

NO. 35470-5-II

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

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STATE OF WASHINGTON, Respondent

v.

TIMOTHY J. BERRIER, Appellant

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FROM THE SUPERIOR COURT FOR COWLITZ COUNTY

THE HONORABLE JILL JOHANSON

AND

THE HONORABLE JAMES WARME

---

BRIEF OF APPELLANT

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Respectfully submitted by:  
Lisa E. Tabbut  
Attorney for Appellant  
P.O. Box 1396  
Longview, WA 98632  
Telephone (360) 425-8155

pm 4-25-01

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**I. ASSIGNMENTS OF ERROR**

1. **THE SENTENCING COURT ERRED IN CONSIDERING AGGRAVATING FACTORS SUPPORTING AN EXCEPTIONAL SENTENCE AS THE STATE FAILED TO PLEAD THE AGGRAVATING FACTORS IN THE INFORMATION THEREBY DEPRIVING TIMOTHY BERRIER OF NOTICE AND DUE PROCESS.**
2. **THE TRIAL COURT ERRED IN FINDING AGGRAVATING FACTORS TO SUPPORT AN EXCEPTIONAL SENTENCE BECAUSE THE FACTORS WERE NOT SUPPORTED BY FACT OR BY LAW OR SUPPORTED THE LENGTH OF THE SENTENCE.**

**II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. **WHETHER TIMOTHY BERRIER WAS DENIED DUE PROCESS OF LAW WHEN, AFTER MR. BERRIER WAIVED HIS RIGHT TO A JURY DETERMINATION OF AGGRAVATING SENTENCING FACTORS, THE TRIAL COURT CONSIDERED THE FACTORS EVEN THOUGH THEY HAD NOT BEEN PLED IN THE INFORMATION?**
2. **WHETHER THE AGGRAVATING FACTORS FOUND BY THE TRIAL COURT AND THE LENGTH OF THE CONSEQUENT EXCEPTIONAL SENTENCE WERE SUPPORTED IN LAW AND FACT?**

**III. STATEMENT OF THE CASE**

On July 11, 2006, the State filed an information charging Timothy Berrier with a single count of felony harassment as follows:

The defendant, in the County of Cowlitz, State of Washington, on or about July 06, 2006, did knowingly and without lawful authority, did threaten to kill Kathryn Grey and by words or conduct placed the person threatened in reasonable fear that the threat would be carried out; contrary

to RCW 9A.46.020(1)(a)(i), (1)(b) and (2)(b) and against the peace and dignity of the State of Washington.

CP 1-2. On the same date, the State also filed a separate notice of intent to seek an exceptional sentence. CP 3. The notice listed five aggravating factors recognized as such in RCW 9.94A.535(3). CP 3.

On August 8, Mr. Berrier was in court after having a Western State Hospital competency evaluation. RP<sup>1</sup> 1-2. Mr. Berrier and the State asked the court to enter a written finding of competency. RP 2-3. Mr. Berrier then handed a guilty plea form to the court and asked the court to accept his plea as charged. RP 3-4. The State objected to the plea; it wanted to file an amended information adding to the amended information the aggravating factors it had previously filed in a separate notice. RP 4; CP 4-6. Mr. Berrier objected to the amended information as untimely and further complained that he had never been served with notice of the State's intent to seek an exceptional sentence or its motion to amend the information. RP 7. The court did not take the guilty plea. RP 5-6. Rather, the court decided to maintain the status quo and set the matter over. RP 5-6. In so doing, the court noted that it was

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<sup>1</sup> There is only one volume of verbatim although it contains many hearings. As the pages are numbered sequentially, the record will simply be cited to as "RP" followed by the pertinent page number.

not accepting the amended information. RP 6-7. The State served Mr. Berrier with the amended information and the notice to seek an exceptional sentence. RP 6-7.

On August 15, the State withdrew its objection to Mr. Berrier's guilty plea. RP 9. Accordingly, the court took Mr. Berrier's plea to the original information. RP 10-13. The State moved to empanel a jury to consider the aggravating sentencing factors. RP 17. The court set the case over and asked that the issue be briefed. RP 15. Both the State and Mr. Berrier filed pleadings. CP 17-43.

On August 31, the court ruled that a sentencing jury could be empanelled to hear and decide aggravating factors. RP 42-44. The court also ruled that the notice of intent to seek an exceptional sentence put Mr. Berrier on notice of the State's sentencing intent before his guilty plea and that the aggravating factors did not have to be pled in the information. RP 42-44.

On September 5, Mr. Berrier waived his right to have a jury determine the aggravating sentencing factors. RP 52-54; CP 47. On October 10, Mr. Berrier signed various stipulations as to the evidence to be presented to the court on the aggravating factors. RP 74; CP 48-51. In effect, Mr. Berrier's stipulations waived the

need for any testimony. RP 74. Instead, by agreement, the court was asked to review certain documents and listen to a compact disk (CD) in order to rule on the aggravating sentencing factors. RP 74; CP 48-51.

On October 11, the court, Judge Warne presiding, heard sentencing. RP 81-133. The court noted that it had reviewed all of the written material but had not reviewed the CD it had been provided.<sup>2</sup> RP 85. The material revealed that on July 6, 2006, Mr. Berrier was being supervised by Department of Corrections (DOC) Officer Eric Morgan. SCP<sup>3</sup> 82-83. Mr. Berrier has a long history of mental illness. SCP 105-54. DOC classifies him as a Dangerously Mentally Ill Offender. CP 82. Mr. Berrier had previously been convicted of attempted assault in the first degree and robbery in the first degree. SCP 42. While incarcerated in the special offender unit of the Monroe Correctional complex in 2002, Mr. Berrier interacted with the mental health unit supervisor Kathryn Grey. SCP 170-71. He became obsessed with Ms. Grey and told her

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<sup>2</sup> Although encouraged to do so by the State, the court did not recess during the sentencing hearing to listen to the CD. As such, the content of the CD was not factored into his ruling and is not provided in the supplemental designation of clerk papers.

<sup>3</sup> "SCP" refers to those items designated as supplemental Clerk's Papers. The numbering of the supplemental Clerk's Papers follows in sequence with the Clerk's Papers.

about bad thoughts he had about raping and killing her. SCP 170-71. Ms. Grey was very fearful of Mr. Berrier and she reasonably believed that he might kill her. SCP 170-71.

While being supervised by Mr. Morgan, Mr. Berrier had availed himself of mental health treatment. SCP 82-83. Nonetheless, Mr. Berrier seemed to be increasingly paranoid and was fearful of living at his apartment complex. SCP 82-83. He decided that he would only be safe if he was back in custody. SCP 82-32. Mr. Berrier could not possess alcohol as a condition of his supervision. SCP 82-83. He bought a beer and put it in his refrigerator then called Mr. Morgan to report his transgression in hope of being arrested. SCP 82-83. Mr. Morgan did contact Mr. Berrier and brought him into the DOC office. SCP 82-83. While talking to Mr. Morgan, Mr. Berrier told him that he wanted to be back in jail and would commit a crime to do so. SCP 82-83. Upon further prompting, Mr. Berrier said that he would go so far as to kill someone if he had to. SCP 82-83. Mr. Morgan asked Mr. Berrier specifically about Kathryn Grey. Mr. Berrier said that he had made plans in his head to get a Greyhound to Seattle where she lived so he could find her and rape her. SCP 82-83. Mr. Berrier was

subsequently interviewed by police detectives and expressed doubt that he had said those things. SCP 69.

On these facts, the court found three of the State's aggravating factors in support of an exceptional sentence: (1) that Mr. Berrier's conduct during the current offense had manifested deliberate cruelty to Ms. Grey; (2) that Mr. Berrier displayed an egregious lack of remorse; and (3) that Mr. Berrier committed the offense against Mr. Morgan, a public official for retaliatory purposes. RP 125-130; CP 62.

Consequently, the court imposed a 30-month exceptional sentence on a standard range of 4-12 months. RP 130; CP 52-65.

Mr. Berrier filed his notice of appeal on October 12.

## **V. ARGUMENT**

### **I. THE STATE'S FAILURE TO ALLEGE AGGRAVATING FACTORS IN THE INFORMATION PRIOR TO MR. BERRIER'S GUILTY PLEA VIOLATED HIS DUE PROCESS RIGHT TO NOTICE UNDER WASHINGTON CONSTITUTION, ARTICLE 1, §§ 3 AND 22 AND UNDER UNITED STATES CONSTITUTION, SIXTH AND FOURTEENTH AMENDMENTS.**

Under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment, a charging document must contain "[a]ll essential elements of a crime" so as to give the

defendant notice of the charges and allow the defendant to prepare a defense. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). This right to adequate notice is also part and parcel of the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment. State v. Sullivan, 143 Wn.2d. 162, 19 P.3d 1012 (2001). Thus, a defendant may only be convicted of the crime charged, or a lesser included offense. State v. Pelkey, 109 Wn.2d 484, 745 P.2d. 854 (1987); State v. Taylor, 90 Wn.App. 312, 950 P.2d. 526 (1998). As this division of the Court of Appeals has previously stated:

Generally, the State must give the accused notice of the charge he will face at trial. An accused cannot be convicted of an uncharged or inadequately charged offense. A jury may, however, find an accused guilty of a lesser degree offense when the State charges the accused with a higher degree or multiple degree offense. In such instances, the State does not have to notify the defendant that he may be convicted of the lesser included offense.

Taylor, 90 Wn. App. at 322 (citations omitted).

This constitutional principle is also adopted by statute in RCW 10.61.010, which states as follows:

Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser

degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.

RCW 10.61.010.

This principle also applies to the imposition of sentencing enhancements based upon the existence of specific facts such as the commission of a crime within a particular protected area (school zone enhancement under RCW 69.50.435, the use of a firearm in the commission of a crime (firearm enhancement under RCW 9.94A.533(3)), the use of a deadly weapon during the commission of an offense (deadly weapon enhancement under RCW 9.94A.533(4)), and the existence of prior convictions for the same offense (elevating harassment to a felony under RCW 26.50.110).

For example in State v. Theroff, 95 Wn.2d. 385, 622 P.2d. 1240 (1980), the State filed an information charging defendant Theroff with two counts of first degree murder. At the same time, the State filed a "notice" informing Theroff that it intended to enhance his sentence under RCW 9.41.025 (firearm enhancement) and RCW 9.95.040 (deadly weapon enhancement). The State later filed an amended information realigning the two counts of first degree murder and also charging second degree felony murder.

The amended information did not include either firearm or deadly weapon enhancements. The jury eventually returned a verdict finding Theroff guilty of second-degree felony murder. The jury also returned a special verdict finding that Theroff was armed with a firearm during the commission of the offense. The court's sentence of Theroff included the firearm enhancement.

On appeal, Theroff argued in part that the inclusion of the firearms enhancement in his sentence violated his constitutional right to notice and due process because the enhancement was not alleged in either the original or amended informations. The State responded that the separate filing was sufficient to put Theroff on notice that the State would seek the sentence enhancement. The Washington Supreme Court rejected the State's argument. Initially, the court stated:

A separate notice of intention to seek an enhanced penalty under RCW 9.41.025 and 9.95.040 was served and filed with the first information. This was not done with the amended information. In State v. Frazier, 81 Wn.2d 628, 503 P.2d 1073 (1972), we determined that intention to charge under RCW 9.41.025 should be set forth in the information. In State v. Cosner, 85 Wn.2d. 45, 50-51, 530 P.2d. 317 (1975), Justice Hamilton writing for the court said:

The appellate courts of this state have held that when the State seeks to rely upon either RCW 9.41.025 or RCW 9.95.040, or both, due process of law requires that the information contain specific allegations to that

effect, thus putting the accused person upon notice that enhanced consequences will flow with a conviction. Failure of the State to so allege precludes reliance upon the statutes by the trial court or the Board of Prison Terms and Paroles.

We do not propose to recede from these holdings. Rather, we again emphasize the necessity of prosecuting attorneys uniformly adhering to the announced rule. Preferably, compliance should take the form of pleading by statutory language and citation of the statute or statutes upon which they are proceeding, i.e., firearms and/or deadly weapons.

(Citations omitted.)

Theroff, 95 Wn.2d. at 392.

The court then went on to note that it was specifically adopting the quoted language from State v. Frazier. The court held:

We adopt the above language in this case. It is the rule in this state -- clear and easy to follow. When prosecutors seek enhanced penalties, notice of their intent must be set forth in the information. Our concern is more than infatuation with mere technical requirements.

As we said in Frazier, *supra* 81 Wn. at 634, 503 P.2d 1073:

The inclusion of this separate issue in the information and verdict will give the appellant notice prior to trial that, if convicted, and if the jury finds the facts causing the aggravation are correct, she will have no possibility of probation. Here decision to enter a plea of guilty to a lesser charge if the prosecutor and court in their discretion would so accept it, is only one of the practical consequences that follow from receipt of

notice at a time while alternative courses or action on her part are still available to her.

Because the prosecutor here did not follow the rule, he may not now ask the court to impose the rigors of our enhanced penalty statutes upon the defendant. The conviction is otherwise affirmed and the case remanded to the trial court for resentencing consistent with this opinion.

Theroff, 95 Wn.2d. at 392-393. See also<sup>4</sup>, In re Bush, 95 Wn.2d 551, 554, 627 P.2d. 953 (1981) (the enhanced penalty “allegation must be included in the information”); State v. Cosner, 85 Wn.2d. 45, 50, 530 P.2d. 317 (1975) (“due process of law requires that the information contain specific allegations...putting the accused person upon notice that enhanced consequences will flow with a conviction”); State v. Frazier, 81 Wn.2d at 635 (“where a greater punishment will be imposed...notice of this must be set forth in the information”); State v. Porter, 81 Wn.2d. 663, 663-64, 504 P.2d 301 (1972) (where “[t]here was no indication of [mandatory minimum sentence] in the information” the matter had to be “remanded for resentencing”)’ In re. Bush, 26 Wn.App. 486, 490, 616 P.2d. 666 (1980), aff’d, 95 Wn.2d. 551, 627 P.2d. 953 (1981) (“Due process of law requires that the information contain specific

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<sup>4</sup> This list is taken from footnote 10 in State v. Crawford, 128 Wn.App. 376, 115 P.3d 187 (2005).

allegations...putting the accused person upon notice that enhanced consequences will flow with a conviction”) (quoting Cosner, 85 Wn.2d. at 50, 530 P.2d. 317); State v. Shaffer, 18 Wn.App. 652, 655, 571 P.2d 220 (1977), review denied, 90 Wn.2d. 1014, cert. denied, 439 U.S. 1050, 99 S.Ct. 729, 58 L.Ed.2d. 710 (1978) (“due process of law requires that the information contain specific allegations...putting the accused person upon notice that enhanced consequences will flow with a conviction”) (quoting Cosner, 85 Wn.2d. at 50, 530 P.2d. 317); State v. Stamm, 16 Wn.App. 603, 616, 618, 559 P.2d. 1 (1976), review denied, 91 Wn.2d 1013 (1977) (due process violated absent “a specific allegation in the information of the particular enhanced penalty statute to be relied upon at sentencing”); State v. Smith, 11 Wn.App. 216, 225, 521 P.2d. 1197 (1974) (“it is required that the prosecution allege...the ‘factor [which] aggravates [the] offense and causes [a] defendant to be subject to a greater punishment’”); State v. Mims, 9 Wn. App. 213, 219, 511 P.2d. 1383 1973) (“due process of law requires notice in the information of a potentially greater penalty”).

In Theroff, 95 Wn.2d 385, defendant Theroff did not allege that he didn’t have actual notice of the State’s claim that the enhancement applied. Similarly, in our case, Mr. Berrier cannot

claim that he did not have notice of the State's claim that it was seeking an exceptional sentence by the time the court finally allowed him to plead guilty. Rather, in Theroff the information and amended information both failed to allege the firearm enhancement. Absent such an allegation in the information, the court could not impose the enhancement without violating the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Sixth Amendment. Similarly, under our facts, the information failed to allege the existence of aggravating factors sufficient to put the defendant on legal notice that he would be subject to anything other than the applicable range were he to plead guilty. Thus, just as in Theroff, the trial court violated Mr. Berrier's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it considered the aggravating factors alleged against Mr. Berrier not in the information but only in the State's notice of intent to seek an exceptional sentence.

It is anticipated that the State will argue that its notice of intent to seek an exceptional sentence was adequate notice citing to RCW 9.94A.537(1).

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

However, a statutory comparison between RCW 9.94A.537 and other enhancement statues supports Mr. Berrier's argument that RCW 9.94A.537 should be interpreted to require the State to allege aggravating factors in the information and that failure to do so precludes the State from seeking an enhanced sentence.

Under RCW 9.94A.533(3)-(5), the legislature has authorized the court to enhance a defendant's sentence beyond that allowed under the standard range if the defendant was armed with a firearm at the time of the offense, if the defendant was armed with a deadly weapon at the time of the offense, or if the defendant committed the charged crime in a jail. This statute states in part:

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010, and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime....

...

(4) The following additional times shall be added to the standard sentence range for felony crimes committed after

July 23, 1995, if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon enhancements based on the classification of the completed felony crime...

...

(5) The following additional times shall be added to the standard sentence range if the offender or an accomplice committed the offense while in a county jail or state correctional facility and the offender is being sentenced for one of the crimes listed in this subsection...

...

RCW 9.94A.533(3)-(5).

As a careful review of this language reveals, the statute does not even require notice that the state will seek to enhance the sentence given the listed aggravating factors. However, as the court clarified in Theroff, Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment not only require notice, but they require that such notice be placed within the information. If an information fails to allege the facts that enhance the possible sentence in the information, then the constitution precludes using those facts to enhance the sentence.

**II. EVEN IF THIS COURT WERE TO FIND ADEQUATE NOTICE, THE AGGRAVATING FACTORS FOUND BY THE COURT ARE NOT FACTUALLY OR LEGALLY ADEQUATE.**

An exceptional sentence upward cannot withstand appellate review if the reasons supplied by the sentencing court are not supported by the record which was before the judge, those reasons do not justify a sentence outside the standard range, or the sentence imposed was clearly excessive or too lenient. RCW 9.94A.585. Here the court adopted three of the State's five proposed aggravating factors. Specifically, the court found that (1) Mr. Berrier's conduct manifested deliberate cruelty to the victim, Kathryn Grey in violation of RCW 9.94A.525(3)(a); (2) Mr. Berrier displayed egregious lack of remorse in violation of 9.94A.535(3)(q); and (3) that Mr. Berrier committed felony harassment against a public officer or officer of the court in retaliation of the public official's performance of her duty to the criminal justice system. CP 62. However, none of these factors are either legally or factually supported. Whether the reasons justify an exceptional sentence is reviewed de novo. State v. Nordby, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986). The trial court's reasoning will be upheld unless it is clearly erroneous. Id.

**(a) There was no deliberate cruelty to Ms. Grey.**

As it began to announce its ruling, the court acknowledged that “the conclusions are somewhat artificial because they don’t really deal with what’s going on here one way or the other.” RP 128. What was going on is that Mr. Berrier is a mentally ill person who didn’t cope well in society and who felt that he would be better off in prison. To that end, he bought a can of beer, a violation of his community supervision, put it in his refrigerator, and called his community custody officer, Eric Morgan, to arrest him and put him back in prison. After arresting Mr. Berrier, Mr. Morgan began questioning him about his thoughts. Mr. Berrier began to volunteer what he might do, if needed, to ensure that he would go back to prison. To that end, Mr. Berrier said that he had been thinking for years about raping and killing Ms. Grey, his former prison mental health therapist. Deliberate cruelty is gratuitous violence, or other conduct which inflicts physical, psychological or emotional pain as an end in itself. State v. Talley, 83 Wn. App. 750, 760, 923 P.2d 721 (1996). In the context of this case, Mr. Berrier’s statements pulled from him by his community corrections officer, do not meet the factual or legal requirements to support an exceptional sentence.

**(b) Mr. Berrier did not demonstrate or display an egregious lack of remorse.**

In its ruling on this factor, the court held that the mentally ill Mr. Berrier was involved in an ongoing pattern of making outrageous statements to get what he wants. Because it serves his interests, Mr. Berrier has no remorse about making the statements. RP 129. A defendant's lack of remorse, if "of an aggravated or egregious nature," may justify an exceptional sentence. State v. Ross, 71 Wn. App. 556, 563, 861 P.2d 473 (1993), 833 P.2d 329 (1994). For example, an egregious lack of remorse was upheld where a defendant bragged and laughed about the murder he committed, mimicked the victim's reaction to being shot, asked the victim if it hurt to get shot, thought the killing was funny, joked about being on television for the murder, and told police he felt no remorse. State v. Erickson, 108 Wn. App. 732, 739-40, 33 P.3d 85 (2001), review denied, 146 Wn.2d 1005, 45 P.3d 551 (2002). In another instance, a finding of egregious remorse was upheld where a woman joked with her husband's killer about sounds her husband made after the killer shot him and went to meet a boyfriend's family 10 days after her husband's death. State v. Wood, 57 Wn. App. 792, 795, 790 P.2d (1990). Mr.

Berrier's making of outrageous statements so he can live in prison pales by comparison to the facts of Erickson and Wood.

**(c) Mr. Berrier's statements were not retaliatory.**

On this last point, the court noted:

In retaliation for being a probation officer, [Mr. Berrier] threatened a probation officer so that he could get what he wanted, which was to go back to custody. So he threatened a probation officer. Again, it is not exactly what the statute talks about.

RP 130. This reasoning is strained. The record does not reflect that Mr. Berrier ever threatened Community Corrections Officer Morgan. Rather, Mr. Morgan felt that Mr. Berrier's thoughts about Ms. Grey were threatening. Moreover, there is no suggestion in the record that Mr. Berrier was retaliating against Mr. Morgan. Rather, as the court noted, Mr. Berrier told Mr. Morgan certain things in an effort to be put back in prison.

**(d) Mr. Berrier's sentence was excessive.**

To the extent the sentence is based upon reasons insufficient to justify an exceptional sentence the matter must be remanded for resentencing within the standard range." State v. Ferguson, 142 Wn.2d 631, 649, 15 P.3d 1271 (2001). As argued above, none of the aggravating factors found by the court support an exceptional sentence. However, if this court were to find the

legal sufficiency of some but not all of the sentencing court's factors, remand is necessary as the court did not announce whether it would have imposed the same sentence absent one or more of the factors. State v. Hooper, 100 Wn.App. 179, 188, 997 P.2d 936 (2000).

#### V. CONCLUSION

Mr. Berrier's case should be remanded for resentencing within his standard range.

Respectfully submitted this 24<sup>th</sup> day of April, 2007.

  
LISA E. TABBUT/WSBA #21344  
Attorney for Appellant

**VI. APPENDIX OF STATUTES AND CONSTITUTIONAL PROVISIONS**

**RCW 9A.46.020**

**Definition — Penalties.**

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or

(ii) To cause physical damage to the property of a person other than the actor; or

(iii) To subject the person threatened or any other person to physical confinement or restraint; or

(iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

(2)(a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.

(b) A person who harasses another is guilty of a class C felony if either of the following applies: (i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact or no-harassment order; or (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

(3) The penalties provided in this section for harassment do not preclude the victim from seeking any other remedy otherwise available under law.

**RCW 9.94A.535**  
**Departures from the guidelines.**

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

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

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

**(1) Mitigating Circumstances - Court to Consider**

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be

consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

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

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances - Considered by a Jury -Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

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

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

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily

harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

**RCW 9.94A.537**

**Aggravating circumstances — Sentences above standard range.**

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

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

(3) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

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

(5) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an

aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

**RCW 10.61.010**  
**Conviction of lesser crime.**

Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.

**WASHINGTON STATE CONSTITUTION**  
**ARTICLE**  
**DECLARATION OF RIGHTS**

I

**SECTION 3 PERSONAL RIGHTS.** No person shall be deprived of life, liberty, or property, without due process of law.

**SECTION 22 RIGHTS OF THE ACCUSED.** In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided*, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car,

coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed. [AMENDMENT 10, 1921 p 79 Section 1. Approved November, 1922.]

## **UNITED STATES CONSTITUTION**

### **Amendment VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

### **Amendment XIV**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of

age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

COURT OF APPEALS  
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STATE OF WASHINGTON  
BY Lisa  
DEPUTY

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

STATE OF WASHINGTON,	)	Cowlitz County No. 06-1-00876-3
	)	Court of Appeals No. 35470-5-II
Respondent,	)	
	)	
vs.	)	AFFIDAVIT OF MAILING
	)	
TIMOTHY JAMES BERRIER,	)	
	)	
Appellant.	)	
	)	
	)	
	)	

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LISA E. TABBUT, being sworn on oath, states that on the 25th day of April 2007  
affiant deposited in the mails of the United States of America, a properly stamped envelope  
directed to:

Susan I. Baur  
Cowlitz County Prosecuting Attorney  
312 S.W. 1<sup>st</sup> Avenue  
Kelso, Washington 98626

And

Timothy J. Berrier/DOC #716042  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520-9504

AFFIDAVIT OF MAILING - 1 -

LISA E. TABBUT  
ATTORNEY AT LAW  
P.O. Box 1396 • Longview, WA 98632  
Phone: (360) 425-8155 • Fax: (360) 425-9011

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and that said envelope contained the following:

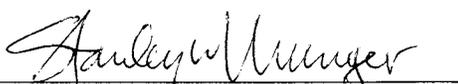
- (1) APPELLANT'S BRIEF
- (2) AFFIDAVIT OF MAILING

Dated this 25th day of April 2007,



LISA E. TABBUT, WSBA #21344  
Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 25th day of April 2007.



Stanley W. Munger  
Notary Public in and for the  
State of Washington  
Residing at Longview, WA 98632  
My commission expires 05/24/08