

NO. 35423-3-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

v.

JOHN K. McNEAL,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
CLERK OF COURT
JAN 10 2013
BY [Signature]

ON APPEAL FROM THE
SUPERIOR COURT OF LEWIS COUNTY

Before the Honorable Richard L. Brosey, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's imposition of a sentence in Count 3 in excess of 120 months based upon the RCW 69.50.408 doubling provision violated McNeal's right to notice under Wash. Const. art. I, § 22, and U. S. Const. amend. VI.

2. The exceptional sentence imposed in Count 3 violated McNeal's Sixth Amendment right to jury trial.

3. The exceptional sentence imposed in Counts 1, 2, and 3, by ordering the counts to be served consecutively, violated McNeal's Sixth Amendment right to jury trial.

4. The exceptional sentences violated McNeal's constitutional due process right to have the State prove beyond a reasonable doubt every fact necessary to his punishment.

5. The trial court erred by entering the following Findings of Fact:

1.1 The judgment in this case was "final" for sentencing purposes as defined in RCW 10.73.090(3) and by the United States Supreme Court in *Griffith v. Kentucky*, 479 U.S. 314, 329 (1987) on 30 January 2002 when the mandate on direct appeal was filed. The decision in *Blakely v. Washington*, 542 U.S. 296 (2004) was not filed until 24 June 2004.

1.2 The defendant was found guilty on 18 September 1997, by jury verdict, of: Count I—Vehicular homicide; Count II—Vehicular assault; Count III—

Possession of methamphetamine with intent to deliver.

- 1.5 The defendant has failed to take advantage of prior sentences and confinement as an opportunity to improve himself.
6. The trial court erred by entering Finding of Fact 1.3.
7. The trial court erred by entering the following Conclusions of

Law:

- 2.1 The decision in *Blakely* does not apply for resentencing in the instant case. *State v. Evans*, 154 Wn.2d 438 (2005).
- 2.3 This court adopts for resentencing purposes the findings of the original sentencing judge as entered on 16 October 1997.
- 2.4 There is a basis for an exceptional sentence as to each count, pursuant to (former) RCW 9.94A.390(2)(i), because a presumptive sentence would, by operation of the multiple offense policy, be clearly too lenient in light of the purpose of the Sentencing Reform Act.
- 2.5 At the time judgment was rendered in this case, pursuant to *State v. Stephens*, 116 Wn.2d 238, 243 (1991), an exceptional sentence is justified as to each count, based on defendant's high offender score coupled with multiple current convictions, which is a basis for an exceptional sentence.
- 2.6 As to Counts I and II, the defendant's high score combined with multiple current offenses is such that a standard sentence would result in crimes for which there is no additional penalty, which is a basis for an exceptional sentence, pursuant to *Stephens*.

2.7 At the time judgment was rendered in this case, the defendant's criminal history included three prior drug offenses, as defined by (former) RCW 9.94A.030(18) and 4 other VUCSA convictions. The number of these, combined with the time frame—i.e., 6 controlled substance felony convictions (4 possession and 2 “drug offenses” in less than 6 years)—and the defendant's prior criminal felony history clearly demonstrate a basis for an exceptional sentence on Count III. This is based upon the purposes set forth in [RCW] 9.94A.010. Specifically, an exceptional sentence is appropriate on Count III in order to ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history; promote respect for the law by providing punishment which is just; and protect the public.

8. The trial court erred by entering Findings of Fact on October 16, 1997, and adopted in Conclusion of Law 2.2 on October 10, 2006.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a trial court's imposition of a sentence in excess of 120 months in Count 3, based upon the RCW 69.50.408 doubling enhancement violate a defendant's right to notice under Wash. Const. art. I, § 22, and U. S. Const. Amend. VI where the Information failed to allege the fact of one or more prior convictions under Chap. 69.50 RCW? Assignments of Error No. 1 and 2.

2. Under *Blakely v. Washington*,¹ when a sentencing court imposes an exceptional sentence, each factor other than a jury verdict must be found by a jury beyond a reasonable doubt. *Blakely* does not apply retroactively to cases already final on direct review.² McNeal's direct review ended in January, 2002, when the Mandate issued. *Blakely* was filed June 24, 2004. Pursuant to a Personal Restraint Petition, McNeal's sentence was vacated and remanded for resentencing. On September 29, 2006, the court ordered the sentences to be served consecutively, and the sentence in count 3 was doubled pursuant to RCW 69.50.408; an imposes an exceptional sentence. Where a sentence is vacated and remanded for resentencing pursuant to a Personal Restraint Petition, does the holding of *Evans* that *Blakely* cannot be applied retroactively on collateral review apply? Assignments of Error No. 1, 2, 3, and 4.

3. Where a sentence from 1997 is vacated and remanded for resentencing, is the Appellant placed back in the pre-sentencing posture of 1997 for purposes of *Blakely*, thereby permitting the application of *Blakely*? Assignments of Error No. 1, 2, 3, 4, 5, 6, 7 and 8.

4. Was the conviction "final" where the sentence from 1997 is vacated and remanded for resentencing, thereby permitting the application of

¹ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

² *State v. Evans*, 154 Wn.2d 438, 448, 114 P.3d 627, *cert. denied*, 126 S. Ct. 560, 163 L. Ed. 2d 470 (2005).

Blakely? Assignments of Error No. 1, 2, 3, 4, 5, 6, 7 and 8.

5. New rules of criminal procedure must be applied retroactively to cases on collateral review that are final if infringement on the rule substantially diminishes the likelihood of obtaining an accurate conviction, and if the rule alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding. The *Blakely* rule defense “sentencing factors” as essential elements of a crime that must be proved to a jury beyond a reasonable doubt, and thereby alters our understanding of these bedrock procedural requirements. Should *Blakely* apply retroactively on collateral review to convictions that are final? Assignments of Error No. 1, 2, 3, 4, 5, 6, 7 and 8.

C. STATEMENT OF THE CASE

1. Procedural history:

On July 5, 1996, in Lewis County, Washington, John McNeal crossed the center line while driving his automobile resulting in a head-on collision, killing a passenger in the oncoming vehicle. *State v. McNeal*, 98 Wn. App. 585, 588-89, 991 P.2d 649 (1999). A jury convicted McNeal of vehicular homicide (count 1), vehicular assault (count 2), and possession of a controlled substance with intent to deliver (count 3). *McNeal*, 98 Wn. App. at 590. The trial court imposed two exceptional sentences: an above-range

sentence for the possession with intent to deliver conviction and consecutive sentences. *Id.*, 98 Wn. App. at 597.

Count	Charge	Standard Range	Sentence Imposed
I	Vehicular Homicide	87-116 months	116 months
II	Vehicular Assault	63-84 months	84 months
III	Possession with Intent to Deliver	108-144 months	240 months

The court ordered that the sentences be served consecutively, for a total of 440 months. *Id.*, 98 Wn. App. at 597. Clerk's Papers [CP] at 113-126.

McNeal appealed his convictions for vehicular homicide and vehicular assault, asserting that they were inconsistent. *Id.*, 98 Wn. App. at 590. The jury, by special verdict, found that McNeal was not under the influence of drugs when he was operating the motor vehicle at the time of the wreck. The jury also found that he was under the influence of drugs when he assaulted another victim in the same accident. The jury found defendant was not under the influence of drugs when he was operating the motor vehicle at the time of the accident. But the jury also found that he was under the influence of drugs when he assaulted another victim in the same accident.

Id., 98 Wn. App. at 590-91. On appeal, this Court affirmed McNeal's convictions. *Id.*, 98 Wn. App. at 594.

McNeal also challenged the exceptional sentences on appeal, arguing that the court's reasons are not supported by factual findings and are not legally sound. *Id.*, 98 Wn. App. at 597. The trial court gave two reasons for the exceptional sentences:

“(1) the standard sentence would be clearly too lenient because the multiple offense policy would result in two offenses essentially going unpunished, citing *State v. Stephens*, 116 Wn.2d 238, 243, 803 P.2d 319 (1991) (apparently justifying the consecutive sentences); and (2) McNeal's extensive criminal history indicates his failure to take advantage of opportunities to "improve himself," (apparently justifying the exceptional sentence on the conviction for possession with intent to deliver).”

McNeal, 98 Wn. App. at 598.

This Court found that the record supports the trial court's finding, and that the finding supports an exceptional sentence. *Id.*, 98 Wn. App. at 599-600.

McNeal was granted review by the Supreme Court. The principal issues on appeal were whether counsel's failure to object at trial to what he claimed were inconsistent jury verdicts constituted a waiver of his right to raise that objection on appeal and, if so, whether his trial counsel's failure to raise the objection on defendant's behalf amounted to ineffective assistance of

counsel. *State v. McNeal*, 145 Wn.2d 352, 355, 37 P.3d 280 (2002).

The Supreme Court held that the inconsistency in the general and special verdicts was not prejudicial to him since the record contained sufficient evidence to support both verdicts and that he did not receive ineffective assistance of counsel when counsel did not object to the alleged inconsistent verdicts. *McNeal*, 145 Wn.2d at 363-64.

McNeal filed a personal restraint petition, arguing that the sentencing court imposed a sentence exceeding the statutory maximum in count 3, the conviction for possession of methamphetamine with intent to deliver. CP at 85-86. Appendix A. This Court found that the statutory maximum for Count 3, a Class B felony, is 120 months. With application of RCW 69.50.408, which permits the doubling of the maximum sentence where a defendant has a prior conviction under RCW 69.50, the maximum that could be imposed was 240 months. CP at 85. This Court noted that the trial court imposed 240 months for count 3, plus an additional 12 months of community placement, exceeding the statutory maximum. CP at 85. This Court found that “[c]learly the court exceeded that statutory maximum and thus the sentence must be vacated.” CP at 85. This Court remanded the case to the superior court for resentencing. CP at 86.

While the Court was considering the first PRP, McNeal filed a second

PRP, arguing (1) that that he was not notified of the doubling of the maximum of 120 months in Count 3 under RCW 69.50.408; (2) that his offender score was not correctly calculated; and (3) that the trial court unconstitutionally imposed an exceptional sentence under *Blakely v. Washington*.³ CP at 83-84. Appendix B.

The Court dismissed the PRP, ruling that “the sentencing court is in a far better position to consider these matters on the merits as they may affect the ultimate sentence imposed” and that McNeal may raise the issues below. CP at 84.

2. Resentencing.

The case came on for resentencing before Lewis County Superior Court Judge Richard Brosey on September 29, 2006. The court heard argument regarding the three issues contained in McNeal’s second Personal Restraint Petition. The State requested that the court’s findings from the October 16, 1997 sentencing be adopted, that counts 1, 2, and 3 be served consecutively, and that the court impose 228 months for count 3. Report of Proceedings [RP] at 5, 7.

The court considered the issues raised in McNeal’s second PRP. RP at 8-24. Judge Brosey held that RCW 69.50.408 is not a sentencing

³ 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

enhancement and that it did not have to be set forth in the Information. RP at 26, 27. The court also ruled that McNeal was not entitled to notice of the doubling aspect of RCW 69.50.408 because he did not plead guilty. RP at 27.

The court ruled that the 1980 convictions for taking a motor vehicle and theft in the second degree were washed out. RP at 27. The ruling resulted in a corrected offender score of 10 for Count I and Count 2, and 14 for Count 3. RP at 25. CP at 11.

Regarding the consecutive sentences, the State argued that the convictions were final and therefore *Blakely* does not apply. The defense argued that because it came back for resentencing on all three counts, the case was in the posture it was in 1996, and that application of an exceptional sentence triggers the present application of *Blakely*, regardless of whether the previous appeal on the other non-*Blakely* issues had been finalized prior to *Blakely*. RP at 13, 18, 19.

The court ruled that there was a final decision in McNeal's case at the time *Blakely* was decided in 2004, and therefore *Blakely* does not apply. RP at 28-29. The court imposed exceptional sentences, ordering that all three counts be served consecutively, finding that McNeal's prior felony drug history demonstrates a basis for an exceptional sentence in count 3 to ensure

that the punishment is proportionate to the seriousness of the offense and the criminal history, and to promote respect for the law, and to protect the public. The court also ordered that count 3 be doubled pursuant RCW 69.50.408. McNeal's total sentence is 428 months. RP at 30.

Count	Charge	Standard Range	Sentence Imposed
I	Vehicular Homicide	87-116 months	116 months
II	Vehicular Assault	63-84 months	84 months
III	Possession with Intent to Deliver	108-144 months	288 months

The court entered an Amended Judgment and Sentence on October 10, 2006. CP at 10-19. The Court entered the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

- 1.1 The judgment in this case was “final” for sentencing purposes as defined in RCW 10.73.090(3) and by the United States Supreme Court in *Griffith v. Kentucky*, 479 U.S. 314, 329 (1987) on 30 January 2002 when the mandate on direct appeal was filed. The decision in *Blakely v. Washington*, 542 U.S. 296 (2004) was not filed until 24 June 2004.
- 1.2 The defendant was found guilty on 18 September 1997, by jury verdict, of: Count I—Vehicular

homicide; Count II—Vehicular assault; Count III—
Possession methamphetamine with intent to deliver.

1.3 The defendant’s felony criminal history consists of the following:

<u>Crime</u>	<u>Sentence Date</u>	<u>Sentencing Court</u>	<u>Date of Crime</u>	<u>Ad/Juv Fel/Misd</u>	
Minor in Possession(washed)	9/20/77	Lewis Co. Juvenile	8/3/77	J	M
Pos. Marj. <40 g(washed)	9/20/77	Lewis Co. Juvenile	8/3/77	J	M
Theft 1(washed)	1/28/79	Lewis Co. Juvenile	1/28/80	J	F
Sale of a Cont. Subst. (washed)	10/23/79	Lewis Co. Juvenile	8/24/79	J	F
Burg 2(washed)	1/24/80	Lewis Co. Juvenile	10/14/79	J	F
Burg 2(washed)	1/24/80	Lewis Co. Juvenile	10/14/79	J	F
TMVOP(washed)	12/22/80	Lewis Co. Superior	7/2/80	A	F
Theft2(washed)	12/22/80	Lewis Co. Superior	7/2/80	A	F
Robbery 2	3/8/82	Lewis Co. Superior	1/11/82	A	F
VUCSA—Poss. Cont. Subst.	2/19/91	Thurston Co. Superior	12/4/90	A	F
Willful Failure to Return from Furlough	5/20/92	Thurston Co. Superior	5/11/91	A	F
VUCSA—Poss. w/Intent to Manuf.	11/2/92	Lewis Co. Superior	10/19/91	A	F
VUSCA—Poss. Const. Subst.	11/2/92	Lewis Co. Superior	4/28/92	A	F
VUSCA—Poss. Const. Subst.	9/13/96	Lewis Co. Superior	7/23/95	A	F
VUSCA—Consp. To PWID	12/10/96	Thurston Co. Superior	3/20/95	A	F
VUSCA—Poss. Cont. Subst.	12/10/96	Thurston Co. Superior	1/26/96	A	F

1.4 The defendant’s offender score (not counting “washed” offenses) on Count I is 10; the defendant’s offender score (not counting “washed” offenses) on Cont II is 10; the defendant’s offender score (not counting “washed” offenses) on Count III is 14.

1.5 The defendant has failed to take advantage of prior sentences and confinement as an opportunity to improve himself.

Based on the foregoing Findings of Fact, the court makes the following:

II. CONCLUSIONS OF LAW

- 2.1 The decision in *Blakely* does not apply for resentencing in the instant case. *State v. Evans*, 154 Wn.2d 438 (2005).
- 2.2 RCW 9.94A.535(2)(c) authorizes a sentencing court to impose an exceptional sentence if the defendant committed multiple offenses and the defendant's high offender score would result in some of the current offenses going unpublished [sic].
- 2.3 This court adopts for resentencing purposes the findings of the original sentencing judge as entered on 16 October 1997.
- 2.4 There is a basis for an exceptional sentence as to each count, pursuant to (former) RCW 9.94A.390(2)(i), because a presumptive sentence would, by operation of the multiple offense policy, be clearly too lenient in light of the purpose of the Sentencing Reform Act.
- 2.5 At the time judgment was rendered in this case, pursuant to *State v. Stephens*, 116 Wn.2d 238, 243 (1991), an exceptional sentence is justified as to each count, based on defendant's high offender score coupled with multiple current convictions, which is a basis for an exceptional sentence.
- 2.6 As to Counts I and II, the defendant's high score combined with multiple current offenses is such that a standard sentence would result in crimes for which there is no additional penalty, which is a basis for an exceptional sentence, pursuant to *Stephens*.

27. At the time judgment was rendered in this case, the defendant's criminal history included three prior drug offenses, as defined by (former) RCW 9.94A.030(18) and 4 other VUCSA convictions. The number of these, combined with the time frame—i.e., 6 controlled substance felony convictions (4 possession and 2 “drug offenses” in less than 6 years)—and the defendant's prior criminal felony history clearly demonstrate a basis for an exceptional sentence on Count III. This is based upon the purposes set forth in [RCW] 9.94A.010. Specifically, an exceptional sentence is appropriate on Count III in order to ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history; promote respect for the law by providing punishment which is just; and protect the public.

CP at 17-19. Appendix C.

Timely notice of appeal was filed on October 10, 2006. CP at 9.

This appeal follows.

D. ARGUMENT

1. **THE TRIAL COURT'S IMPOSITION OF A SENTENCE IN COUNT 3 IN EXCESS OF 120 MONTHS BASED UPON RCW 69.50.408 VIOLATED McNEAL'S RIGHT TO NOTICE UNDER ARTICLE 1, § 22 OF THE WASHINGTON CONSTITUTION, AND THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.**

John McNeal argues that he should have been informed that he was

facing a potential maximum sentence of 20 years under RCW 69.50.408.⁴

RCW 69.50.408 provides that a person convicted of a second or subsequent offense under RCW 69.50 “may be imprisoned for a term up to twice the term otherwise authorized” The State asserts that McNeal has prior convictions under RCW 69.50.

The application of RCW 69.50.408, however, denied McNeal his constitutional right to notice under the Wash. Const. art. I, § 22, and the Sixth Amendment of the United States Constitution, as provided in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), because the charging documents fail to allege the existence of the condition precedent to application of RCW 69.50.408 doubling provision. Supplemental Clerk’s Papers at 1-2.

Under Article I, § 22, and the Sixth Amendment of the U.S.

⁴RCW 69.50.408 provides:

(1) Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

(2) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.

(3) This section does not apply to offenses under RCW 69.50.4013.

Constitution, every person charged with an offense has the right to be informed of all the elements of the charged offense, whether the elements are statutorily created or judicially imposed. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The claim that an Information fails to allege all the specified elements of a statutory crime may be raised at any time. *State v. Holt*, 104 Wn.2d 315, 321, 704 P.2d 1189 (1985) (citing *Seattle v. Jordan*, 134 Wn. 30, 235 P. 6 (1925)).

The Supreme Court held in *Blakely* that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

Here, Judge Brosey found that RCW 69.50.408 is not a sentencing enhancement. RP at 26. He also found that *Blakely* does not apply. RP at 28-29.

The Washington Supreme Court has not addressed whether RCW 69.50.408 constitutes a sentencing enhancement. In *In re Personal Restraint of Hopkins*, 89 Wn. App. 198, 203, 948 P.2d 394 (1997), *rev'd on other grounds*, 137 Wn.2d 897, 976 P.2d 616), Division 1 held "that RCW

69.50.408 is neither discretionary nor a sentence enhancement but rather a provision that automatically doubles the statutory maximum sentence for convictions under RCW 69.50 when the defendant has a prior conviction under that statute.” The Supreme Court declined to address the Court of Appeals’ holding *In re Pers. Restraint of Hopkins*, 137 Wn.2d 897, 976 P.2d 616 (1992).

Here, the sentencing court found prior convictions under Chapter 69.50 RCW, and imposed a sentence of over 120 months under RCW 69.50.408 because of the prior convictions. However, the court’s ruling ignores the notice purpose of *Blakely*. Often overlooked in the litigation over *Blakely’s* meaning is that its rule encompasses not only the right to a jury trial, specifically, but also the right to notice and due process, generally. In *Apprendi v. New Jersey*, the United States Supreme Court stated that its holding in *Jones v. United States* that “[u]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment any fact (other than prior conviction) that increases the maximum penalty for a crime *must be charged in an indictment*, submitted to a jury, and proven beyond a reasonable doubt” applied in its entirety in cases involving a state statute under the Fourteenth Amendment. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (emphasis added).

Nothing in *Blakely* affected the portion of the rule discussing the charging instrument which provides in its notice portion that that question is not whether a particular fact is characterized as an enhancement or aggravating factor, but instead the issue is whether all the fact “which the law makes essential to the punishment” are alleged in the charging document.

If they are not, then there is a violation of the Sixth Amendment notice requirement of *Blakely*.

Here, there is nothing in the Information or Amended Information filed July 18, 1996 that puts McNeal on notice that the State claims that McNeal’s criminal history triggers the statute in question, making the statutory maximum 20 years in Count 3. SCP at 1-2. Therefore, to permit the State to claim—after the defendant has been convicted—that he faced 240 months because of the existence of a fact not alleged in the charging documents, violated his state and federal rights to notice. Therefore, the trial court erred when it imposed a sentence in excess of 120 months in count 3.

2. **THE SENTENCING COURT VIOLATED McNEAL’S SIXTH AMENDMENT RIGHT TO A JURY DETERMINATION WHEN IT ENTERED A JUDGMENT AND SENTENCE WITH EXCEPTIONAL SENTENCES FOUND BY A JUDGE RATHER THAN A JURY.**

- a. **The sentencing court violated McNeal’s Sixth Amendment right to a jury**

**determination for facts necessary to impose
exceptional sentences**

Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000). The United States Supreme Court found the statutory scheme in Washington, which allowed a judge to engage in fact finding to impose a sentence beyond the jury verdict, violated an individual's Sixth Amendment right to a jury determination, stating "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

**b. McNeal's original sentence was vacated by
the Supreme Court on June 9, 2006.**

In the instant case, McNeal received exceptional sentences on October 16, 1997 based on facts not submitted to a jury in 2002. CP at 113-126. He appealed his convictions and sentence. The Supreme Court affirmed his convictions on January 3, 2002. Direct review ended on January 30, 2002, when the Mandate issued. *Blakely* was handed down two years later, in June, 2004. Principles announced in *Blakely* apply to consecutive sentences

imposed under RCW 9.94A.589(1)(a). *In re Pers. Restraint of VanDelft*, 158 Wn.2d 731, 147 P.3d 573 (2006).

In 2006, this Court determined that the 240 month sentence imposed in count 3 exceeded the maximum sentence that could be imposed and ordered that the sentence be vacated. CP at 85-86. McNeal was remanded for resentencing. This Court also granted leave for McNeal to raise the three issues contained in his second PRP at resentencing “as [the issues] may affect the ultimate sentence imposed” CP at 83-84, 86. McNeal was resentenced and the court again imposed an exceptional sentence without a jury determination on the aggravating factors. The court made new findings, and adopted the findings made in 1997. CP at 18-20.

Our Supreme Court held in *State v. Evans*, 154 Wn.2d 438, 448-49, 114 P.3d 627, *cert. denied*, 126 S. Ct. 560, 163 L. Ed. 2d 472 (2005), that *Blakely* does not apply retroactively to convictions already final when *Blakely* was decided. In the case at bar, the judge ruled that under *Evans*, the conviction was final and that *Blakely* did not apply. RP at 28. McNeal’s case, however, presents a critical difference not contained in published post-*Evans* decisions: McNeal’s sentence was vacated by this Court on June 9, 2006. At that point McNeal started over and was returned to the position he was in on October 16, 1997, when he first came on for sentencing. When the

court imposed a new sentence, McNeal was entitled to have a jury determine beyond a reasonable doubt whether aggravating factors were proven before the judge could impose an exceptional sentence. *Apprendi, supra*. Because the sentencing court re-imposed exceptional sentences without a jury determination on the exceptional sentence facts, the sentence violated *Blakely* and must be reversed. 542 U.S. at 303-04.

3. **IN THE ALTERNATIVE, THIS COURT MUST VACATE McNEAL'S EXCEPTIONAL SENTENCE, AS THE APPRENDI/BLAKELY RULE APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW THAT ARE FINAL.**

The United States Supreme Court's decision in *Blakely* applied the *Apprendi* rule to hold Washington's sentencing procedures for finding aggravating factors beyond a jury's verdict violated a defendant's Sixth Amendment rights. *Blakely*, 542 U.S. at 301.

a. **The dismissal of *Burton v. Stewart* by the United States Supreme Court.**

The issue of the retroactivity of the *Apprendi/Blakely* rule was, until recently, pending before the United States Supreme Court in *Burton v. Stewart*, 127 S. Ct. ____ (2007), (No. 05-9222). The Supreme Court granted certiorari in *Burton* to determine whether its decision in *Blakely* announced a new rule and, if so, whether it applies retroactively on collateral review. The

Burton case involves Lonnie Lee Burton, a Washington State man serving a sentence of 562 months after being found guilty of raping a 15-year-old boy, and guilty of robbery and burglary. Burton's sentences were within state guideline ranges for each of the crimes, but the judge ordered them to be served consecutive based on facts found by the judge, not the jury. As noted *supra*, imposition of exceptional sentences requiring consecutive sentences violates *Blakely*. *VanDelft*, 158 Wn.2d at 742.

Burton, in a habeas case filed in early 2002, claimed, among other arguments, that his consecutive sentence as imposed by a judge violated the *Apprendi* principle. While his case was pending on appeal, the Supreme Court decided *Blakely*. The Ninth Circuit ruled that he could not rely on *Blakely*, because his habeas case preceded it, and *Blakely* is not to be applied retroactively. Burton brought a federal habeas corpus action challenging his sentence because it was enhanced based on facts that were found by the judge rather than by a jury. The 9th Circuit held that *Blakely* did not apply because it should not apply in a retroactive manner to convictions that were final before it was decided.

Oral argument was heard by the United States Supreme Court on November 7, 2006. The Court did not decide whether *Blakely* applies retroactively on collateral review, finding instead that Burton failed to

comply with the gate-keeping requirements of 28 U.S.C. § 2244(b). The Court ruled that this failure deprived the District Court of jurisdiction to hear his claims, and vacated the judgment of the Court of Appeals and remanded with instructions to direct the District Court to dismiss Burton's habeas corpus application for lack of jurisdiction.

The per curium decision reversed all proceedings and held that the habeas proceeding must be dismissed. The question of the retroactive application of *Blakely* on collateral review therefore remains undecided.

b. *Apprendi* and *Blakely* represent a fundamental shift in adjudication of criminal offenses.

In 2000, in *Apprendi v. New Jersey*, the United States Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 530 U.S. at 490. This rule is mandated by the Sixth Amendment right to a jury trial⁵ and the Fourteenth Amendment right to due process of law.⁶ *Id.* at 476.

In *Blakely*, the Supreme Court clarified that “statutory maximum” for

⁵ The Sixth Amendment provides, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State wherein the crime shall have been committed.”

⁶ The Fourteenth Amendment provides, “nor shall any State deprive any person of life, liberty, or property, without due process of law.”

purposes of *Apprendi* means the “maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” 542 U.S. at 303. In other words, the “statutory maximum” is the maximum that a judge may impose “without any additional findings.” *Id.* at 304 (emphasis in original). The impact of the *Apprendi/Blakely* rule has been to invalidate exceptional sentences in Washington, where the facts underlying the exceptional sentence have not been proved to a jury beyond a reasonable doubt. See *State v. Hughes*, 154 Wn.2d 118, 135-42, 110 P.3d 192 (2005).

McNeal was first given an exceptional sentence on October 16, 1997. The court found that his conviction became final on January 30, 2002, when the Court issued a Mandate, after *Apprendi* was issued in 2000 but before the *Blakely* decision in 2004. CP at 18. Generally, new rules of criminal procedure do not apply to criminal cases that were final at the time the new rule was announced, unless the rule falls under a narrow exception. *Teague v. Lane*, 489 U.S. 288, 311 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989); *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 326, 823, P.2d 492 (1992) (citing *Teague*, 489 U.S. at 311)).

The *Apprendi/Blakely* rule is just such a rare and watershed exception to the general rule barring retroactive application of new criminal procedural

rules. The *Apprendi/Blakely* rule, which requires that State to prove to a jury beyond a reasonable doubt every fact necessary to a defendant's punishment, significantly implicates the bed-rock procedural elements essential to the fairness and accuracy of a criminal proceeding. In deciding whether a new rule of criminal procedure applies retroactively, this court should consider a primary purpose of collateral review, which is to prove the innocent with relief from erroneous convictions. Because the *Apprendi/Blakely* rule has more than a speculative connection to innocence, to leave a sentence standing where the facts necessary to the sentence were never proved to a jury beyond a reasonable doubt creates an impermissibly large risk the State is currently punishing a person for more serious conduct than he actually committed. In sum, this Court should hold the *Apprendi/Blakely* rule is a watershed rule of criminal procedure that applies retroactively to cases on collateral review that are final.

c. A new rule of criminal procedure applies retroactively to cases on collateral review if it implicates the fundamental fairness and accuracy of the criminal proceeding.

Generally, the Washington Supreme Court follows the lead of the United States Supreme Court when deciding whether to give retroactive application to newly articulated principles of law. *State v. Evans*, 154 Wn.2d

438, 444, 114 P.3d 627 (2005). The Supreme Court has held that Blakely introduced a new rule of criminal procedure. *Evans*, 154 Wn.2d at 448. The Court noted that it applies “a new rule for the conduct of criminal prosecutions retroactively ‘to all cases, state or federal, pending on direct review or not yet final.’” *In re St. Pierre*, 118 Wn.2d at 326 (citing *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)).

“Watershed” rules of criminal procedure are those that implicate “the fundamental fairness and accuracy of the criminal proceeding.” *Graham v. Collins*, 506 U.S. 461, 478, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993). To fall within this exception, a new rule must meet two requirements: Infringement of the rule must “seriously diminish the likelihood of obtaining an accurate conviction,” and the rule must “alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding.” *Tyler v. Cain*, 533 U.S. 656, 665, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001)(internal quotation marks and citations omitted) (emphasis in original).

d. The *Apprendi/Blakely* rule is a watershed rule of criminal procedure that must be applied retroactively to cases on collateral review.

In *Evans*, the Washington Supreme Court held the *Apprendi/Blakely* rule does not apply retroactively to cases on collateral review, but it similarly

addressed only the jury-trial aspect of the rule. *See*, 154 Wn.2d 445-48. Moreover, the court held the jury-trial aspect of the rule was not a “watershed” rule of criminal procedure based on its erroneous conclusion the rule is merely a procedure governing the determination of “sentencing factors” rather than one used to prove the elements of a crime. *Id.* At 446, 447 n.2.

Because it does not address the proof-beyond-a-reasonable doubt aspect of the *Apprendi/Blakely* rule, *Evans* must be reexamined. The *Apprendi/Blakely* rule has fundamentally altered the understanding of two bedrock procedural elements essential to the fairness of a criminal proceeding: the right to be tried by a jury and the right to have the State prove the essential elements of the crime beyond a reasonable doubt. It is therefore a watershed rule of criminal procedure that must be made available to petitioners on collateral review.

- e. **The *Apprendi/Blakely* rule is a new procedure without which the likelihood of an accurate conviction is seriously diminished.**

The *Apprendi/Blakely* rule has two distinct components: the requirement that facts authorizing a sentence above an otherwise binding statutory threshold be found beyond a reasonable doubt, and the requirement

that those facts be found by a jury. *See Apprendi*, 530 U.S. at 476-78; *Blakely*, 542 U.S. at 301. Although the Supreme Court held in *Summerlin*, 542 U.S. 348, that infringing the jury-trial component of *Apprendi*'s rule (and by implication, *Blakely*'s rule) does not seriously diminish the likelihood of obtaining an accurate conviction, there is no question that infringing the reasonable doubt component of the *Apprendi/Blakely* rule does.

In holding that *Apprendi* does not apply retroactively, the Washington Supreme Court in *Evans* relied on its conclusion that *Apprendi* affects only "sentencing factors" and not "elements" of the crime. *Evans*, 154 Wn.2d at 446, 447 n.2. But this argument forgets that *Apprendi* and its progeny eliminate this distinction for constitutional purposes. Those decisions hold that a "sentence enhancement" or "aggravating factor" that exposes a defendant to a longer sentence than what if otherwise authorized is "the functional equivalent of an element of a greater offense." *Apprendi*, 530 U.S. at 494 n.19; *see also Blakely*, 542 U.S. at 310-11 (repeatedly referring to sentence enhancements covered by *Blakely* as "elements"); *Washington v. Recuenco*, ___ U.S. ___, 126 S.Ct. 2546, 2552, 165 L.Ed.2d 466 (2006)("elements and sentencing factors must be treated the same for Sixth Amendment purposes."). In other words, a State may not "circumvent the protections of *Winship* merely by 'redefin[ing] the elements that constitute

different crimes, characterizing them as factors that bear solely on the extent of punishment.” *Apprendi*, 530 U.S. at 485 (quoting *Mullaney*, 421 U.S. 684, 698, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975)). Thus, because due process requires that all “facts that exposed a defendant to punishment greater than that legally prescribed” must be proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 483. Punishments imposed in violation of *Apprendi*’s requirement cannot stand.

Applying the *Apprendi/Blakely* rule retroactively would give effect to the concern underlying Justice Harlan’s pronouncement that the central purpose of habeas review is to ensure that “no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.” *Desist*, 394 U.S. 244, 262, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting) (quoted in *Teague*, 489 U.S. at 312). This concern, of course, encompasses not only imprisoning individuals who are innocent of committing any crime but also those who committed some transgression but not a more serious offense for which they are punished.

f. The *Apprendi/Blakely* rule alters the understanding of bedrock procedural elements essential to the fairness of a criminal proceeding.

The *Evans* court held the jury-trial aspect of the *Apprendi* rule did not

alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. 154 Wn.2d at 445-47 (citing, *inter alia*, *Teague*, 498 U.S. at 311 and *Mackey*, 401 U.S. 667, 693, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring)). This holding must be reexamined. Each of the components of the *Apprendi* rule independently satisfies this prong of the *Teague* watershed exception.

The due process requirements that facts exposing defendants to punishment beyond otherwise applicable statutory maximums must be found beyond a reasonable doubt is a “bedrock procedural element essential to the fairness of a proceeding.” *Tyler*, 533 U.S. at 665 (quotation and citation omitted).

Applying the reasonable doubt standard is just as important in the context of factual findings that expose defendants to punishment beyond otherwise applicable statutory maximums as it is with respect to other elements of crimes. The Court reiterated in *Apprendi*, in just this context, that the reasonable doubt standard is a “constitutional protection[] of surpassing importance.” 530 U.S. at 476. Without this rule, a defendant guilty of doing something wrong – but not something as serious as the State alleged – could see his sentence “balloon . . . based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a

report compiled by a probation officer who the judge thinks more than likely got it right than wrong.” *Blakely*, 542 U.S. at 311-12. Such a regime would controvert our most fundamental conceptions of liberty.

That is not to say, of course, that every prisoner sentenced in violation of *Apprendi* should obtain collateral relief. Even within the presumably small group of those who are still in prison and procedurally able to raise such a claim, many will not be able to show that *Apprendi* violations in their cases justify relief. *Cf. Recuenco*, 126 S.Ct. at 2551-53 (*Blakely* errors may be deemed harmless at least where State alleged sentence enhancement in information and issue was litigated at trial). But his reality does not give reason for refusing altogether to apply *Apprendi* retroactively to such prisoners’ claims. Convictions infringing on *Apprendi* present “an impermissibly large risk,” *Teague*, 489 U.S. at 312 quoting *Desist*, 394 U.S. at 262 (Harlan, J., dissenting)), that the State is punishing people for more serious conduct than they actually committed. In sum, the *Apprendi/Blakely* rule should be applied retroactively to cases on collateral review. Because McNeal’s exceptional sentences are shrouded by the constitutional doubt that attends a punishment imposed solely on the basis of a preponderance of the evidence, the sentence cannot be allowed to stand.

McNeal recognizes the ruling in *Evans*, in which the Court concluded

that Apprendi is not a watershed rule of criminal procedure and that it does not apply retroactively to cases already final on direct review. As noted in the discussion of *Burton, supra*, the United States Supreme Court has not yet addressed the retroactivity of the *Apprendi/Blakely* rule.

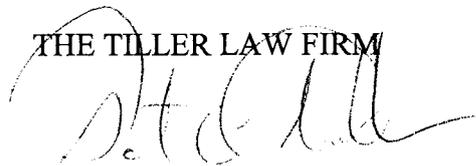
F. CONCLUSION

For the foregoing reasons, McNeal respectfully requests that this Court vacate his exceptional sentences and remand for resentencing within the standard range.

DATED: March 7, 2007.

Respectfully submitted,

THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
Of Attorneys for John McNeal

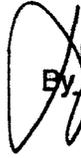
A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

Received & Filed
LEWIS COUNTY, WASH
Superior Court

DIVISION II

JUN 12 2006

By  Kathy A. Brack, Clerk
Deputy

No. 33894-7-II

ORDER GRANTING PETITION

SCANNED
FILED
COURT OF APPEALS
DIVISION II
06 JUN -9 PM 1:32
STATE OF WASHINGTON
DEPUTY

In re the
Personal Restraint Petition of

JOHN KEVIN MCNEAL,

Petitioner.

96-1-261-0

John Kevin McNeal seeks relief from personal restraint imposed following his 1997 convictions of vehicular assault, vehicular homicide, and unlawful possession of methamphetamine with intent to deliver. He claims that his restraint is unlawful because the sentencing court imposed a sentence exceeding the statutory maximum for his drug offense.

Unlawful possession of methamphetamine with intent to deliver is a class B felony. Class B felonies have a statutory maximum sentence of 120 months. But if a defendant, like McNeal, has a prior drug offense, the maximum sentence is double that amount. See RCW 69.50.408(1); *In re Personal Restraint of Cruz*, 2006 Wash. LEXIS 432 (May 25, 2006). Hence, the maximum sentence the court could impose was 240 months. Here the court imposed 240 months plus 12 months of community placement. See RCW 9.94A.120(9)(a). Clearly the court exceeded that statutory maximum and thus the sentence must be vacated. See *State v. Hudnall*, 116 Wn. App. 190, 198, 64 P.3d 687 (2003); *State v. Zavala-Reynoso*, 127 Wn. App. 119, 110 P.3d 827 (2005).

Petitioner also filed a supplemental brief, which this court has not accepted, raising additional sentencing issues. Because petitioner needs to be resentenced and because the sentencing court is in a better position to consider these issues on the merits as they may affect the ultimate sentence imposed, petitioner may raise them below.¹

Accordingly, it is hereby

ORDERED that this petition is granted and this matter is remanded for resentencing.

DATED this 9th day of June, 2006.

Quinn-Bushnell, Ct.
Houghton, J.
Van Aron, J.

cc: John Kevin McNeal
Lewis County Clerk
County Cause No(s). 96-1-00261-0
Jeremy Randolph

¹ In his supplemental materials, petitioner argues that he did not have proper notice of RCW 69.50.408, the doubling statute, that the sentencing court miscalculated his offender score, and that the sentencing court lacked authority to impose an exceptional sentence.

B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SCANNED

In re the
Personal Restraint Petition of

JOHN KEVIN MCNEAL,

Petitioner.

Received & Filed
LEWIS COUNTY, WASH
Superior Court

AUG - 7 2006

By Kathy A. Brack, Clerk
Deputy

No. 35050-5-II

ORDER DISMISSING PETITION

86-1-261-0

STATE OF WASHINGTON
06 JUL 31 AM 9:39
COURT OF APPEALS
DIVISION II
FILED

John Kevin McNeal seeks relief from personal restraint imposed following his jury trial convictions of vehicular homicide, vehicular assault, and possession of methamphetamine with intent to deliver, raising three sentencing issues. He contends (1) Washington statutes failed to notify him the trial court would use RCW 69.50.408 to double his maximum drug sentence, (2) the trial court improperly calculated his offender score, and (3) the trial court unconstitutionally imposed an exceptional sentence. His petition must be dismissed because he has other available remedies.

On June 9, 2006, this court granted petitioner's earlier petition, cause 33894-7-II, and ordered the trial court to resentence petitioner. Petitioner had unsuccessfully attempted to supplement that petition with exactly the same grounds raised in this petition.¹ In the order granting petition 33894-7-II, this court told Petitioner to raise those grounds in the superior court "[b]ecause petitioner needs to be resentenced and because the sentencing court is in a better position to consider these issues on the merits as they

¹ When this court refused to allow Petitioner to supplement 33894-7, he filed the current petition with our Supreme Court. Our Supreme Court has now transferred the current petition to this court.

may affect the ultimate sentence imposed.”

This court will not grant relief from restraint when a petitioner has other adequate remedies. RAP 16.4(d). Because the superior court will be resentencing Petitioner, he may raise his sentencing issues there; he has an available and adequate remedy for his purportedly unlawful restraint. Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 31st day of July, 2006.

Van Deren A.C.J.
Acting Chief Judge

cc: John Kevin McNeal
Lewis County Clerk
County Cause No(s). 96-1-00261-0
Jeremy Randolph

C

Appendix 2.4: Findings of Fact and Conclusions of Law in support of Exceptional Sentence:

I. FINDINGS OF FACT

1.1 The judgment in this case was "final" for sentencing purposes as defined in RCW RCW 10.73.090(3) and by the United States Supreme Court in *Griffith v. Kentucky*, 479 U.S. 314, 329 (1987) on 30 January 2002 when the mandate on direct appeal was filed. The decision in *Blakely v. Washington*, 542 U.S. 296 (2004) was not filed until 24 June 2004.

1.2 The defendant was found guilty on 18 September 1997, by jury verdict, of: Count I-- Vehicular homicide; Count II--Vehicular assault; Count III--Possession of methamphetamine with intent to deliver.

1.3 The defendant's felony criminal history consists of the following:

<u>Crime</u>	<u>Sentence Date</u>	<u>Sentencing Court</u>	<u>Date of Crime</u>	<u>Ad/Juv</u>	
				<u>Fel</u>	<u>Misc</u>
Theft 1(washed)	1/28/79	Lewis Co. Juvenile	1/28/80 1/28/79 NR	J	F
Sale of a Cont. Subst.(washed)	10/23/79	Lewis Co. Juvenile	8/24/79	J	F
Burg 2 (washed)	1/24/80	Lewis Co. Juvenile	10/14/79	J	F
Burg 2(washed)	1/24/80	Lewis Co. Juvenile	10/14/79	J	F
TMVOP(washed)	12/22/80	Lewis Co. Superior	7/2/80	A	F
Theft 2(washed)	12/22/80	Lewis Co. Superior	7/2/80	A	F
Robbery 2(washed)	3/8/82	Lewis Co. Superior	1/11/82	A	F
VUCSA--Poss. Cont. Subst.	2/19/91	Thurston Co. Superior	12/4/90	A	F
Willful Failure to Return from Furlough	5/20/92	Thurston Co. Superior	5/11/91	A	F
VUCSA--Poss. w/ Intent to Manuf.	11/2/92	Lewis Co. Superior	10/19/91	A	F
VUCSA--Poss. Cont. Subst.	11/2/92	Lewis Co. Superior	4/28/92	A	F
VUCSA--Poss. Cont. Subst.	9/13/96	Lewis Co. Superior	7/23/95	A	F

VUCSA—Consp to PWID	12/10/96	Thurston Co. Superior	3/20/95	A	F
VUCSA—Poss. Cont. Subst.	12/10/96	Thurston Co. Superior	1/26/96	A	F

1.4 The defendant's offender score (not counting "washed" offenses) on Count I is 10; The defendant's offender score (not counting "washed" offenses) on Count II is 10; The defendant's offender score (not counting "washed" offenses) on Count III is 14.

1.5 The defendant has failed to take advantage of prior sentences and confinement as an opportunity to improve himself.

Based on the foregoing Findings of Fact, the Court makes the following:

II. CONCLUSIONS OF LAW

2.1 The decision in *Blakely* does not apply for resentencing in the instant case. *State v. Evans*, 154 Wn.2d 438 (2005).

2.2 RCW 9.94A.535 (2)(c) authorizes a sentencing court to impose an exceptional sentence if the defendant committed multiple offenses and the defendant's high offender score would result in some of the current offenses going unpublished.

2.3 This court adopts for resentencing purposes the findings of the original sentencing judge as entered on 16 October 1997.

2.4 There is a basis for an exceptional sentence as to each count, pursuant to (former) RCW 9.94A.390(2)(i), because a presumptive sentence would, by operation of the multiple offense policy, be clearly too lenient in light of the purpose of the Sentencing Reform Act.

2.5 At the time judgment was rendered in this case, pursuant to *State v. Stephens* 116

Wn.2d 238, 243 (1991), an exceptional sentence is justified as to each count, based on defendant's high offender score coupled with multiple current convictions, which is a basis for an exceptional sentence.

2.6 As to Counts I and II, the defendant's high offender score combined with multiple current offenses is such that a standard sentence would result in crimes for which there is no additional penalty, which is a basis for an exceptional sentence, pursuant to *Stephens*.

2.7 At the time judgment was rendered in this case, the defendant's criminal history included three prior drug offenses, as defined by (former) RCW 9.94A.030(18), and 4 other VUCSA convictions. The number of these, combined with the time frame--i.e., 6 controlled substance felony convictions (4 possession and 2 "drug offenses" in less than 6 years)--and the defendant's prior felony history clearly demonstrate a basis for an exceptional sentence on Count III. This is based upon the purposes set forth in 9.94A.010. Specifically, an exceptional sentence is appropriate on Count III in order to ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history; promote respect for the law by providing punishment which is just; and protect the public.

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JOHN K. McNEAL,

Appellant.

COURT OF APPEALS NO.
35423-3-II

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies of were mailed to John K. McNeal, Appellant, and Christopher Baum, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on March 7, 2007, at the Centralia, Washington post office addressed as follows:

Mr. Christopher Baum
Deputy Prosecuting Attorney
Lewis County Prosecutor's Office
360 NW North St., MS: PRO01
Chehalis, WA 98532-1900

Mr. David Ponzoha
Clerk of the Court
WA State Court of Appeals
950 Broadway, Ste. 300
Tacoma, WA 98402-4454

CERTIFICATE OF
MAILING

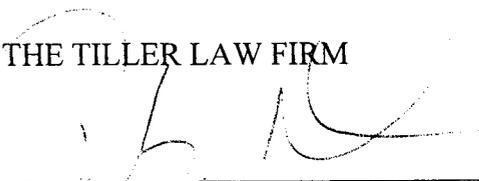
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Mr. John K. McNeal
DOC #634894
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1313 N. 13th Avenue
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DATED: March 7, 2007.

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PETER B. TILLER – WSBA #20835
Attorney for Appellant

CERTIFICATE OF
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