



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

**STATE OF WASHINGTON,**  
**Respondent,**  
**Vs.**  
**Nicholas Hacheny**  
**Appellant.**

CASE NO: No. 38015-3-II  
**STATEMENT OF  
ADDITIONAL GROUNDS  
PURSUANT TO  
RAP 10.10**

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In addition to the issues raised by appellate counsel the appellant would like to bring to the courts attention the following grounds for review.

**I. Assignments of Error**

- 1 The sentence imposed is an exceptional sentence as it exceeds the statutory maximum.
- 2 Imposition of an exceptional sentence without a jury finding of fact, violates the Constitutional right to have all facts which increase punishment proven to a jury beyond a reasonable doubt. 6<sup>th</sup> Amendment to the United State Constitution.

## **II. Issues Pertaining to Assignments of Error**

- 1 Whether a sentence that includes imprisonment and community custody can exceed the “statutory maximum” under the Sentencing Reform Act. (Assignment of Error 1)
- 2 Whether “statutory maximum” is defined as the absolute maximum or the highest of the range allowed under the Sentencing Guidelines. (Assignment of Error 1)

## **III. Statement of the Case**

This appeal comes following a re-sentencing after remand. Mr. Hacheny was originally convicted of First Degree Murder with the Aggravating circumstance of Arson on December 26<sup>th</sup> 2002. He was sentenced to life in prison without the possibility of parole. On appeal the Washington State Supreme Court reversed on the aggravated circumstances and remanded for a standard range sentence on the charge first degree murder. *State v. Hacheny* 160 Wn. 2d 503, 158 P.3d 1152 (2007).

At the re-sentencing hearing, the Honorable Anna Laurie presiding, defense counsel sought to discuss the fact that the state had previously offered Mr. Hacheney a plea bargain for a sentence of 7 years which Mr. Hacheney had refused. (VRP 17) The state objected based on the Real Facts Doctrine and the Court ruled not to allow any discussions of the state's plea offer. (VRP 17-18)

After hearing from the state and defense counsel, the Court imposed a sentence of 320 months in prison to be followed by 24 to 48 months of community custody. (VRP 22)

#### IV. Argument

- 1 The sentence imposed is an exceptional sentence as it exceeds the statutory maximum.

The sentence imposed of 320 months combined with the 24-48 months of community custody results in an "indeterminate" sentence of 344-368 months. Under RCW 9.94A.510, the standard range for first degree murder with no prior offenses is 240-320 months. It goes without saying that a sentence of 344-368 months exceeds the standard range.

It is well settled that a sentence, including community custody cannot exceed the statutory maximum unless an exceptional sentence is imposed. “A trial court may not impose a sentence, including any term of community supervision, community placement, or community custody, that exceeds the statutory maximum for the crime. *State v. Hudnall*, 116 Wn. App. 190, 195 (2003).

“The maximum punishment for every offense is set by the legislature. The total punishment, including imprisonment and community custody, may not exceed the statutory maximum.” *State v. Sloan*, 121 Wn. App. 220,222 (2004) In *Zavala-Reynoso* the Court of Appeals Division III held that “‘Except as [otherwise] provided . . . a court may not *impose* a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.’ (Emphasis added). Since the sentencing court imposed a sentence exceeding Mr. Zavala-Reynoso's statutory maximum, we vacate his sentence and remand for re-sentencing in a manner consistent with this opinion.” *State v. Zavala-Reynoso*, 127 Wn. App. 119, 124, 110 P.3d 827 (2005).

The critical question to this argument is whether in relationship to sentencing a standard range sentence, the term “statutory maximum” means the range established by the Sentencing Reform Act or whether it means “life imprisonment” as defined by RCW 9A.20.

Division III recently ruled in the case of *State v. Adams*, 138 Wn. App. 36, 155 P.3d 989 (2007), that the statutory maximum for Class A felonies is life imprisonment and therefore their ruling in *Zavala-Reynoso* would not apply to a sentence that when combined with community custody exceeded the highest amount on the sentencing range.. (See *State v. Adams* 138 Wn. App. At page 51.)

This position is in direct conflict with the U.S. Supreme Court ruling in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed. 2d 403 (2004), as well as the Washington State Supreme Court’s rulings subsequent to *Blakely*.

Prior to the *Blakely* decision the Washington Supreme Court had determined that the holding of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L. Ed. 2d 435 (2000) did not apply to Washington’s exceptional sentencing procedure because the “statutory maximum” for class

A crime was life imprisonment not the standard range established by the SRA. In *Blakely* the State argued the very same premise that the Court of Appeals Division 3 has held in *Adams* and the U.S. Supreme Court rejected it:

“The State nevertheless contends that there was no *Apprendi* violation because the relevant “statutory maximum” is not 53 months but the 10-year maximum for class B felonies in § 9A.20.021(1)(b). It observes that no exceptional sentence may exceed that limit. See § 9.94A.420.” *Id.* at 2537.

The Court went on to say:

“The maximum sentence is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator.)” *Id.* at 2538.

The Washington State Supreme Court has recognized that its prior *Apprendi* rulings that defined “statutory maximum” as the absolute maximum has been correct by U.S. Supreme Court:

“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 (emphasis added). This court subsequently interpreted that decision to hold that statutory maximum was the absolute maximum sentence provided by the legislature for a certain offense, not the maximum sentence allowed by the jury's findings. *State v. Gore*, 143 Wn.2d 288, 313-15, 21 P.3d 262 (2001) (citing *Apprendi*, 530 U.S. at 481; *McMillan v. Pennsylvania*, 477 U.S. 79, 92, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986)).

The United States Supreme Court corrected our interpretation recently in *Blakely* by holding that the statutory maximum referenced in *Apprendi* ‘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*, 124 S. Ct. at 2537 (citing *Ring v. Arizona*, 536 U.S. 584, 602, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)). Contrary to our holding in *Gore*, the Supreme Court made clear that the statutory maximum is ‘not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.’” *Id.* *State v. Hughes* 154 Wn. 2d 118, 110 P.3d 192 (2005).

This ruling makes it abundantly clear that the “statutory maximum” is that range established under the SRA and outlined in RCW 9.94A.510. To adopt the reasoning of the *Adams* Court and return to a definition of “statutory maximum” as the absolute maximum would nullify the *Blakely* ruling and the subsequent Washington Supreme Court ruling in *Hughes*.

For the case at hand the range is 240-320 months with a statutory maximum of 320 months. The current sentence imposed is in excess of that amount and is an exceptional sentence.

- 2 Imposition of an exceptional sentence without a jury finding of fact violates the Constitutional right to have all facts which increase punishment proven to a jury beyond a reasonable doubt. 6<sup>th</sup> Amendment to the United State Constitution.

Apprendi v. New Jersey 530 U.S. 466, 147 L. Ed. 2d 435, 120 S.Ct. 2348 (2000) requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed. 2d 403 (2004) now has clearly defined that prescribed statutory maximum to mean the standard sentencing range of the SRA. An upward departure from the standard range requires the determination of facts not considered in computing the standard range sentence, *State v. Gore*, 143 Wn. 2d 288, 315, 21 P.3d 262 (2001). Those facts must now be determined by a jury. *Apprendi v. New Jersey* 530 U.S. 466, 147 L. Ed. 2d 435, 120 S.Ct. 2348 (2000), *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed. 2d 403 (2004).

The trial court's imposition of a sentence above that allowed under the Sentencing Guidelines without presenting additional facts to a

jury was a violation of Mr. Hachenev's 6<sup>th</sup> Amendment right to have all facts which increase punishment proven to a jury.

**Conclusion**

As Mr. Hachenev's sentence is clearly in excess of that allowed by statute this Court should reverse the sentence and remand to the trial court for re-sentencing before a different judge.

Respectfully submitted this 23rd day of February 2009.



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Nicholas Hachenev, pro se.

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STATE OF WASHINGTON

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

Case No. 39015-3-II

NICHOLAS HACHENEY,  
Petitioner,

v.

STATE OF WASHINGTON,  
Respondent.

DECLARATION OF MAILING

I, Nick Hachenev, do hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

That on the 23rd day of February, 2009, I did process through the Washington State Reformatory, in accordance with institutional mail policy, postage prepaid, United States Mail addressed to the following:

Clerk of the Court	Jeff Ellis, Attorney at Law	Mr. Randy Sutton
Division II Court of Appeals	705 Second Ave Suite 401	Kitsap County Prosecutor
950 Broadway, Suite 300	Seattle WA 98104	614 Division Street
Tacoma, WA 98402		Port Orchard WA 98366

One (1) true copy of the following documents in the above referenced case number.

- Statement of Additional Grounds

DATED this 23rd day of February, 2009.

Respectfully Submitted,



Nick Hachenev, Pro Se

DECLARATION OF MAILING