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STATE OF WASHINGTON  
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(consolidated case)

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

TIMOTHY JEAN BLUEHORSE,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 07-1-04401-1  
The Honorable Bryan Chushcoff, Judge

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OPENING BRIEF OF APPELLANT

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## I. ASSIGNMENTS OF ERROR

1. The trial court erred when it imposed an exceptional sentence above the standard range.
2. The trial court erred when it failed to enter written findings of fact and conclusions of law in support of its decision to impose an exceptional sentence.
3. The trial court erred when it failed to make a finding that the aggravating sentencing factor found by the jury provides a substantial and compelling reason justifying an exceptional sentence.
4. The State did not present sufficient evidence to prove beyond a reasonable doubt the aggravating sentencing factor alleged in the Information and found by the jury.
5. The trial court violated the real facts doctrine when, in support of its decision to impose an exceptional sentence, it relied on facts that, if true, would prove an additional or greater uncharged crime.
6. The trial court erred when it imposed an exceptional sentence because the aggravating sentencing factor found by the jury does not provide a substantial and compelling reason justifying an exceptional sentence in this case.

7. The length of the exceptional sentence imposed by the trial court is excessive.

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

1. Where the sentencing statute requires that the trial court enter written findings of fact and conclusions of law explaining its decision to impose an exceptional sentence, and the trial court failed to enter such written findings, should this case be remanded for entry of findings of fact and conclusions of law? (Assignments of Error 1 & 2)
2. Where the sentencing statute requires that the trial court specifically find that the factors relied upon in imposing an exceptional sentence provide substantial and compelling reasons justifying an exceptional sentence, and the trial court failed to make such a finding, should this case be remanded for resentencing? (Assignments of Error 1 & 3)
3. Where the State's evidence failed to establish that Appellant was a gang member or associate, and failed to establish that the charged incident was motivated by gang membership, but instead only established that the victims were gang members and that there was a history of gang violence in the neighborhood, was there sufficient evidence to prove

beyond a reasonable doubt that Appellant committed the crime of drive-by shooting in order to obtain, maintain or advance his membership within a gang? (Assignments of Error 1 & 4)

4. Where the prosecutor told the court at sentencing that Appellant should have been charged with the greater offense of assault, but was not because the prosecutor was too busy to prosecute that crime; and where the trial court agreed that Appellant's actions more closely resembled first degree assault than drive-by shooting and therefore the appropriate sentence was the mid-point of the standard range for the crime of assault in the first degree; did the trial court improperly rely on facts that would prove an additional or greater uncharged crime, in support of its decision to impose an exceptional sentence? (Assignments of Error 1 & 5)
5. Where the facts presented by the State in order to prove the crime of drive-by shooting were no more egregious than the average drive-by shooting case, do the facts of this case provide substantial and compelling reasons justifying an exceptional sentence? (Assignment of Error 1 & 6)
6. Is an exceptional sentence that is more than five times

longer than the maximum standard range sentence clearly excessive? (Assignments of Error 1 & 7)

### III. STATEMENT OF THE CASE

#### A. Procedural History

The State charged Timothy Jean Bluehorse with one count of drive-by shooting in connection with an incident on July 5, 2007, and one count of drive-by shooting and two counts of second degree assault in connection with an incident on August 15, 2007. (CP 26-28) The State also alleged as an aggravating sentencing factor that Bluehorse was a gang member who committed the offenses in order to obtain, maintain or advance his membership or position in a gang. (CP 26-28) The State charged two other individuals, Kevin Abuan and Raymond Howell, as co-defendants in the August 15 incident. (CP 3, 6)

Howell entered a guilty plea at the start of trial. (06/04/2008 RP 192-98)<sup>1</sup> Bluehorse and Abuan proceeded with a joint jury trial. The trial ran longer than expected so, in order to avoid losing jurors, the court, with the consent of all parties, recessed for two months mid-trial. (06/19/2008 RP 1687)

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<sup>1</sup> Citations to the transcripts in this case will be to the date of the proceeding followed by the page number.

The jury convicted Bluehorse of the July 5 drive-by shooting charge, and found by special verdict that the offense was gang motivated (that Bluehorse committed the offense in order to obtain, maintain or advance his membership or position in a gang). (CP 71-72; 08/20/08 RP 9-10) The jury acquitted Bluehorse on the remaining charges relating to the August 15th incident. (CP 29-33, 73-75; 08/20/2008 RP 9-10) The jury convicted Abuan of drive-by shooting and assault relating to the August 15th incident, but found he did not commit the crimes in order to obtain, maintain or advance his membership or position in a gang. (08/20/08 RP 8-9)

Bluehorse stipulated to an offender score of zero, and a standard range of 15 to 20 months of confinement. (CP 76-77) The trial court imposed an exceptional sentence of 108 months. (CP 83, 102-03; 09/12/08 RP 1824) This appeal timely follows. (CP 91)

B. Substantive Facts

1. *Gang Evidence*

The trial court allowed several law enforcement officers to testify about gangs and gang culture in East Tacoma. The officers testified that there are approximately 20 different “sets” of gangs within the area, most are loosely affiliated with the larger Blood or

Crip gangs. (06/10/08 RP 610)

The color red is associated with Blood gangs, and the color blue is associated with Crip gangs. (06/09/08 RP 412; 06/10/08 RP 612) Members show their affiliation and loyalty to a gang by “flying” their colors—wearing items of clothing or accessories in their gang’s color. (06/09/08 RP 412; 06/10/08 RP 625-26) Members also make, or “throw,” hand gestures which indicate their gang affiliation. (06/10/08 RP622) Members also have nicknames, or monikers that show a connection to a particular gang or senior gang member. (06/10/08 RP 623-24)

East Tacoma gangs include the Outlaw Crip Killers (OLCK) and the Native Gangster Crips (NGC). The OLCK membership is primarily Samoan, and is affiliated with the Bloods. (06/12/08 RP 1005, 1007) The NGC membership is primarily Native American, and is affiliated with the Crips. (06/10/08 RP 610-11) The OLCK’s “enemies” are the NGC and the Eastside Gangster Crips (EGC). (06/12/08 RP 1009; 06/17/08 RP 1259)

There are different levels of involvement in a gang: hardcore member, associate, or wannabe. (06/09/08 RP 378; 06/10/08 RP 616-17) A hardcore member is someone who has been officially “put-on” or “jumped-in” to the gang through some act by or against

him. (06/09/08 RP 378; 06/10/08 RP 616-17) A member typically commits criminal acts in order to gain or maintain their status within the gang. (06/10/08 RP 628-29) A member also maintains status by defending other members against aggression or disrespect from members of rival gangs. (06/10/08 RP 629-30) If gang members feel that a particular member has not been sufficiently involved in their gang's activities, they will "check" them by assaulting them. (06/10/08 RP 629) Typically, checking and maintaining relates to the hardcore gang members, but occasionally to an associate. (06/10/08 RP 630)

An associate is someone who hangs around gang members, but is not a full-fledged member. (06/09/08 RP 379; 06/10/08 RP 616) They do not necessarily participate in gang-related crimes, but sometimes participate or defend other members. (06/09/08 RP 379; 06/10/08 RP 616-17, 630) A wannabe is someone who likes gang culture and wants to be a member of a gang, but has not been put-on or jumped-in yet. (06/09/08 RP 379; 06/10/08 RP 617) They sometimes do criminal acts to try to prove that they are gang material. (06/09/08 RP 379)

Encroaching into an area considered to be the territory of a rival gang is seen as a disrespectful and aggressive act. (06/10/08

RP 620) Throwing hand gestures at rival gang members can also be considered confrontational. (06/10/08 RP 623, 691) Rival gang members often settle these disputes with violence. (06/10/08 RP 692) Although most rivalries occur between a Blood set and a Crip set, occasionally there will be a rivalry between two Blood sets or two Crip sets. (06/10/08 RP 612, 613)

## 2. *Evidence of Charged Crimes*

In the summer of 2007, brothers Fomai and Francis Leoso lived at 3589 East J Street in East Tacoma.<sup>2</sup> (06/12/08 RP 1002, 1004; 06/17/08 RP 1256) They are both admitted members of the OLCK. (06/12/08 RP 1005; 06/17/08 RP 1257-58) Bluehorse has a brother named Hokeshina Tolbert, who bears a physical resemblance to Bluehorse, but is shorter. (06/10/08 RP 525; 06/12/08 RP 1022-23) Tolbert is a known and active NGC gang member. (06/19/08 RP 1578; 08/18/08 RP 38; 08/19/08 RP 16)

Francis and Fomai both testified that they knew Bluehorse because they had seen him around the neighborhood. (06/12/08 RP 1021-22; 06/17/08 RP 1260, 1262-63) Francis testified that Bluehorse would throw NGC signs at him, and he would respond by

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<sup>2</sup> Because Fomai Leoso and Francis Leoso share a last name, they will be referred to in this brief by their first names.

throwing OLCK signs at Bluehorse. (06/12/08 RP 1041, 1043)  
Francis also saw Bluehorse dressed in blue clothing. (06/12/08 RP 1042-43) But Fomai testified that he did not have any problems with Bluehorse. (06/17/08 RP 1260)

Ibbha Pritchard is Francis' and Fomai's cousin, and a former member of a Blood gang sect called the Royal Samoan Pirus (RSP). (06/12/08 RP 1047; 06/16/08 RP 1217, 1220; 06/17/08 RP 1243) On July 4, 2007, he went to the Leosos' house for a family party. (06/16/08 RP 1217) Pritchard and Fomai were standing in front of the house shortly after midnight, when a dark SUV drove up. (06/16/08 RP 1219) Pritchard heard someone yell something like, "What's up cuz?" (06/16/08 RP 1222) Then he heard gunshots. (06/16/08 RP 1222) A bullet hit Pritchard in the leg, and is still lodged in his thigh. (06/16/08 RP

When police officers arrived at the scene, none of the witnesses were able to describe the suspects; they could only describe the car. (06/11/08 RP 800, 819, 820) At trial, however, Pritchard testified that he saw the face of the shooter, but did not recognize him at the time. (06/16/08 RP 1225, 1233) Fomai testified that he did not see the face of the shooter, but noticed that the shooter had a plastic cast on his arm. (06/17/1219 08 RP 1269,

1270) Fomai did not tell the responding officers about seeing the plastic cast. (06/17/08 RP 1342)

A few days later, Pritchard went with friends and family, including Francis and Fomai, to a local lake. (06/12/08 RP 1044, 1046; 06/16/08 RP 1229, 1230) While they were there, Pritchard saw the man he believed shot him. (06/16/08 RP 1229, 1230) Someone in his group told him that the man's name was Timmy Bluehorse. (06/16/08 RP 1230) Pritchard and his group then confronted Bluehorse and accused him of shooting Pritchard. (06/12/08 RP 1048-49; 06/16/08 RP 1231) Bluehorse denied any involvement, and a physical fight broke out. (06/12/08 RP 1049; 06/16/08 RP 1231-32; 06/17/08 RP 1282) The fight ended when Bluehorse ran away. (06/12/08 RP 1050; 06/16/08 RP 1233; 06/17/08 RP 1284-85)

On the night of August 15, as he sat in his garage, Francis saw a red car drive up and heard someone say "N-G-C cuz." (06/12/08 RP 1016-17, 1019) Francis testified that he saw Bluehorse lean out of the window and fire several shots toward the garage. (06/12/08 RP 1013, 1016, 1020) Francis grabbed his gun and shot at the red car. (06/12/08 RP 1019, 1030) Francis and Fomai, who had been inside the house when the shots were fired,

then jumped into their car and tried unsuccessfully to chase the red car. (06/12/08 RP 1031-32; 06/17/08 RP 1287-88) They were later stopped by police, and Francis was arrested for gun possession. (06/18/08 RP 1375, 1377. 1380)

On August 17, Tacoma Police officers conducted a traffic stop of a red vehicle with expired registration. (06/09/08 RP 362-63) Howell was driving and Abuan was the passenger. (06/09/08 RP 364) Police arrested Howell for driving with a suspended license, and arrested Abuan for possession of marijuana. (06/09/08 RP 365, 366-37) During a search incident to arrest, the officers found a handgun under the driver's seat, and noticed damage to the rear of the car. (06/09/08 RP 375, 471, 484) Abuan told police that someone shot at the car. (06/09/08 RP 376, 485)

The arresting officers also noticed that Abuan was wearing red accessories. (06/09/08 RP 376) Abuan admitted that he was a member of the Native Gangster Blood gang, and told the officers that his gang moniker is "Tiny K.O." (06/09/08 RP 376, 491-92) The officers suspected that Abuan and Howell had been involved in the August 15th shooting incident. (06/09/08 RP 375, 400, 406)

During a subsequent interview with a police detective, Abuan admitted that he drove the red car during the shooting on August

15. (06/10/08 RP 647) He told the detective that Howell was a passenger, and that "Marquez" and "Little Bear" were firing from the back seat. (06/10/08 RP 647) Further investigation excluded "Marquez" as a participant. (06/10/08 RP 652) When the detective questioned Abuan about this inconsistency, Abuan said that a person named Jeremy James had fired the gun. (06/10/08 RP 653, 655-56) Abuan never mentioned Bluehorse as a participant. (06/11/08 RP 744)

Bluehorse testified on his own behalf. He testified that he is not in a gang, but that people assume he is because his brother and cousins are gang members. (06/19/08 RP 1578-79; 08/19/08 RP 16) He testified that he attends school, works, and plays sports instead. (06/19/08 RP 1575, 1583)

Bluehorse testified that he broke his dominant right hand and underwent surgery on July 1, 2007. (06/19/08 RP 1574) Doctors placed a cast on his arm, which stretched from his fingertips to his elbow. (06/19/08 RP 1577) He could not move his fingers while the cast was in place. (06/19/08 RP 1575)

Bluehorse testified that he went out with friends on the night of July 4, and was home by about 10:00PM. (06/19/08 RP 1586) He remained at home the rest of the night, and did not participate in

the drive-by shooting at the Leosos' house. (06/19/08 RP 1587-88, 1605)

In mid-July, Bluehorse went to La Push, Washington, to watch a baseball tournament. (06/19/08 RP 1603) He stayed in La Push most of the summer, returning to Tacoma once to get his cast removed. (06/19/08 RP 1604)

In the evening of August 14, La Push police detained and questioned Bluehorse because a witness reported seeing him vandalizing cars in the area. (06/19/08 RP 1609, 1630, 1659; 08/19/08 RP 6, 17) Bluehorse told La Push police officer Ryan Lewis that he came to La Push to escape the gangs, and that he had been shot at many times in Tacoma. (08/19/08 RP 9) Bluehorse told Lewis that he is affiliated with a Tacoma gang, but that he does not "back up" a gang. (08/19/08 RP 10) Bluehorse explained at trial that he told the officer he might be affiliated with a gang because members of his family are in gangs. (06/19/08 RP 1639) He also told the officer that he does not participate in gang crimes. (06/19/08 RP 1642) Bluehorse was not charged with any crimes in La Push relating to the vandalism. (06/19/08 RP 1608)

Bluehorse's brother, Hokeshina Tolbert, had also come to La Push for the summer. (06/19/08 RP 1610) Bluehorse became

angry at Tolbert after the vandalizing incident, because he thought Tolbert was involved. (06/19/08 RP 1624-25) They had an argument, and Tolbert returned to Tacoma. (06/19/08 RP 1611)

Bluehorse testified that he left La Push on August 17 to participate in a softball tournament. (06/19/08 RP 1645) He returned to Tacoma on August 19, and learned that the police were looking for him. (06/19/08 RP 1647-48) He immediately called the investigating detective, and turned himself in. (06/09/08 RP 430-31; 06/19/08 RP 1648)

Bluehorse and Abuan called several alibi witnesses. Lavenia Billy is Bluehorse's cousin, and lives with him at her mother's home in Tacoma. (09/19/08 RP 1550, 1552, 1558) She testified that Bluehorse is not a member of the NGC gang. (09/19/08 RP 1554) She also testified that she was at home on the night of July 4. She saw Bluehorse come home that night at about 10:00 or 10:30PM, and she testified he was at home the rest of the night. (09/19/08 RP 1551, 1553)

Stacy Harrison testified that Bluehorse stayed at her home in La Push from mid-July to mid-August of 2007. (06/18/08 RP 1491-92, 1495) Harrison confirmed that Bluehorse had a cast on his arm in July, that he could only move his thumb and pointer finger, and

that he had trouble holding anything in his hand. (06/18/08 RP 1492, 1495) Harrison testified that she saw Bluehorse in La Push on August 15 and 16. (06/18/08 RP 1493, 1514)

Charles Penn testified that he met Bluehorse in La Push. (06/18/08 RP 1516-17) He and Bluehorse traveled together with a softball team to the tournament on August 17. (06/18/09 RP 1520) He also testified that Bluehorse told him that he was not a gang member. (06/18/08 RP 1521)

Jimmy John testified that he is Abuan's cousin, and was with Abuan all evening and overnight on August 15. (06/18/08 RP 1429, 1432-33) He also testified that he saw Bluehorse working at a Native American firecracker stand on the afternoon of July 4. (06/18/08 RP 1476-77) He noticed that Bluehorse's arm was in a cast and a sling. (06/18/08 RP 1476-77, 1479) John also testified that Bluehorse is not in a gang. (06/18/08 RP 1478)

Tara Foulkes also testified that she was with Abuan on the night of August 15. (08/18/09 RP 27-28, 29-30) She testified that she does not know if Bluehorse is a gang member, but knows that his brother is. (08/18/09 RP 38) She believes that Tolbert could be mistaken for Bluehorse. (08/18/09 RP 38-39)

#### IV. ARGUMENT & AUTHORITIES

##### A. Facts from the Sentencing Hearing

Bluehorse was charged with and convicted of the July 5 drive-by shooting. (CP 26-28; 71; 08/20/08 RP 9-10) The State alleged, and the jury found, that Bluehorse committed the offense in order to obtain, maintain or advance his membership or position in a gang, which is a recognized aggravating factor for sentencing purposes under RCW 9.94A.535(3)(s). (CP 26-28, 71-72) Bluehorse stipulated to an offender score of zero, and a standard range of 15 to 20 months. (CP 76-77)

At the sentencing hearing, the prosecutor asked the court to impose an exceptional sentence of 120 months, stating:

In fact, of course, Mr. Bluehorse is guilty of the crime and that his involvement in, just speaking of the count that he was convicted of, was deadly. He was grossly undercharged in that case. It is in large part due to the overwhelming caseload that I have involving gang members. Keeping up with each case and the quantity of information that each case requires as far as providing to the defense, researching, and understanding who the gang members are, the associates, who they are, you know, it doesn't involve a simple incident of crime and witness. It involves a history. It is very difficult to compile that kind of history to get to know the person, frankly, that has been charged, so you can make a decision about what the appropriate level of prosecution should be, et cetera.

Somehow, by the time this got to court, I was

way behind the curve, and I should have, long before, moved to rearraign Mr. Bluehorse and charge him with assault in the Second Degree, but I didn't. He has been convicted of drive-by. In fact, he shot Mr. Pritchard, Ibbha Pritchard in the leg, as I recall.

...  
That is more serious than a simple drive-by.

...  
I have to highlight this for the Court because the ultimate conviction in this case doesn't really represent what happened. . . .

(09/12/08 RP 1806-09)

The court then imposed an exceptional sentence of 108 months, stating:

[The jury] did consider as an aggravating circumstance, under RCW 9.94A.535(3)(s), that the defendant committed the offense to obtain [his] membership or advance [his] position in a hierarchy in an organization, association, or identifiable group. That is an aggravating circumstance that the jury has found. That does support the Court in deciding to part from the standard range and impose a more appropriate sentence that such an aggravation would justify.

...  
One of the things I thought was interesting that [the prosecutor] pointed out was, this could have as easily been charged as Assault in the First Degree since the person – on the occasion of the drive-by on which he was – Mr. Bluehorse was convicted by the jury was the occasion in which Ibbha Pritchard was shot in the leg. Mr. Greer is kind of beating himself up a little bit for not charging that. With an offender score of zero, an Assault in the First Degree has a standard range of 93 to 12[3] months. You can see the difference between that and the 15 to 20 just for drive-by shooting would otherwise have for the same

offender score.

. . . .  
I do think that [the prosecutor] has made a point that this particular offense resembles much more an Assault in the First Degree than merely drive-by given that someone was instead shot. . . .

. . . What I'm talking about, in general, is that you have a scene that – you have a dangerous scene that gets created by this whole gangland world. While Mr. Bluehorse, certainly, deserves to be judged only by the events on that particular evening that he was convicted about, one of the things that makes gang activity an aggravating circumstance is because these kings of reprisals and people firing back such as what happened in the August event, although Mr. Bluehorse was acquitted of that, are the kind of consequence that puts everyone at risk. . . .

Now, it's also interesting, the mathematics of this, because a range of 93 to 123 months would have a mid-point of 108 months, which is exactly what Mr. Abuan just got. Although Mr. Bluehorse shouldn't necessarily be punished the same way as Mr. Abuan was because there were two other charges there, other people standing by, and so on, the events in July indicated that there were certainly other people nearby who could have been in the line of danger of a drive-by shooting.

While that happens to be a neat equivalence of the two sentences, I happen to also think, independently of that, that is a reasonable sentence for Mr. Bluehorse, and that's what I will do. 108 months[.]

(09/12/08 RP 1820-24) (A complete copy of both the prosecutor's recommendation and the court's oral ruling are attached in Appendix A and Appendix B, respectively.)

B. Law regarding imposition and review of an exceptional sentence.

Sentences must fall within the proper presumptive sentencing ranges set by the legislature. *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). However, a court may impose a sentence that exceeds that sentence range if a jury finds, beyond a reasonable doubt, one or more aggravating factors alleged by the State, and if the court determines that “the facts found are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.537(6); see also RCW 9.94A.535. “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.” RCW 9.94A.535.

RCW 9.94A.585(4) governs appellate review of the imposition of an exceptional sentence:

To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

The reviewing court performs a three-pronged analysis in its review

of an exceptional sentence: (1) whether the record supports the jury's special verdict on the aggravating circumstances; (2) whether the trial court's reasons for imposing an exceptional sentence are substantial and compelling; and (3) whether the sentence was clearly excessive or clearly lenient. *State v. Hale*, 146 Wn. App. 299, 305-06, 189 P.3d 829 (2008); RCW 9.94A.585.

C. The trial court erred when it failed to make and enter the statutorily required written findings in support of its decision to impose an exceptional sentence.

In this case, the jury unanimously found as an aggravating factor that the offense was gang motivated; that Bluehorse committed the drive-by shooting "in order to maintain his membership or to advance his position in the hierarchy of an organization, association, or identifiable group." (CP 72) This is a recognized aggravating factor for sentencing purposes. RCW 9.94A.535(3)(s).

However, the trial court failed to make a finding that this fact provides a substantial and compelling reason justifying an exceptional sentence in this case, as required by RCW 9.94A.535. See also *Hale*, 146 Wn. App. at 306 ("the trial court must enter findings and conclusions justifying its exceptional sentence"). The court also failed to enter written findings of fact as required by RCW

9.94A.535.

By failing to make the required finding that substantial and compelling reasons justify an exceptional sentence, and by failing to enter any written findings and conclusions in support of its decision to impose an exceptional sentence, the trial court failed to fulfill its statutory sentencing obligations.

This failure is prejudicial in this case because, as argued in more detail below, a review of the trial court's oral ruling shows that the court did not particularly rely on the gang motivation factor found by the jury when it imposed an exceptional sentence. The court engaged in a general discussion of the dangers of gang culture and activities. (09/12/08 RP 1823-24) But the court failed to explain whether and/or why the jury's finding that Bluehorse's behavior was motivated by his supposed gang affiliation presents a substantial and compelling reason to deviate from a standard range sentence for the crime of drive-by shooting. (09/12/08 RP 1820) Thus, without specific written findings, it is impossible to conclude that the exceptional sentence imposed in this case comports with statutory requirements.

Where the court fails to enter written findings of fact, the case should be remanded for entry of findings. *In re Breedlove*,

138 Wn.2d 298, 313, 979 P.2d 417 (1999). And when the trial court fails to make a finding of substantial and compelling reasons to justify an exceptional sentence, reversal of the sentence and remand for resentencing is required. *State v. Taitt*, 93 Wn. App. 783, 792, 970 P.2d 785 (1999).

D. The trial court erred when it imposed an exceptional sentence because the State failed to prove the gang motivation aggravating factor.

In reviewing the imposition of an exceptional sentence, this Court reviews “whether the record supports the jury’s special verdict on the aggravating circumstances.” *Hale*, 146 Wn. App. at 307 (citing RCW 9.94A.585(4); *State v. Fowler*, 145 Wn.2d 400, 405, 38 P.3d 335 (2002)). This Court has applied the “clearly erroneous” standard when reviewing factual findings in support of an aggravating factor. *Hale*, 146 Wn. App. at 306.

The jury’s special verdicts in this case were “clearly erroneous” because the evidence was not sufficient to support a conclusion that Bluehorse was associated with a gang, or that Bluehorse’s actions were motivated by a gang association.

RCW 9.94A.535(3)(s) provides that the court may give an exceptional sentence if the jury finds that: “[t]he 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.” In this case, however, the State failed to present sufficient evidence to establish: (1) that Bluehorse had membership or a position in a gang, or (2) that the shooting on July 5 was motivated by a desire to obtain, maintain or advance his position in a gang.

Not a single witness testified that Bluehorse was a known gang member—not the police officers who were called as experts on Tacoma gang membership and culture, not the victims of the drive-by shootings who are admitted gang members themselves, and not a single friend or family member of Bluehorse. The State’s evidence on this matter consisted of a single witness who testified that Bluehorse threw NGC hand gestures at him and that he was occasionally seen wearing blue clothing, and Bluehorse’s statement to a La Push police officer that he might be considered associated with a gang because his brother and cousins are gang members. (06/12/08 RP 1021, 1041, 1042-43) This evidence does not establish, beyond a reasonable doubt, that Bluehorse is a gang

member or even a gang associate.<sup>3</sup>

Moreover, merely showing gang membership, without more, is insufficient to support an exceptional sentence under RCW 9.94A.535(3)(s). Although the First Amendment does not protect criminal actions, it does protect a person who commits a crime from being punished twice merely because he happens to belong to a gang. See *State v. Johnson*, 124 Wn.2d 57, 67, 873 P.2d 514 (1994); *State v. Smith*, 64 Wn. App. 620, 624-25, 825 P.2d 741 (1992). The First Amendment protects an individual's right to associate with others, even when the group or its purpose are unpopular. *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *Smith*, 64 Wn. App. at 625. Furthermore, RCW 9.94A.340 prohibits consideration of factors at sentencing that do not relate to the crime or the previous record of the defendant.<sup>4</sup> To support an exceptional sentence, the evidence in this case must establish more than just gang membership; it must

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<sup>3</sup> Curiously, even though Abuan himself admitted to police that he was a gang member and admitted to driving the vehicle used in the August 15 drive-by shooting, and even though during that incident the shooter yelled "N-G-C cuz" and the car's occupants wore blue bandanas, the jury did not find that Abuan's crimes on that date were gang motivated. (06/09/08 RP 376, 491-92; 06/10/08 RP 647; 06/12/08 RP 1016, 1028; 08/20/08 RP 8-9)

<sup>4</sup> "The sentencing guidelines and prosecuting standards apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant." RCW 9.94A.340.

establish that the crime was committed in furtherance of the gang or gang membership.

Assuming for the purpose of this argument that the State proved that Bluehorse was a gang member or associate, that fact does not amount to sufficient evidence that the crime was committed to obtain, maintain or advance his position or status with a gang. The only evidence offered by the State to show a connection between the drive-by shooting and the gang was the general statement of one detective that individuals are often required to commit crimes in order to join or maintain membership in a gang, and that gang members often turn to violence to settle disputes. (06/10/08 RP 628-29, 692) But the detective also testified that gang associates do not always participate in the gang's crimes. (06/09/08 RP 379; 06/10/08 RP 616-17, 630)

Unlike the August 15 incident, where the car's occupants were observed wearing blue bandanas and the shooter called out "N-G-C cuz," the State presented no evidence to establish that the July 5 shooting was gang related. (06/12/08 RP 1016, 1028) The State simply failed to establish, if Bluehorse was indeed involved in the July 5 shooting, that he was motivated by his association with a gang. The jury's finding on the aggravating factor is not supported

by the record in this case, and does not support the imposition of an exceptional sentence.

- E. The reasons given by the trial court in its oral ruling are not substantial and compelling justifications for an exceptional sentence.

This Court reviews de novo whether the trial court's reasons for imposing an exceptional sentence are substantial and compelling. *Hale*, 146 Wn. App. at 308 (citing *Fowler*, 145 Wn.2d at 406).

1. *The trial court's reliance on facts that could prove a greater or additional crime was improper and does not provide a substantial and compelling reason to impose an exceptional sentence.*

The real facts doctrine prohibits trial courts from imposing a sentence based on facts that compose the elements of an additional, unproven crime, or facts that would elevate the degree of the charged crime. *State v. Wakefield*, 130 Wash.2d 464, 475-76, 925 P.2d 183 (1996). This rule is codified in RCW 9.94A.530(3), which states: "Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range[.]"

For example, in *State v. Morreira*, Division 3 held that a trial court cannot justify an exceptional sentence for second degree

assault on the defendant's intent to inflict bodily injury, because intent is what separates second degree assault from first degree assault. 107 Wn. App. 450, 460, 27 P.3d 639 (2001). Similarly, in *State v. Sly*, Division 1 held that the trial court cannot base an exceptional sentence for second degree robbery on the defendant's infliction of bodily harm because that is an element which separates second degree robbery from first degree robbery. 58 Wn. App. 740, 750, 794 P.2d 1316 (1990).

In this case, the State charged and convicted Bluehorse of drive-by shooting. (CP 26, 71)

A person is guilty of drive-by shooting when he or she recklessly discharges a firearm . . . in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

RCW 9A.36.045(1). Drive-by shooting is a class B felony. RCW 9A.36.045(3). At the sentencing hearing, the prosecutor explained that he did not charge Bluehorse with assault because he has an overwhelming case load and because crimes are harder to prove when gang members are involved. (09/12/08 RP 1806-08)

The trial court agreed with the prosecutor that "this particular offense resembles much more an Assault in the First Degree than

merely the drive-by given that someone was instead shot.” (09/12/08 RP 1822) First degree assault is proved if, “with intent to inflict great bodily harm”, a defendant “[a]ssaults another with a firearm” or “[a]ssaults another and inflicts great bodily harm.” RCW 9A.36.011(1)(a), (1)(c). First degree assault is a class A felony. RCW 9A.36.011(3).

“Great bodily harm” is defined as “bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement[.]” RCW 9A.04.110(4)(c). And Washington courts have held that intent to inflict great bodily harm can be inferred where a defendant shoots a gun in the direction of the victim. See *State v. Pedro-Guerra*, \_\_ Wn. App. \_\_\_, 201 P.3d 398, 407 (2009).

Assuming the truth of the State’s evidence, the facts showed that Bluehorse purposefully fired a weapon at individuals standing in front of a house. (06/16/08 RP 1219, 1222, 1225) Pritchard was hit by a bullet, which remains lodged in his thigh. (06/16/08 RP 1219) The trial court specifically relied on these facts when it decided to impose an exceptional sentence. (09/12/08 RP 1821, 1822, 1823-24) These facts, if true, establish the elements of first degree assault, a crime the State, for the sake of convenience or

expedience, chose not to charge. These facts cannot justify an exceptional sentence.

2. *The jury's finding of gang motivation is not a substantial and compelling reason justifying an exceptional sentence in this case.*

To justify an exceptional sentence, the facts relied upon by the trial court must be sufficiently substantial and compelling to distinguish the crime from others in the same category. *State v. Grewe*, 117 Wn.2d 211, 215-16, 813 P.2d 1238 (1991). The State's evidence regarding the July 5 incident are no more egregious than any other typical drive-by shooting case. And, as argued above, the evidence that this incident was gang-related was minimal to non-existent. The facts of this case are not substantial and compelling enough to justify an exceptional sentence.

- F. A 108-month exceptional sentence is clearly excessive.

Bluehorse has an offender score of zero, and the standard range for his drive-by shooting conviction is 15 to 20 months. (CP 81) The trial court imposed an exceptional sentence of 108 months, over five times longer than the high-end of Bluehorse's standard range. (CP 83, 103; 09/12/08 RP 1824) The Legislature understood the risks and dangers involved in drive-by shooting

crimes, and set what it believed was the appropriate standard range. The Legislature believed that a first time offender convicted of drive-by shooting should receive a sentence of less than two years. RCW 9.94A.510, .515. The sentence imposed by the court in this case adds over seven years of confinement to the term set by the Legislature, and is clearly excessive.

G. This Court should reverse Bluehorse's exceptional sentence and remand for resentencing.

Where all of the reasons relied on by the trial court to impose an exceptional sentence are erroneous, then remand for resentencing within the standard range is required. *State v. Ha'mim*, 132 Wn.2d 834, 847, 940 P.2d 633 (1997); *State v. Serrano*, 95 Wn. App. 700, 715, 977 P.2d 47 (1999). As argued above, both of the reasons relied on by the trial court to impose an exceptional sentence in this case are erroneous. Therefore, this Court should reverse and remand for sentencing within the standard range.

If, however, this Court concludes that the jury's verdict on the gang-motivation aggravating factor is supported by the evidence, and does provide substantial and compelling justification for an exceptional sentence, Bluehorse's sentence should still be

reversed because it is not clear that the trial court would have imposed the same sentence had it not been influenced by the prosecutor's assertions and its own view that the July 5 incident fit the elements of first degree assault rather than simple drive-by shooting.

The trial court clearly stated its belief that first degree assault would have been a more accurate conviction in this case. (09/12/08 RP 1821, 1822) The court went on to note the disparity between the standard range sentence for first degree assault versus the standard range for drive-by shooting. (09/12/08 RP 1821) The court then calculated the mid-point of the first degree assault standard range, 108 months, and imposed that as the exceptional sentence in this case. (09/12/08 RP 1824)

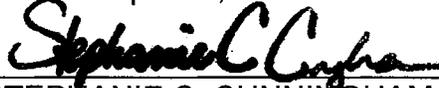
In determining what sentence to impose for Bluehorse's drive-by shooting conviction, the court was clearly influenced by its consideration of the elements and standard range sentence for first degree assault. It is not clear from the record that the court would have imposed the same sentence had it not considered these improper facts. Likewise, it is not clear from the record that the court would have imposed the same sentence had it not been influenced by the jury's gang-motivation finding. Under these

circumstances, the exceptional sentence must be reversed, and this case remanded for resentencing.

#### V. CONCLUSION

The exceptional sentence imposed in this case is flawed in a multitude of ways. The trial court thoroughly failed to perform its statutory duties by failing to make the required findings, and by failing to put those findings in writing. The trial court should have refused to impose an exceptional sentence based on the gang motivation aggravating factor, because the evidence did not support the jury's verdict, and the facts of this case are not substantial and compelling enough to support an exceptional sentence. The trial court also violated the real facts doctrine by sentencing Bluehorse as if he had been charged with and convicted of first degree assault. Finally, the sentence imposed is clearly excessive in length. For all these reasons, Bluehorse's exceptional sentence must be reversed, and his case remanded for resentencing.

DATED: April 21, 2009

  
STEPHANIE C. CUNNINGHAM  
WSBA No. 26436  
Attorney for Timothy J. Bluehorse

**CERTIFICATE OF MAILING**

I certify that on 04/21/2009, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Timothy J. Bluehorse, DOC# 322855, Monroe Correctional Complex, P.O. Box 777, Monroe, WA 98272-0777.



STEPHANIE C. CUNNINGHAM  
WSBA No. 26436

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DIVISION II  
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STATE OF WASHINGTON  
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# APPENDIX A

PROSECUTOR'S SENTENCING RECOMMENDATION

1 maybe the weapon, right?

2 MR. GREER: Correct, it was not the weapon.

3 THE COURT: Do you know whose weapon it is?

4 MR. GREER: Law enforcement's now.

5 MR. FERRELL: I don't believe --

6 THE COURT: Any interest Mr. Abuan may have in the  
7 weapon should be forfeited. If it is somebody else's  
8 weapon, I'm not deciding that. If it is his weapon, it  
9 isn't anymore.

10 MR. FERRELL: I don't think that he was claiming  
11 ownership, Your Honor.

12 THE COURT: I didn't think so. He hadn't so far,  
13 but you never know.

14 MR. FERRELL: We had filed Notices of Appeal today  
15 as well.

16 THE COURT: Thank you very much, Mr. Ferrell.

17 MR. GREER: Mr. Bluehorse does not have any prior  
18 felony criminal history. He was convicted of Count 1,  
19 drive-by shooting. The jury found that it was a --  
20 there is an aggravator. It is termed the gang  
21 enhancement -- or the gang aggravator, I guess. It's  
22 not an enhancement. He committed the crime in order to  
23 obtain, maintain, his status in an organization.  
24 That's a summary of what it says, not verbatim. In  
25 essence, the crime itself was, in the State's opinion,

1 to maintain status, gang status.

2 The State feels somewhat differently regarding  
3 Mr. Bluehorse than Mr. Abuan. The State agrees with  
4 the Court in large respect as far as the Court's  
5 analysis of what happened in court and sort of the  
6 personal observations that the Court made.

7 Mr. Bluehorse, in contrast, put on witnesses. He  
8 took the stand. The State believes that the witnesses  
9 were not compelling or truthful. In fact, of course,  
10 Mr. Bluehorse is guilty of the crime and that his  
11 involvement in, just speaking of the count that he was  
12 convicted of, was deadly. He was grossly undercharged  
13 in that case. It is in large part due to the  
14 overwhelming caseload that I have involving gang  
15 members. Keeping up with each case and the quantity of  
16 information that each case requires as far as providing  
17 to the defense, researching, and understanding who the  
18 gang members are, the associates, who they are, you  
19 know, it doesn't involve a simple incident of crime and  
20 witnesses. It involves a history. It is very  
21 difficult to compile that kind of history to get to  
22 know the person, frankly, that has been charged, so you  
23 can make a decision about what the appropriate level of  
24 prosecution should be, et cetera.

25 Somehow, by the time this got to court, I was way

1 behind the curve, and I should have, long before, moved  
2 to rearraign Mr. Bluehorse and charge him with Assault  
3 in the Second Degree, but I didn't. He has been  
4 convicted of drive-by. In fact, he shot Mr. Pritchard,  
5 Ibbha Pritchard, in the leg, as I recall.

6 THE COURT: He did.

7 MR. GREER: That is more serious than a simple  
8 drive-by.

9 The gang issue is, of course, present, again, in  
10 this case. In that situation, the motivation is not to  
11 be found as far as what could cause someone to do that  
12 type of thing, shoot into a crowd of people, frankly,  
13 with a firearm. I don't want to just continue harping  
14 on this issue, but it just can't be stated enough that  
15 the types of things that are happening are being  
16 repeated daily almost. I wouldn't say daily now.  
17 Thankfully. I think that law enforcement is doing a  
18 very good job in trying to control what is happening.  
19 Nonetheless, as many cases go out as far as  
20 disposition, that many are coming in. The number of  
21 murder cases where there are no witnesses, the murder  
22 of -- excuse me, serious assaults or drive-bys where  
23 there are no witnesses. This was that same case.

24 I have to highlight this for the Court because the  
25 ultimate conviction in this case doesn't represent what

1           happened. In understanding the gang enhancement aspect  
2           as well, I want the Court to understand the hurdles  
3           that have to be overcome beyond, as I said, just  
4           understanding the person. The Court recalls you have  
5           Ibbha Pritchard shot. He didn't see a thing. All of  
6           his family, or whoever was out there, didn't see a  
7           thing. No evidence. No witnesses. The case comes  
8           together later. That's just the way it always is.

9           I'm not asking the Court to take it out on  
10          Mr. Bluehorse, the difficulties that the State has in  
11          prosecuting these cases. As I said earlier, it is a  
12          cultural issue, and it is a gang. It has rules. The  
13          rules, in part, are that those who are involved as  
14          participants, willing participants, in the gang life  
15          won't snitch on each other. Where it has gone beyond  
16          that to where it's really serious is, the neighbors  
17          won't snitch. The people in the neighborhood won't  
18          talk. Nobody wants to talk because they are going to  
19          get shot at. Their home is going to get destroyed.  
20          They have put themselves at risk.

21          When you look at these cases, and this one in  
22          particular, it doesn't just come down to a victim,  
23          Mr. Pritchard and the defendant. It comes down to a  
24          victim, Mr. Pritchard, everybody else that was involved  
25          out there that was at risk of being hit, all of the

1 neighbors that know that this kind of thing is  
2 happening -- and this is the same house that the other  
3 incident occurred at. The Court heard some of those  
4 neighbors talking directly, how sick and tired they are  
5 of it. Thankfully, the Leosos were evicted, and they  
6 are no longer in that neighborhood. Who knows where  
7 they are now. They're a problem also.

8 This long sort of spiel is just to emphasize that  
9 when the State recommends 120 months, which is what I'm  
10 doing, I mean it. I'm not trying to do it to scare the  
11 defendant. His range, as I understand it, is 15 to 20  
12 months, but the State believes firmly that he deserves  
13 120 months. The Court should agree with the jury,  
14 first of all, with their finding that this was a gang  
15 incident and warrants an aggravated upward sentence.  
16 The Court should impose the statutory maximum for the  
17 reasons that I have just stated.

18 The other conditions that the State is requesting  
19 are standard, and they include a 500-dollar Crime  
20 Victim Penalty Assessment; 200-dollar court costs; \$100  
21 DNA fee; 500-dollar DAC recoupment; restitution by  
22 later order the Court. I don't have any information at  
23 this time; no contact with Ibbha Pritchard; eighteen to  
24 36 months community custody. Thank you.

25 THE COURT: Mr. Benjamin.

# APPENDIX B

COURT'S ORAL RULING REGARDING EXCEPTIONAL SENTENCE

1 do right. My auntie always taught me the right things.

2 I wish...

3 THE COURT: I'm sorry, I can't hear you.

4 THE DEFENDANT: I hope that you have leniency on  
5 me because -- I don't know. I can't...

6 THE COURT: Go ahead and take a moment to compose  
7 yourself, Mr. Bluehorse.

8 Is there anything else that you would like to add?

9 MR. BENJAMIN: Your Honor, I don't believe that my  
10 client wants to allocute further?

11 THE COURT: Is that right, Mr. Bluehorse?

12 THE DEFENDANT: (Nodding.)

13 THE COURT: He is nodding his head "yes."

14 The Court -- or, actually, the jury, I should say,  
15 did consider as an aggravating circumstance, under  
16 RCW 9.94A.535(3)(s), that the defendant committed the  
17 offense to obtain or his or her membership or advance  
18 his or her position in a hierarchy in an organization,  
19 association, or identifiable group. That is an  
20 aggravating circumstance that the jury has found. That  
21 does support the Court in deciding to part from the  
22 standard range and impose a more appropriate sentence  
23 that such an aggravation would justify.

24 We do have a 15- to 20-month standard range  
25 sentence based on an offender score of zero. One of

1 the things that is interesting to me is that, you  
2 know -- Mr. Benjamin is quite right in the sense that  
3 there is nothing, but the Court's own, hopefully, wise  
4 discretion based upon considerations of the facts of  
5 this particular case and the facts of this particular  
6 offender to determine what is an appropriate  
7 determination here. The Court, even though there is an  
8 aggravating circumstance, need not depart from the  
9 standard range. The Court has that opportunity despite  
10 the finding of the jury or may do so if it thinks that  
11 it is appropriate and may do so up to the statutory  
12 maximum depending on what he thinks is appropriate.  
13 The statutory maximum for this, of course, is  
14 120 months, or 10 years.

15 One of the things I thought was interesting that  
16 Mr. Greer pointed out was, this could have as easily  
17 been charged as an Assault in the First Degree since  
18 the person -- on the occasion of the drive-by on which  
19 he was -- Mr. Bluehorse was convicted by the jury was  
20 the occasion in which Ibbha Pritchard was shot in the  
21 leg. Mr. Greer is kind of beating himself up a little  
22 bit for not charging that. With an offender score of  
23 zero, an Assault in the First Degree has a standard  
24 range of 93 to 120 months. You can see the difference  
25 between that and the 15 to 20 just for drive-by

1 shooting would otherwise have for the same offender  
2 score.

3 I have, myself, had a personal philosophy that the  
4 legislature had in its mind that 15 to 20 months, or  
5 whatever range it picks, is what it will anticipate and  
6 that most cases are not going to be much more than,  
7 say, twice whatever the standard range might be for  
8 that, which would get us 30 to 40 months.

9 Having said that, there was a rule, I believe, in  
10 Minnesota. I don't know if they still do. They did  
11 some years ago. Minnesota is one of those states like  
12 Washington that has a determinative sentencing range,  
13 and it used to have a presumption that anything above  
14 twice the standard range was a -- kind of presumptively  
15 an abuse of discretion; although, it would still permit  
16 on occasion to go above that if there were clear  
17 circumstances justifying it.

18 I do think that Mr. Greer has made the point that  
19 this particular offense resembles much more an Assault  
20 in the First Degree than merely the drive-by given that  
21 someone was instead shot. I appreciate Mr. Bluehorse's  
22 denial of responsibility here. Of course, I look at  
23 Mr. Bluehorse, too, just as I looked at Mr. Abuan  
24 throughout. One of the things that was different is,  
25 although Mr. Abuan and Mr. Bluehorse stayed reasonably

1           calm -- as I say, both of them were completely  
2           well-behaved in the courtroom and were just wonderful  
3           in that way. Mr. Bluehorse did, you know -- again,  
4           this is body language. It's not a great thing to base  
5           anything on. Mr. Bluehorse has a certain coolness.  
6           Let's put it that way. That was a little scary. I'm  
7           not so sure he much cared about anything other than his  
8           own circumstance and the fact that there was,  
9           obviously, somebody shot here and other people  
10          threatened and this whole neighborhood was kind of shot  
11          up, not necessarily by whoever the drive-by shooters  
12          were, but by the Leosos when they returned fire.

13                 MR. BENJAMIN: Your Honor, if I may, that is  
14                 something that my client was acquitted on.

15                 THE COURT: I understand that. That was the  
16                 August event.

17                 What I'm talking about, in general, is -- because  
18                 I know that nobody fired back on the July event, which  
19                 is what he is convicted of. What I'm talking about, in  
20                 general, is that you have a scene that -- you have a  
21                 dangerous scene that gets created by this whole  
22                 gangland world. While Mr. Bluehorse, certainly,  
23                 deserves to be judged only by the events on that  
24                 particular event that he was convicted about, one of  
25                 the things that makes gang activity an aggravating

1           circumstance is because these kinds of reprisals and  
2           people firing back such as what happened in the August  
3           event, although Mr. Bluehorse was acquitted of that,  
4           are the kind of consequence that puts everybody at  
5           risk. There was a child who was almost shot in that  
6           other house. Certainly, the neighbors were upset.  
7           Whether it is the Leosos firing back at whoever fires  
8           at them or them being fired at in this whole sequence  
9           of events, this whole neighborhood was, for months,  
10          terrorized. It appears Mr. Bluehorse was at least a  
11          portion of that.

12                 Now, it's also interesting, the mathematics of  
13          this, because a range of 93 to 123 months would have a  
14          mid-point of 108 months, which is exactly what  
15          Mr. Abuan just got. Although Mr. Bluehorse shouldn't  
16          necessarily be punished the same way as Mr. Abuan was  
17          because there were two other charges there, other  
18          people standing by, and so on, the events in July  
19          indicated that there were certainly other people nearby  
20          who could have been in the line of danger of a drive-by  
21          shooting.

22                 While that happens to be a neat equivalence of the  
23          two sentences, I happen to also think, independently of  
24          that, that is a reasonable sentence for Mr. Bluehorse,  
25          and that's what I will do. 108 months; credit for time

1 served; 18 to 36 months community custody with the same  
2 language, that in no event, it should exceed  
3 120 months. He is to be on community custody on the  
4 standard conditions including no contact with the  
5 victims. Restitution by later order of the court and,  
6 of course, law-abiding behavior on that, and other  
7 standard conditions of community custody.

8 I will impose the same legal financial obligations  
9 as Mr. Abuan. 200-dollar for the filing fee; \$500 for  
10 the Crime Victim Penalty Assessment; and \$100 for the  
11 biological testing fee; \$2,000 for DAC recoupment.

12 I say to Mr. Bluehorse many of the same things  
13 that I said to Mr. Abuan. He strikes me as a talented,  
14 intelligent, nice-looking guy. Obviously, he is  
15 athletic as well. There was a coldness in his  
16 personality that I'm worried about for all of our sakes  
17 but most especially for him. I hope that I have  
18 misjudged him that way, but I wish him luck. That will  
19 be my ruling.

20 MR. GREER: Mr. Abuan has filed appellate notice  
21 with the Court and also Mr. Bluehorse. The Court  
22 didn't read the rights, but there has already been an  
23 appeal filed.

24 THE COURT: They have signed the written  
25 advisement, anyway. I will give them a copy of that.