented a chain of custody document from the laboratory that performed blood draws on K.G. and Winter Star.

RP 464; Ex. 2A. The State also presented the live testimony, not of the persons who performed those draws and who placed the samples in the mail, but instead of the laboratory director who had no personal knowledge of either event. RP 464.

The statements made by Charlene McGinnis and Donna Woods that they drew the blood and mailed it according to official procedures were testimonial statements subject to the Confrontation Clause. Declarations or affirmations made for the purpose of establishing some fact are testimonial. Crawford, 124 S.Ct. at 1364. Business records are generally not included in this category. Crawford, 124 S. Ct. at 1367. However, the Crawford Court explained that affidavits or other statements are testimonial when the declarant would reasonably expect them to be used by the prosecutor. Crawford, 124 S.Ct. at 1364. The statements made by Charlene McGinnis and Donna Woods were testimonial in nature because they were made with the reasonable expectation of use in a criminal prosecution and because they are tantamount to affidavits.

First, these statements were made in anticipation of use by the prosecutor. Under Crawford, statements that the declarant would reasonably expect to be used by the prosecution are testimonial. 124 S.Ct. at 1364. Marco Scarpetta, the lab director, stated that he regularly testifies in court relying on the chain of custody documentation. RP 456.

Charlene McGinnis and Donna Woods must, therefore, have known that their statements were likely to be used in court. In addition to the general knowledge that their statements about their work would be used at trial, in this case, the samples were shipped directly to the Pierce County Sheriff's Office. RP 467, 475. Given those circumstances, the statements regarding the blood draw and shipping of samples were expected to be used by the prosecution.

These statements were also testimonial because they were tantamount to affidavits. Affidavits are specifically referred to in Crawford as being testimonial in nature. 124 S.Ct. at 1364. Here, McGinnis and Woods stated that they had properly drawn the blood and mailed it under penalty of perjury. RP 472-73. Statements certified under penalty of perjury are tantamount to an affidavit under Washington law. See RCW 9A.72.085.

The importance of DNA evidence makes it all the more necessary for Earl to be able to confront those bearing testimony to establish facts in the chain of custody. The prevailing wisdom, promoted by such popular media events as the "CSI," television series is that DNA evidence is infallible. See generally, Jason Borenstein, DNA in the Legal System: the Benefits Are Clear, the Problems Aren't Always, 3 *Cardozo Pub. L. Pol'y & Ethics J.* 847 (2006). Without the opportunity for the defendant to cross

examine those who drew the blood that was tested and who mailed that blood across the country for testing, defense counsel can not probe the conditions under which samples were taken, the care with which they were handled, or the possibility of tampering or exchange. A zealous defense regarding the foundation of this crucial evidence is foreclosed.

At least two other jurisdictions have also held that statements regarding a blood draw are testimonial under Crawford because they were prepared specifically for use by the prosecution. See People v. Rogers, 8 A.D.3d 888, 891 (N.Y. App. 2005) (holding that admission of blood test results without the ability to cross-examine the report's preparer was a violation of defendant's rights under the 6th Amendment's Confrontation Clause); City of Las Vegas v. Walsh, 91 P.3d 591, 593-94 (Nev. App. 2004) reversed on other grounds, City of Las Vegas v. Walsh, 124 P.3d 203, 207-08 (Nev. 2005) (holding that the affidavit of the nurse who drew blood for a sample was testimonial and inadmissible in light of Crawford). Washington cases in this area have generally held that statements certifying a copy of a public record or the absence thereof are not testimonial. See, e.g., State v. Kronich, 131 Wn. App. 537, 128 P.3d 119 (2006); State v. N. M. K., 129 Wn. App.155, 118 P.3d 368 (2005). Such cases are distinguishable from the case at hand, however, because drawing blood samples for a DNA test is fundamentally different from certifying a

copy of a public record. Unlike public and business records, blood samples are so alike as to be easily confused or interchanged, such that a more stringent chain of custody showing is required. See State v. Roche, 114 Wn. App. 424, 436, 59 P.3d 682 (2002). The same imperative that requires a more stringent chain of custody also indicates a heightened need for cross-examination.

The hearsay statements contained in the chain of custody and testified to by Scarpetta are not necessarily outside the reach of Crawford merely because they fall under the business records exception to the hearsay rule. Although Crawford indicates that business records are generally not testimonial, it does not preclude the possibility of testimonial hearsay being included in a business record. Crawford, 124 S.Ct. at 1367. Florida has explicitly recognized that a business record may contain a statement that is, by its nature, intended to bear witness. Johnson v. State, 929 So.2d 4 (Fla.2d DCA 2005) review granted, 928 So.2d 810 (Fla. 2006). The court held that such a statement does not lose its testimonial character merely through inclusion in a business record. Id. Similarly, the statements by Charlene McGinnis and Donna Woods do not lose their testimonial nature merely because they are recorded in a business record.

b. Statements by K.G. were admitted in violation of the Sixth Amendment.

Earl's right to confront witnesses was again violated when the State presented the testimony of Nurse Becky McMahon, who testified about statements made to her by K.G. RP 269. Again, it is undisputed that Earl was never able to cross examine K.G. Therefore, the only issue remains whether her statements to McMahon were testimonial.

K.G.'s statements to McMahon were testimonial because McMahon was cooperating with the government in questioning K.G. about the parentage of her unborn child. See RP 283. In State v. Moses, 129 Wn. App. 718, 728, 119 P.3d 9096 (2005), the defendant challenged statements made by the victim to a doctor and a social worker. State v. Moses, 129 Wn. App. 718, 728, 119 P.3d 9096 (2005). In deciding whether the statements were testimonial, the court inquired as to the clear purpose of the declarant's encounter with the health care provider. Id. at 730. In determining this purpose, the court considered whether the provider was a government employee or was working in conjunction with or on behalf of investigating police officers or other government officials, whether there was any indication of a purpose to prepare testimony for trial, and whether the encounter with the provider occurred significantly after the sexual assault. Id. at 729-30.

Here, McMahon was a county health worker and she testified she questioned K.G. about the paternity of her child and the circumstances of conception at the direction of Jolene LaPointe, a Child Protective Services worker from the Puyallup Tribe. RP 288. She understood this request to be coming from the prosecuting authority in Washington. See RP 283. Moreover, the visit with McMahon must have occurred at least ten weeks after the alleged incident with Earl, since K.G. was ten weeks pregnant at the time. See RP 271. Under such conditions, the statements were reasonably expected to be used for purposes of criminal prosecution and should be considered testimonial.

By analogy, K.G.'s statements to McMahon also fall under the definition of testimonial statements found in United States v. Davis, ___U.S.___, 126 S.Ct. 2266, 165 L. Ed. 2d 224 (2006). In considering the testimonial nature of the victim's statements to police, the Court held that the distinction between testimonial and non-testimonial statements is the purpose of the interrogator. *Id.* at 2273-74. Statements are not testimonial if the purpose is to meet an ongoing emergency. *Id.* Statements are testimonial, on the other hand, if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* Here, although K.G. was questioned by a nurse, rather than a police officer, the purpose was still clearly testimonial. McMahon

stated that her purpose was to take K.G.'s statement for the "D.A." by which she meant the prosecutor. RP 283. Therefore, her purpose was to establish the truth of past events potentially relevant to later criminal prosecution and therefore K.G.'s statements to her are testimonial under United States v. Davis. 126 S.Ct. 2273-74.

c. These violations of Earl's right to confront witnesses are manifest constitutional error.

Manifest constitutional error may be raised for the first time on appeal. RAP 2.5(a)(3). In determining a manifest error, courts consider four factors: 1) whether the alleged error is a constitutional issue, 2) whether the error is manifest, that is, whether it had practical and identifiable consequences, 3) the merits of the constitutional issue, and 4) whether the error was harmless. State v. Barr, 123 Wn. App. 373, 98 P.3d 518 (2004), review denied, 154 Wn.2d 1009 (2005).

A violation of the right to confront witnesses is a constitutional issue. See Crawford, 124 S.Ct. 1354; U.S. Const. amend VI. The merits of that issue have been discussed above. The only remaining issues, therefore, are whether that constitutional violation had practical and identifiable consequences, and if so, whether the error was harmless. Here, the violation of Earl's right to confront Charlene McGinnis, Donna Woods, and K.G. resulted in the admission of damning DNA evidence and

statements by the complaining witness. The admission of such evidence is a practical and identifiable consequence and is not harmless beyond a reasonable doubt.

The erroneous admission of testimonial hearsay here had practical and identifiable consequences. The lab employees' statements improperly bolstered the DNA evidence and K.G.'s statements to McMahon were crucial to the State's case. Without Charlene McGinnis's and Donna Woods's testimony, there is a significant gap in the chain of custody required to lay a foundation for the admission of the DNA evidence. See Roche, 114 Wn. App. at 436-37. In Roche, the court held that it was an abuse of discretion to admit drugs as evidence, because there was evidence that the laboratory technician had been stealing and using heroin that came through the crime lab. Id. Similar to the controlled substances at issue in State v. Roche, blood is not easily identifiable and requires a significant chain of custody. Id. With such a significant gap in the chain of custody, it is likely the court would not have admitted the DNA test as evidence. Even had the court still admitted the DNA, that significant gap would also have then been presented to the jury.

Under the constitutional harmless error standard, the court looks at the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426,

705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). If there is any reasonable possibility the use of inadmissible evidence was necessary to reach a guilty verdict, the conviction must be reversed. Id. Here, it is impossible to know whether cross examination of Charlene McGinnis or Donna Woods would have revealed potential tampering such as that revealed in Roche. 114 Wn. App. at 436-37. Even if the DNA evidence were admitted despite the gaps in the chain, the error was not harmless because with the gap evident before the jury, defense counsel could have argued with more vitality that the evidence was unreliable. The State cannot prove beyond a reasonable doubt that the jury would not have taken such argument to heart.

The error in admitting K.G.'s statements to McMahon was also not harmless because McMahon's testimony was crucial to the State. Besides the DNA test, the only other evidence of the charge relating to K.G. consisted of hearsay. Of the persons who related K.G.'s allegations, McMahon was the only impartial third party. The other hearsay testimony was offered by K.G.'s mother and sister, who had a financial interest in establishing Earl's paternity of K.G. and Winter Star. RP 204-205. This financial interest of the main witnesses against him formed the backbone of Earl's defense. Without McMahon's testimony, the jury would have been much more likely to find reasonable doubt. Moreover, the State

offered McMahon's hearsay of K.G.'s allegations because it clearly felt it was essential in the absence of K.G.'s testimony. RP 38. The improper admission of evidence so crucial to the State's case cannot be considered harmless.

Without the testimonial hearsay in this case, the evidence that Earl fathered K.G.'s child is notably underwhelming. The jury would be left with the hearsay related by K.G.'s mother and sister. If the DNA evidence were admitted at all, the testimony would have revealed a significant gap in the chain of custody, casting serious doubt upon the weight of that evidence. The violation of Earl's right to confront these witnesses was not harmless.

2. THE COURT LACKED AUTHORITY TO IMPOSE AN EXCEPTIONAL SENTENCE.

Earl was convicted of crimes that occurred in 1999. CP 1-3. His judgment and sentence was final in 2006. CP 137. He received an exceptional sentence based on aggravating factors found by a jury. CP 137-150. No law permitted this procedure, which violated his constitutional rights.

Sentencing authority derives strictly from statute, subject to the constitutional restrictions. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 2536-38, 159 L. Ed. 2d 403 (2004); State v. Ammons, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986). 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). The exceptional sentence statute in place at the time of commission of the crimes was struck down by Blakely v. Washington in 2004, well before Earl's judgment was final. Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The legislature enacted the so-called "Blakely fix" in 2005, providing a new procedure for imposing exceptional sentences. However, this law does not, by its terms, nor can it, constitutionally, be applied to Earl. In this "hiatus" between Blakely, and the statutory response, no authority permitted a court to charge a jury to decide aggravating factors to form the basis of an exceptional sentence. See State v. Hughes, 154 Wn.2d 118, 148-49, 110 P.3d 192 (2005). Therefore, Earl's exceptional sentence was imposed without authority of law and must be reversed.

Because Earl's crimes occurred before 2005, he may be sentenced only under the version of the Sentencing Reform Act (SRA) that existed at that time. See, e.g., State v. Freitag, 127 Wn.2d 141, 144-45, 896 p.2d 1254, 905 P.2d 355 (1995); RCW 9.94A.345. Prior to 2005, an exceptional sentence could only be imposed if the court found substantial and compelling reasons justifying such a sentence. Former RCW 9.94A.535 (2003). Former RCW 9.94A.535 explicitly did not contain a

procedure for juries to consider aggravating facts. Hughes, 154 Wn.2d at 148-49. Nor did it authorize the court to submit aggravating factors to the jury and have them render special verdicts on those claims. See id. Therefore, in Earl's case, the court was not authorized under the then-extant version of the SRA to submit aggravating factors to the jury.

The current version of the SRA does not, nor can it constitutionally, apply retroactively to crimes committed before its effective date, April 15, 2005. No other statute provides the necessary authority. Moreover, the imposition of Earl's exceptional sentence violated his rights to equal protection and due process and the doctrine of separation of powers.

- a. The 2005 amendments do not apply retroactively to this 1999 crime².

In 2005, 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 by proof beyond a reasonable doubt. See Laws of 2005, ch. 68. The Act does not, and cannot, apply to this case.

First, RCW 9.94A.345 provides that, "[a]ny sentence imposed under this chapter shall be determined in accordance with the law in effect

² The State Supreme Court heard argument on a variety of post-Blakely questions, including the retroactivity of RCW 9.94A.537, in the consolidated cases of State v. Pillatos, Butters, Base, and Metcalf, No. 75984-7 on March 24, 2005.

when the current offense was committed.” Further, 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. There is a strong presumption against retroactive application of a statute. See State v. Cruz, 139 Wn.2d 186, 190, 985 P.2d 385 (1999). That presumption is “an essential thread in the mantle of protection that the law affords the individual citizen.” Id.; 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).

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 the Act indicates an intent to apply to crimes committed before the Act’s effective date, April 15, 2005. See Laws of 2005, ch. 68, § 7.

Retroactive application of the amendments also cannot be justified on the grounds that the amendments were 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 that 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 the amendments 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, an amendment is substantive, not remedial, when it affects a substantive right because it “alters the standard of punishment which existed under prior law or makes more burdensome the punishment for the crime.” In re Personal Restraint of Sapperfield, 92 Wn. App. 729, 740-41, 964 P.2d 1204 (1998).

Here, the amendments altered the standard of punishment that existed under prior law. Under prior law, an exceptional sentence could not have been imposed on Earl, 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). Therefore, the amendments altered the punishment and made it more burdensome because they authorized a sentence that could not previously have been imposed.

Moreover, even without regards to the foregoing retroactivity analysis, application of the 2005 amendments to the 1999 crimes in this case would violate the prohibition against ex post facto laws. 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).

The Act is substantive, not procedural because it fundamentally alters the sentencing scheme. 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 that occurred before its enactment. Hennings, 129 Wn.2d at 525. Earl's crime occurred in 1999, well before the Act was enacted in 2005. The law disadvantages Earl because retroactive application would increase his punishment, as explained above.

b. Earl's exceptional sentence violates Equal Protection.

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).³ 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 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).

Earl 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. 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

³ Washington courts have thus far construed the Washington clause as “substantially 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).

impose an exceptional sentence. But here Earl was subjected to an exceptionally long sentence without his consent. Because he exercised his constitutional right to trial by jury, a jury was already empanelled and deemed to have the authority to find aggravating factors. 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 empanelled for those who plead guilty, an exceptional sentence could only be imposed on them if they knowingly, voluntarily and intelligently waived their Blakely rights. See id.

Applying strict scrutiny, 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). Here, the different treatment of a potential exceptional sentence is based solely upon the exercise of the fundamental constitutional right to have a jury trial. There can be no compelling governmental interest that would support such punishment under the equal protection clause.

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. State v. Bowerman, 115 Wn.2d 794, 802, 802 P.2d 116 (1990). In addition to the Equal Protection problem, this imposes an impermissible burden on Earl's Fifth Amendment right not to plead guilty and his Sixth Amendment right to jury trial. See State v. Bowerman, 115 Wn.2d 794, 802, 802 P.2d 116 (1990); United States v. Jackson, 390 U.S. 570, 571, 88 S.Ct. 1209, 20 L.Ed. 2d. 138 (1968) (holding that the Federal Kidnapping Act, which imposed the death penalty only on those convicted by jury, unconstitutionally deterred exercise of the Fifth amendment right not to plead guilty and the Sixth Amendment right to a jury trial).

The imposition of the exceptional sentence here violated Earl's right to equal protection, his Fifth Amendment right not to plead guilty, and his Sixth Amendment right to a jury trial. Reversal of the sentence is, therefore, required.

c. Imposition of the sentence violated due process.

Reversal of the exceptional sentence is also required because former RCW 9.94A.535 created a liberty interest in the statutory procedure that is protected by the due process clause. See Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980).

In Hicks, the defendant's sentence 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. Similarly to the defendant in Hicks, Earl had a liberty interest in the procedure provided under former RCW 9.94A.535, namely, that an exceptional sentence could only be imposed by the court. Former RCW 9.94A.535 (2003).

A statute creates a liberty interest if it imposes very specific limits on governmental action such as decision-making. 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 to depart from that range. *Id.* In contrast, statutes which contain a specific directive that a certain result follows in a given situation 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 fact finder for any aggravating circumstance. Instead, those statutes

provided that the judge would be the fact finder, in every circumstance. Former RCW 9.94A.530(2) (2003); former RCW 9.94A.535 (2003).

- d. Neither RCW 2.28.150 nor CrR 6.16(b) granted the missing statutory authority.

Contrary to the court's holding in State v. Davis, 2006 Wash. App. LEXIS 1043 (2006), RCW 2.28.150 and CrR 6.16 do not authorize the court to submit aggravating factors to the jury in order to comply with Blakely. 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." 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." However, the court in Hughes held 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. The course of proceeding for exceptional sentences, therefore, was not simply absent, and RCW 2.28.150 does not apply. 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.

Similar reasoning to that found in State v. Davis was rejected in State v. Nelson, 53 Wn. App. 128, 134, 766 P.2d 471 (1988). In that case, 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 either confine a defendant or modify monetary payments or community service obligations. 53 Wn. App. at 135.⁵ The Court rejected the 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.

Moreover, in Hughes, 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

⁴ After 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).

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 named the situation of the exceptional sentencing scheme after Blakely as just such a situation. Harris, 123 Wn. App. at 923-24. Thus, the highest court in this state 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.

- 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).

Here, the Legislature specifically placed the authority for making findings on aggravating factors in the court. Former RCW 9.94A.535 (2003). 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 of whether that choice made sense, or was wise policy, it was the Legislature’s choice to make. In imposing the exceptional sentence, the court, either by judicially rewriting the law in effect prior to 2005, or by retroactively applying amendments, the court usurped the legislative function and violated the doctrine of separation of powers.

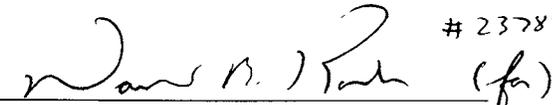
D. CONCLUSION

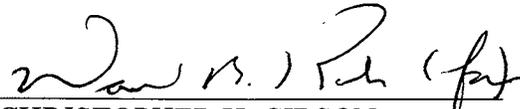
For the foregoing reasons, Earl respectfully requests that the Court reverse his conviction and exceptional sentence.

DATED this 19th day of January, 2007.

Respectfully submitted,

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

FRANK EARL,

Appellant.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On January 19, 2007, I deposited in the US mail, a properly stamped and addressed envelope containing a true and correct copy of the following documents on the parties below:

Documents Served:

- 1. Opening Brief of Appellant

Via Mail to:

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Dated this 19th day of January, 2007.

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