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STATE OF WASHINGTON  
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DEPUTY

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

STATE OF WASHINGTON,

Respondent,

v.

NEIL GRENNING

Appellant.

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

The Honorable James R. Orlando, Judge

REPLY BRIEF OF APPELLANT

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**A. RESTATEMENT OF THE CASE**

Appellant agrees with respondent that it is helpful to place the procedural history of Mr. Grenning's case in the context of some of the changes in the law of exceptional sentences over the past decade in Washington.<sup>1</sup> The following chronology should demonstrate that Mr. Grenning's exceptional sentences should be reversed and remanded for imposition of a standard range sentence.

- June 21, 2004** Verdicts were returned in Mr. Grenning's case.
- July 30, 2004** The state filed a Notice of Intent to Seek Exceptional Sentence.
- October 13, 2004** The state filed Special Allegations of Aggravating Factors: deliberate cruelty, particular vulnerability, abuse of position of trust, multiple incidents of abuse, commission of second degree assault with sexual motivation, ongoing pattern of sexual abuse, and **a presumptive sentence that is too lenient in light of the purposes of the Sentencing Reform Act and RCW 9.94A.534.**
- October 2004** The court imposed an exceptional sentence based upon its judicial findings of fact.

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<sup>1</sup> Appellant **disagrees** with the state's representation in its Brief of Respondent that at the resentencing hearing the prosecutor argued "that a standard range sentence would result in the defendant receiving no punishment for many of his crimes." BOR 5 (citing 10/26/10 RP 2-5. This argument does not appear in the record of the hearing. Nor is the state's claim that "the court cited to defendant's high offender score and his multiple current offenses resulting in 'free crimes' . . . 1-/26/10) 14" reflected in the verbatim report of the proceedings of the resentencing hearing at that page. What is most noticeable is the absence of discussion and argument on the issue.

- April 14, 2005**      *State v. Hughes*, 154 Wn.2d 118, 136-137, 110 P.2d 192 (2005), held that the “clearly too lenient” aggravating factor had to be proved to a jury beyond a reasonable doubt and that “**prior convictions alone can never be enough to warrant an exceptional sentence.**”
- 2005 legislative session**      The legislature amended RCW 9.94A.535 to include an aggravating factor, “The defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.” Laws of 2005, ch. 68, § 3.
- 2006**      *In re Personal Restraint of VanDelft*, 158 Wn.2d 731, 147 P.3d 573 (2006), held that the trial court could not, without a jury verdict, rely on the fact that some crimes would go unpunished as a basis for concluding that the multiple offense policy of the SRA resulted in a sentence that was clearly too lenient.
- 2008**      The Court of Appeals affirmed Mr. Grenning’s exceptional sentences on two grounds: that jury findings are not required for sentences under RCW 9.94A.712 and that the second degree assault was committed with sexual motivation; his convictions for possession of depictions of minors were reversed. On appeal, the state conceded that the multiple offense aggravating factor was improper because it had not been found by the jury. **The state now concedes that RCW 9.94A.712 does not apply.**
- 2009**      The Washington Supreme Court affirmed the Court of Appeals decision in Mr. Grenning’s case on the discovery violation issue only.
- May 5, 2010**      *State v. Vance*, 168 Wn.2d 754, 230 P.3d 1055 (2010), overruled *VanDelft*.

**October 26, 2010** The trial court reentered the same exceptional sentence, reduced by 12 months because of the dismissal of the counts of depictions of minors and the same findings and conclusions.

Several things are clear from this chronology. First, Mr. Grenning did not receive notice of any aggravating factors prior to trial. Second he has **never** received notice that the state was seeking an exceptional sentence based on the free crimes aggravator; the state gave notice of the “clearly too lenient” and other aggravating factors instead. Third, it is clear that Mr. Grenning’s exceptional sentence should have been reversed on his first appeal; the Court of Appeals correctly held that the “clearly too lenient” factor was improper and mistakenly held that RCW 9.94A.712 applied. Insofar as the Court relied on the sexual motivation finding for the second degree assault, this finding could not support an exceptional sentence for other counts. Fourth, the SRA was amended to include the “free crimes” aggravating factor in 2005, after Mr. Grenning’s crimes were committed. At the time the crimes were committed, under *Hughes*, the SRA did not permit an exceptional sentence based on offender score alone.

Additionally, Mr. Grenning requested the trial court to find crimes encompassed the same criminal conduct . RP(sentencing) 6. The court found “these are not all part of the same criminal conduct.”

RP(sentencing) 14. This conclusion by the trial court rested on its prior judicial findings of fact.

**B. ARGUMENT IN REPLY**

**1. THE STATE CONCEDES THAT RCW 9.94A.712 IS NOT APPLICABLE TO MR. GRENNING'S CASE.**

The state properly concedes that former RCW 9.94A.712, establishing an indeterminate sentence for nonpersistent sex offenders, cannot be applied to Mr. Grenning's crimes; and therefore cannot provide a basis for upholding his exceptional sentences. Brief of Respondent (BOR) 25-28.

**2. BECAUSE THERE WAS NO AUTHORITY, OTHER THAN RCW 9.94A. 712, AUTHORIZING JUDICIAL FINDING OF "FREE CRIMES" OR AN EXCEPTIONAL SENTENCE BASED ENTIRELY ON OFFENDER SCORE AT THE TIME THE CRIMES WERE COMMITTED, A "FREE CRIMES" AGGRAVATING FACTOR, EVEN IF ACTUALLY FOUND BY THE SENTENCING COURT, CANNOT SUPPORT MR. GRENNING'S EXCEPTIONAL SENTENCE.<sup>2</sup>**

The state concedes that the trial court's reliance on the previously-entered findings and conclusions on remand was improper and that those

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<sup>2</sup> The jury's finding of sexual motivation for the one count of second degree assault could not justify an exceptional sentence for other counts AOR at 21-22. The state does not seriously dispute this conclusion: "Additionally the sentencing court had one jury found aggravating factor – the finding of sexual motivation on the assault – upon which to base an exceptional sentence." BOR at 13.

findings reflect judicial fact-finding in violation of *Blakely*. BOR 27.

Contrary to the state's argument, however, the "free crimes" aggravator cannot apply to Mr. Grenning or justify an exceptional sentence in his case.

The "free crimes" aggravator (RCW 9.94A.535(c)(2)), enacted by the Legislature in 2005, differs from the "clearly too lenient" aggravator (former RCW 9.94A.535(2)(i)), which was applicable at the time Mr. Grenning was convicted and sentenced. The "clearly too lenient in light of the multiple offense policy" of the SRA aggravating factor requires a jury finding. *State v. Alvarado*, 164 Wn.2d 556, 192 P.3d 345 (2008).

Mr. Grenning was never charged with the "free crimes" aggravator and never received notice, at any time, that the state was seeking to impose an exceptional sentence on that basis; instead, he expressly received notice that the state intended to prove the "clearly too lenient" factor. This is not surprising given the fact that, at the time the crimes charged against him were committed, the "free crimes" factor was not a proper factor – either for the jury or the court to find. *State v. Hughes*, *supra* (holding that criminal history alone is never sufficient to justify an exceptional sentence). RCW 9.94A.535(c)(2) was not enacted until 2005,

well after Mr. Grenning was convicted and sentenced.<sup>3</sup>

The addition of RCW 9.94A.535(c)(2) in 2005, was not simply a procedural change, changing the responsibility for the finding of an aggravating factor from the court to the jury. *See State v. Hylton*, 154 Wn. App. 945, 957-958, 226 P.3d 246 (2010) (2005 amendment to include the abuse of trust factor did not violate ex post facto prohibitions). It was a substantive change. Prior to the “free crimes” amendment, criminal history alone could not support an exceptional sentence. *Hughes, supra*. Prior to the “free crimes” amendment, accused persons had no notice that having a high offender score alone was criminal conduct or conduct which could result in a sentence greater than the standard range sentence. *State v. Pillatos*, 159 Wn.2d 459, 475, 150 P.3d 1130 (2007) (ex post facto violation where there is no notice that conduct is illegal and carried certain consequences).

Accordingly, to hold that the “free crimes” factor supported Mr. Grenning’s exceptional sentence would violate the prohibition against ex post facto laws by increasing the quantum of punishment after the offense was committed. *Weaver v. Graham*, 450 U.S. 24, 29, 67 L. Ed. 2d 17, 101

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<sup>3</sup> The state argues that the notice requirements of RCW 9.94A.537(1) cannot apply to Mr. Grenning because the statute had not been enacted at the time of his initial sentencing. BOR 24. This argument admits that .535(c)(2) cannot apply to him either for the same reason.

S. Ct. 96 0 (1981); *In re Stamphill*, 134 Wn.2d 165, 169-170, 949 P.2d 365 (1998). “In the context of an act already criminally punishable, disadvantage means the statute alters the standard of punishment that existed under the prior law.” *State v. Schmidt*, 143 Wn.2d 673, 685, 23 P.3d 452 (2001).

That applying .535 to Mr. Grenning would be ex post facto is demonstrated by the fact that this Court could not and did not uphold his exceptional sentence based on “free crimes” at the time of the initial appeal. The law was to the contrary at the time. The state conceded this at that time -- that the court’s findings, except for the jury’s finding of sexual motivation, could not support an exceptional sentence.

Applying the “free crimes factor to Mr. Grenning would also violate due process. When the Washington Supreme Court, in *Hughes*, interpreted the SRA as always requiring something more than criminal history to support an exceptional sentence, this “interpretation operate[d] as if it were originally written into the statute.” *State v. Dean*, 113 Wn. App. 691, 699, 54 P.3d 243 (2002). At the time the crimes were committed, the SRA did not allow criminal history alone to support an exceptional sentence, and the aggravating factor that the “multiple offense results in a presumptive sentence that is clearly too lenient in that it would allow the defendant to go unpunished for one or more of the current

offense” was a question of fact that had to be found by a jury. *In re Personal Restraint Petition of Van Delft*, 158 Wn.2d 731, 147 P.3d 573 (2006).

When the Supreme Court overruled *Van Delft*, in *State v. Vance*, 168 Wn.2d 754, 230 P.2d 1055 (2010), this overruling can be applied only prospectively without violating due process: “where a court overrules a prior decision so as to enlarge the scope of criminal liability, [due process] requires that the new rule must be applied prospectively only.” *State v. Gore*, 101 Wn.2d 481, 489, 681 P.2d 227 (1984). This rule applies where the new decision (1) aggravates a current crime, (2) imposes a more severe punishment, or (3) permits less or different testimony to convict. *Id.*

To allow a statute not enacted at the time or a subsequent decision overruling the applicable law at the time of the crimes to justify a greater punishment violates both the prohibition against ex post facto laws and due process.

Moreover, and most importantly, the trial court did not impose an exceptional sentence for “free crimes,” but for “free crimes” in light of “the multiple offense policy,” finding that “the ‘free crimes’ **and** multiple offense policy is not a question that must be submitted to the jury.” **CP (Conclusions XII, XV, XVII, XVIII, XX, XXI, XXII)**. By tying the “free crimes” to the multiple offense policy, the court’s findings were

consistent with RCW .535(2)(i), “[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purposes of this chapter.”

The state’s argument is essentially that because the court “**could find**” that there would be free crimes (BOR 11), that *State v. Vance*, 168 Wn.2d 754, 230 P.3d 1055 (2010), is controlling and justifies an exceptional sentence in Mr. Grenning’s case. This is neither what the trial court did, nor a finding that the trial court could have made without violating ex post facto and due process.

**3. THE TRIAL COURT ENGAGED IN FACT-FINDING BEYOND MERE CONSIDERATION OF OFFENDER SCORE TO DETERMINE THAT THERE WERE “FREE CRIMES”: MR. GRENNING’S OFFENDER SCORE OF OVER 9 RESTED ON THE CONCLUSION THAT THE CRIMES DID NOT ENCOMPASS THE SAME CRIMINAL CONDUCT WHICH IN TURN RESTED ON THE TRIAL COURT’S JUDICIAL FACT-FINDING, AS REFLECTED IN THE FINDINGS AND CONCLUSIONS IN SUPPORT OF AN EXCEPTIONAL SENTENCE.**

At the resentencing hearing, Mr. Grenning’s attorney asked the trial court to find that a number of his convictions were the same criminal conduct and, accordingly, should count only one point in his offender score. RP(sentencing) 6. The trial court responded that none of the convictions were the same criminal conduct. RP(resentencing) 14. The

written Findings of Fact and Conclusions of Law Regarding Exceptional Sentence, as originally entered and re-entered on remand, apparently provide the factual basis for the court's determination, e.g., VI, some occurred on different days because the defendant and R.W. were wearing different clothes; and VII, the rapes of a child against R.W. were sequential and not simultaneous and the defendant had time and opportunity to pause, reflect, and either cease or proceed to commit further crimes. CP 40-60, 88-89, 171-200. Thus, even if the trial court made a "free crimes" finding, it was not based solely on offender score; the high offender score was based on a determination that the crimes were not the same criminal conduct, which was in turn based on judicial fact finding in violation of *Blakely v. Washington*.

"Same criminal conduct," as used in RCW 9.94A.589(1) "means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." In determining whether current offenses should be treated as the same offense, the court determines whether the offense exhibited the same criminal intent by considering the extent to which one crime furthers the other, whether the crimes were part of the same scheme or plan and whether the criminal objective changed from one crime to the other. *State v. Calvert*. 79 Wn. App. 569, 903 P.2d 1003, *review denied*, 129 Wn.2d 1005 (1995).

The same criminal conduct determination involves fact finding as well as judicial discretion. *State v. Nitsch*, 100 Wn. App. 512, 997 P.2d 1000, *review denied*, 141 Wn.2d 10030 (2000). Here, the fact finding was by the judge, not a jury.

The trial court made factual determinations beyond any findings made by the jury as a basis for determining that the crimes were not the same criminal conduct and, therefore, Mr. Grenning's criminal history was over 9 and some of his crimes would go unpunished with a standard range sentence. Thus, *if* the court made a finding of the "free crimes" aggravator, given that this finding was based on more than mere criminal history, an exceptional sentence based on that factor would unconstitutionally deny Mr. Grenning his right to a jury trial on every fact, other than a fact of a prior conviction, which is used to impose a sentence above the standard range. Blakely v. Washington, 542 U.S.296, 124 S. Ct. 2531, 2536-2437, 159 L. Ed. 2d 403 (2004) (the rule of Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)-- "[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." -- applies to facts necessary to support an exceptional sentence under the Sentencing Reform Act).

While there may be cases in which a high offender score because of

other current convictions does not require judicial fact finding, Mr. Grenning's case is not one of those cases. Here the determination of whether counts should be considered the same criminal conduct determined the offender score and was based on judicial fact finding. So, even if the trial court made the "free crimes" finding, it cannot support the exceptional sentence imposed without violating *Blakely* and *Apprendi*.

**4. IMPOSING EXCEPTIONAL SENTENCES WITHOUT HAVING PROVIDED SUFFICIENT NOTICE VIOLATES THE RIGHTS TO DUE PROCESS AND TO APPEAR AND DEFEND AT TRIAL.**

The state relies on the case of *State v. Edvalds*, 157 Wn. App. 517, 237 P.3d 368 (2010), to support its argument that the "free crimes" aggravating factor which can be found by the judge rather than the jury, is not subject to the notice requirements of RCW 9.94A537, and is like a recidivism law rather than an exceptional sentence provision. BOR at 19-23. This Court should not follow *Edalds* or extend it beyond its holding.

*Edalds* was not petitioned to the Washington Supreme Court and it directly conflicts with the plain terms of the SRA and with the decision of the Washington Supreme Court in *State v. Powell*, 167 Wn.2d 672, 223 P.3d 493 (2009), in which a majority of the Court held that aggravating factors, in the future, had to be set out in the information. This Court should not follow *Edvalds* or extend its holdings beyond the specific facts

of the case.

The legislature chose to include, as an aggravating factor, in RCW 9.94A.535(c)(2), that the “defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.” RCW 9.94A.537(1) provides that an accused person has the right to notice of aggravating factors before trial or entry of a plea. These statutes are unambiguous and not subject to construction. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (statutes that are clear and unambiguous do not need interpretation); *In re Estate of Jones*, 152 Wn.2d 1, 11, 93 P.3d 147 (2004) (“where a statute is unambiguous, the court assumes the legislature means what it says and will not engage in statutory construction”). Moreover, if that statute were ambiguous, the rule of lenity would require the interpretation which favored a criminal defendant. *State v. Veliz*, 160 Wn. App. 396, 405, 247 P.3d 833 (2011).

Moreover, the fact pattern in *Edvalds* represented an exception rather than the rule. There the defendant was sentenced on the same day for crimes charged in separate cause numbers, an atypical occurrence. It should not provide the basis for the overwhelmingly usual situation in which a person is sentenced for crimes charged in the same information after a guilty verdict on those charges.

Further, contrary to the reasoning in *Edvalds* and argument of respondent, BOR 21-23, RCW 9.94A.535 (c)(2), even if it could constitutionally be applied to Mr. Grenning, is not a recidivism statute, nor did Mr. Grenning have **any** criminal history. The so-called “free crimes” aggravator applies only where the “defendant has committed multiple **current** offenses” and the high offender score results in some of those current offenses going unpunished. RCW 9.94A.535(c)(2). By its plain terms, this would not apply to one current conviction for a recidivist with a high offender score from past convictions. It is a provision, placed in the exceptional sentences—aggravating circumstances provisions, meant to permit the trial court to adjust for instances in which the multiple **current** offense policy results in some conduct going unpunished because of a high offender score. It is not a “three strikes” or “two strikes” provision, nor a statute “which raises the minimum and maximum sentences depending on an offender’s criminal history.” BOR at 22. The statutes and cases cited by respondent applicable to recidivism statutes are inapposite to statutory aggravating factors. BOR 22-23.

Mr. Grenning did not receive any notice that the state or the court would attempt to impose an exceptional sentence because of a “free crimes” aggravating factor. In fact, there was no way that Mr. Grenning could have known that he faced a potential sentence effectively greater

than a sentence of life without parole based solely on the number of his current convictions; at the time, the SRA did not permit such a sentence.. Without notice, such fact-finding by the court or by a jury denies due process and the right to appear and defend at trial. *See* AOB at 2731.

In Mr. Grenning's case, the fact that his offender score was over 9 was based on the trial court's determination that none of the crimes encompassed the same criminal conduct – a determination which required fact-finding. Any "free crimes" determination in his case was not merely a matter of criminal history.

Finally, the "free crimes" aggravator, if solely a matter of other current criminal convictions runs afoul of the prohibition against double jeopardy. Mr. Grenning received convictions for each crime charged against him and found by the jury. A conviction alone, even without a sentence, can constitute punishment. *Ball v. United States*, 479 U.S. 856, 865, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985); *State v. Womac*, 160 Wn.2d 643, 644, 656-658, 160 P.3d 40 (2007). None of Mr. Grennings crimes were unpunished; he had no "free crimes."

**5. THE DECISION IN *STATE V. MUTCH* IS DISTINGUISHABLE.**

The decision in *State v. Mutch*, \_\_\_\_\_ P.3d \_\_\_\_\_, 2011 WL 2276776, is distinguishable from Mr. Grenning's case. The state was

excused from giving notice of intent to seek an exceptional sentence in *Mutch* because of the erroneous belief that he would be sentenced for a third strike if convicted. The state never, as in Mr. Grenning's case, gave actual, if belated, notice of the "clearly too lenient" aggravating factor, which must be proven to a jury; and the trial court never independently found that "free crimes" alone would justify the exceptional sentence. Moreover, *Mutch* was not based on judicial fact-finding that none of the crimes encompassed the same criminal conduct which resulted in the high offender score.

Further, in *Mutch*, there was no prior decision in which the Court of Appeals erred in not reversing the exceptional sentence under prevailing and binding law in effect at the time of the decision.

Finally, in *Mutch* there is no ex post facto analysis and no recognition of the holding in *Hughes* that criminal history alone was insufficient to support an exceptional sentence under the SRA, which contradicted any conclusion that an exceptional sentence based solely on criminal history was permissible at the time the crimes were charged.

Although the state does not cite *Mutch*, it is relevant, but distinguishable from the facts in Mr. Grenning's case.

**5 THE IMPOSITION OF CONSECUTIVE TERMS CANNOT BE UPHELD BASED ON JUDICIAL FINDINGS UNDER *OREGON V. ICE* BECAUSE SUCH FINDINGS WOULD VIOLATE THE WASHINGTON CONSTITUTIONAL RIGHT TO A JURY TRIAL AND BECAUSE *STATE V. VANCE* WAS WRONGLY DECIDED.**

The state does not address the discussion why the decision in *Oregon v. Ice*, 55 U.S. 160, 129 S. Ct. 711, 715 L. Ed. 2d 517 (2009), does not apply to the SRA because of the significant differences between the Washington and Oregon determinate sentencing statutes and concurrent versus consecutive term provisions. See AOB at 32-35 (setting out the critical differences and why *Oregon v. Ice* should not apply to the SRA exceptional sentence provisions).

Nor does the state address the argument that *Vance* was wrongly decided in light of the differences between Oregon and Washington statutes. See AOB 35-38 (setting out why *Vance* misapplied *Ice* to the SRA).

The state does briefly address the argument that *Oregon v. Ice* should be rejected on independent state grounds under a *Gunwall* analysis. In this brief argument, the state relies on the decision in *State v. Smith*, 150 Wn.2d 135, 75 P.3d 934 (2003), a case rejecting a challenge to the Persistent Offender Accountability Act, or three-strikes law, holding that before the state constitution was adopted, Washington law had abolished

the jury's role in sentencing.

This argument ignores that the imposition of a consecutive sentence for sentences which are presumptively concurrent “is an exceptional sentence subject to the limitations” of RCW 9.94A.535, the statute setting out mitigating and aggravator factors which must support an exceptional sentence. As such, the factors which support an exceptional sentence as consecutive terms are as much tantamount to elements of a crime as the factors which support a sentence longer than the standard range. *See Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), and *State v. Powell*, *supra*. (both holding that sentencing enhancements under the Washington statute should be considered equivalent to an element of the crime).

Factors determining exceptional consecutive terms are not matters of sentencing discretion as set out in Laws of 1866, § 239, *Statutes of the Territory of Washington* 102 (1866) (“When the defendant is found guilty, the court, and not the jury, shall fix the amount of fine and the punishment to be inflicted”), cited in *Smith*. “Sentencing” in this sense is equivalent to the determination by the trial court of what sentence within the standard range the defendant should receive or the appropriate length of an exceptional sentence after the determination of facts sufficient to justify an exceptional sentence has been made by the jury. As held by the Court held

in *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986), the trial court's discretion in sentencing is that which the legislature has provided.

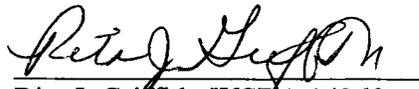
The analysis of the *Gunwall* factors, as set out in AOB at 38-44, should not be artificially restricted by a categorization of the exceptional sentencing provisions of the SRA sentencing matters which the trial court has the exclusive right to determine.

The *Gunwall* analysis shows that the Washington State Constitution requires the "clearly too lenient" aggravating factor to be proven to a jury, as held in *Van Delft*.

**C. CONCLUSION**

Appellant respectfully submits that his exceptional sentence should be reversed and remanded for imposition of a standard range sentence, except that his 120-month second for second degree assault can be imposed to run consecutively to other sentences if the court so chooses.

DATED this 16<sup>th</sup> day of August, 2011

  
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