

No. 43141-6-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**LAURA LYNN HICKEY,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITES ..... ii

I. ISSUES.....1

II. STATEMENT OF THE CASE .....1

III. ARGUMENT .....5

    A. THE EXCEPTIONAL SENTENCE ENTERED IN  
    HICKEY’S CASE WAS NOT IN ERROR AND SHOULD  
    BE AFFIRMED .....5

        1. The Trial Court Did Not Violate Hickey’s Sixth  
        Amendment Right To Have A Jury Determine  
        Whether The Victim In This Case Was Particularly  
        Vulnerable Because She Admitted The Aggravating  
        Factor In Her Guilty Plea .....7

        2. Hickey Admitted That The Baby She Killed Was  
        A Particularly Vulnerable Victim As Part Of Her  
        Plea Of Guilty To The Charge Of Murder In The  
        Second Degree And This Admission Is Sufficient  
        To Support The Trial Court’s Finding Of A  
        Particularly Vulnerable Victim And The Exceptional  
        Sentence ..... 12

        3. If Violation Occurred, The Proper Remedy Is  
        To Remand Back To The Trial Court For  
        Resentencing.....32

IV. CONCLUSION.....34

## TABLE OF AUTHORITIES

### **Washington Cases**

<i>State v. Boyer</i> , 91 Wn.2d 342, 588 P.2d 1151 (1979) .....	31
<i>State v. Brandenburg</i> , 153 Wn. App. 944, 223 P.3d 1259 (2009) .....	22, 23
<i>State v. Ermels</i> , 156 Wn.2d 528, 131 P.3d 299 (2006).....	22
<i>State v. Fisher</i> , 108 Wn.2d 419, 739 P.2d 683 (1987) .....	13, 14, 30
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999) .....	33
<i>State v. Hagar</i> , 158 Wn.2d 369, 144 P.3d 298 (2006) .	15, 16, 19, 20
<i>State v. Henderson</i> , 114 Wn.2d 867, 792 P.2d 514 (1990) .....	31
<i>State v. Hughes</i> , 154 Wn.2d 118, 110 P.3d (2005) .....	15, 16, 17, 18, 20
<i>State v. Jennings</i> , 106 Wn. App. 532, 24 P.3d 430 (2001) .....	13
<i>State v. Knutz</i> , 161 Wn. App. 395, 253 P.3d 437 (2011) .....	5, 6
<i>State v. Ross</i> , 71 Wn. App. 556, 861 P.2d 473 (1993) .....	13, 14
<i>Sate v. Steele</i> , 134 Wn. App. 844, 142 P.3d 649 (2006) .....	10, 11
<i>State v. Suleiman</i> , 158 Wn.2d 280, 143 P.3d 795 (2006) .....	15, 16, 20, 21
<i>State v. Woody</i> , 48 Wn. App. 772, 742 P.2d 133 (1987) .....	14

**Federal Cases**

*Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000) .....9, 10

*Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004) .....9, 10, 12, 17, 20, 21

**Washington Statutes**

RCW 9A.32.030 .....9

RCW 9A.32.050 .....9

RCW 9.94A.510 .....9

RCW 9.94A.515 .....9

RCW 9.94A.535 .....5

**Constitutional Provisions**

U.S. Constitution, Amendment 6.....8, 9, 11, 12, 16, 17, 18, 20

## I. ISSUES

- A. Did the trial court error when it imposed an exceptional sentence because the stipulation by Hickey was insufficient to support the trial court's findings and Hickey's Constitutional rights were therefore violated when the trial court considered extrinsic evidence?

## II. STATEMENT OF THE CASE

On March 10, 2011 the State charged Laura Hickey with one count of Murder in the First Degree. CP 1. The State submitted a probable cause affidavit based upon the police reports regarding Hickey's actions on March 2, 2011. Supp. CP PC Aff.<sup>1</sup> The State alleged that on March 2, 2011, at approximately 12:51 a.m., a neighbor of Hickey's called 911 requesting medical assistance because Hickey was bleeding and coming in and out of consciousness. Supp. CP PC Aff. The neighbor relayed that Hickey was possibly having a miscarriage. Supp. CP PC Aff. Hickey was transported by ambulance to Providence Hospital. Supp. CP PC Aff. The hospital called 911 to alert the police that Hickey had given birth prior to her arrival at the hospital and that the baby may be in Hickey's trailer under the kitchen sink. Supp. CP PC Aff. The police entered the trailer, found traces of blood on the floor of the trailer and then located what appeared to be a fully formed infant in a

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<sup>1</sup> The State will be submitting a supplemental Clerk's papers designating the Affidavit of Probable Cause.

Tupperware container under the sink. Supp. CP PC Aff. The baby was pinkish in color, had the umbilical cord attached and the head was severed from the baby's body. Supp. CP PC Aff. Hickey admitted to decapitating the baby, cleaning him up and placing him under the sink because she did not want her mother to know she was pregnant. Supp. CP PC Aff. Hickey also stated she did not believe the baby would survive because he was gurgling and attempting to take a breath and she did not want the baby to suffer so she cut off his head. Supp. CP PC Aff. The pathologist who examined the baby stated that the baby had been born alive and was viable. Supp. CP PC Aff.

The State alleged several aggravating factors in the information. CP 1-2. The State alleged the following five aggravating factors:

- The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.
- The offense involved a destructive and foreseeable impact on persons other than the victim.

- The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.
- The defendant demonstrated or displayed an egregious lack of remorse.
- The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

CP 1-2. The trial court entered an order to have Hickey evaluated at Western State Hospital for competency. CP 4-9. Hickey was found to be competent. CP 10. The State extended a plea offer to Hickey in February 2012. CP 23-24. The State agreed to amend the charge against Hickey to Murder in the Second Degree, with a deadly weapon enhancement and the aggravating factor of a particularly vulnerable victim. CP 23. This would give Hickey, who did not have any prior felony history, a standard sentencing range of 123 to 220 months, plus the 24 month deadly weapon enhancement. CP 23, 448. The State agreed that Hickey could argue for a standard range sentence and the State would be free to argue any sentence up to the statutory maximum sentence of life in

prison. CP 23. Hickey accepted the State's plea deal. 1RP<sup>2</sup> CP 14-24.

On February 7, 2012 Hickey pleaded guilty to one count of Murder in the Second Degree as charged in the amended information. 1RP; CP 11-24. Hickey also pleaded guilty to the weapon enhancement and the aggravating factor of a particularly vulnerable victim. 1RP 11; CP 14. The sentencing was set over to February 22, 2012, 2RP. The State submitted a sentencing memorandum. CP 134-444. Hickey also submitted a sentencing memorandum. CP 25-52. The State asked the trial court to sentence Hickey to 82 years in prison. 2RP 4. Hickey's trial counsel asked for the trial court to sentence Hickey to 10 years in prison, or at a minimum, sentence Hickey to the low end of the standard range. 2RP 11; CP 26. The trial court gave Hickey an exceptional sentence of 30 years. 2RP 17. The trial court justified the exceptional sentence by finding that it was appropriate due to the victim being particularly vulnerable. 2RP 18-20. Hickey timely appeals her exceptional sentence. 458-469.

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<sup>2</sup> There are two verbatim report of proceedings. The State will refer to the guilty plea hearing held on February 7, 2012 as 1RP. The State will refer to the sentencing hearing held on February 22, 2012 as 2RP.

The State will provide supplemental the facts below in its argument below.

### III. ARGUMENT

#### A. THE EXCEPTIONAL SENTENCE ENTERED IN HICKEY'S CASE WAS NOT IN ERROR AND SHOULD BE AFFIRMED.

When a trial court imposes a sentence outside the standard sentence range it must find compelling and substantial reasons justifying the exceptional sentence. RCW 9.94A.535. Once a trial court has made the required determination, “the sentence court may exercise its discretion to determine the length of an appropriate exceptional sentence.” *State v. Knutz*, 161 Wn. App. 395, 410, 253 P.3d 437 (2011). A trial court’s exceptional sentence is reviewed under an abuse of discretion standard for a determination if the sentence was clearly excessive. *Kuntz*, 161 Wn. App. at 410. A sentence is clearly excessive when it is clearly unreasonable. *Id.* A sentence is clearly unreasonable when the sentence is “exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken.” *Id.* (citations omitted).

If the trial court bases its exceptional sentence on proper reasons, as stated above, then the reviewing court will only find the

sentence to be excessive, “if its length, in light of the record, shocks the conscience.” *Id.* at 410-11. A sentence is considered to shock the conscience only if it is a sentence that no reasonable person would adopt. *Id.* at 411.

Hickey pleaded guilty to Murder in the Second Degree and admitted the deadly weapon enhancement and the aggravating factor of particularly vulnerable victim. 1RP 9-11; CP 14-24. In her Statement of Defendant on Plea of Guilty (SDPG) Hickey wrote:

On March 2, 2011 I gave birth to a small premature child in Lewis County. I felt the baby would not survive and I chose to cut off his head with a knife. To prevent any other suffering. I’m very truley [sic] sorry for what I’ve done.

CP 21. Upon further questioning from the trial court Hickey admitted her intent was to kill the baby. 1RP 10-11.

Prior to the sentencing hearing the State and Hickey submitted sentencing memorandums to the trial court. CP 25-52, 134-444. In Hickey’s sentencing memorandum it included a letter from Hickey to the trial court. CP 52. The trial court sentenced Hickey to an exceptional sentence of 360 months including a 24 month deadly weapon enhancement. 1RP 17; CP 447-458. The trial court reasoned that there was no more vulnerable being than a newborn. 1RP 18; CP 456. The trial court went on to state that

Hickey repeatedly and habitually exposed the unborn baby to methamphetamine. 1RP 18. The trial court also stated that the doctor who performed the autopsy on the baby opined that the baby was already addicted to methamphetamine. 1RP 18. The trial court further commented that when you, as Hickey did in this case, engage in a two-month methamphetamine binge, there will be problems with the birth of the child. 1RP 18. The trial court found that while those additional facts support the aggravating factor of a particularly vulnerable victim, the support was not necessary “as there can really be no more vulnerable person than a newborn.” 1RP 19. The trial court entered findings of fact stating the exceptional sentence was justified by: “the victim in this matter was a particularly vulnerable premature baby boy, who was drug intoxicated (methamphetamine).” CP 456.

In this case Hickey makes two arguments to this Court, first, that the trial court violated Hickey’s Sixth Amendment right to trial by a jury and second, that the stipulated facts were not sufficient to prove that the victim was particularly vulnerable. Brief of Appellant 7-15. Hickey argues to this court that due to the improperly imposed exceptional sentence Hickey is entitled to be resentenced within the standard range. Brief of Appellant 15-17. The State

respectfully disagrees with Hickey's arguments and submits to this Court that there was not a violation of Hickey's Sixth Amendment Rights. Even if the State submitted facts beyond the facts stipulated by Hickey there was sufficient evidence contained within the stipulation to support the finding of a particularly vulnerable victim. Finally, if this Court decides that Hickey must be remanded for resentencing, the State should be able to seek an exceptional sentence given the admission and stipulation of a particularly vulnerable victim.

**1. The Trial Court Did Not Violate Hickey's Sixth Amendment Right To Have A Jury Determine Whether The Victim In This Case Was Particularly Vulnerable Because She Admitted The Aggravating Factor In Her Guilty Plea.**

In the present case the State alleged the victim in this case was a particularly vulnerable victim. CP 11. As part of the plea agreement Hickey was required to plead guilty to the charge of Murder in the Second Degree, the deadly weapon enhancement and the particularly vulnerable victim aggravating factor. CP 23-24. This was a reduction from the originally charged crime of Murder in the First Degree and also dropped several aggravating factors. CP 1-2. The benefit to Hickey was it reduced her standard sentencing range from 240 months to 320 months down to 123 months to 220

months and allowed Hickey to argue for low end of the standard range. RCW 9.94A.510; RCW 9.94A.515; RCW 9A.32.030; RCW 9A.32.050; CP 1-2, 11-12, 23-24, 447. In the SDPG and during the plea hearing, Hickey pleaded guilty to and admitted that the victim in this case was a particularly vulnerable victim. 1RP 11; CP 14-24. The trial court had the authority, due to Hickey's admission and guilty plea to the aggravating factor, to sentence Hickey to an exceptional sentence, which it did. 2RP 17-19; CP 447-57.

The Sixth Amendment of United States Constitution guarantees a criminal defendant the right to a trial by a jury of his or her peers. The United States Supreme Court has held that this right extends to any fact, other than a prior conviction, that increases the penalty of a crime beyond the statutory maximum. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000). The United States Supreme Court also determined that the statutory maximum sentences it referred to 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 v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004) (citations omitted, italics original). The Court found that in a state such as Washington, where the legislature has

enacted the Sentencing Reform Act, the maximum sentence would be a sentence within the standard range not the statutory maximum. *Blakely*, 542 U.S. at 303-04.

A defendant is free to waive his or her *Apprendi* rights. *Id.* at 310. If the defendant pleads guilty and stipulates to the aggravating factor or consents to a judicial fact finding the State is free to seek judicial sentencing enhancements. *Id.* In *State v. Steele* the State agreed that Steele could ask for a Special Sex Offender Sentencing Alternative (SSOSA) if Steele stipulated to aggravating factors. *Sate v. Steele*, 134 Wn. App. 844, 846-47, 142 P.3d 649 (2006). The State originally charged Steele with 10 separate sex offenses and the plea deal allowed Steele to plead guilty to one count of rape of a child in the first degree rape and one count of rape of a child in the second degree. *Steele*, 134 Wn. App. at 846-47. Steele also had to stipulate to two aggravating factors, abuse of trust and committing an ongoing pattern of sexual abuse to the same victim who was under 18 years of age. *Id.* at 847. The State was able to request an exceptional sentence of 280 months. *Id.* The trial court took Steele's plea of guilty finding it was voluntarily and freely made. *Id.* at 848. The trial court handed down an exceptional sentence of 280 months. *Id.* at 849. Steele argued to the Court of

Appeals that while he waived his Sixth Amendment right to a jury trial he did not knowingly, voluntarily and intelligently waive his right to have a jury find the factual basis for the exceptional sentence. *Id.* at 850. Steele asked the Court of Appeals to remand his case back to the trial court for imposition of a sentence within the standard range. *Id.* The Court of appeals held:

Steele's statement is sufficient to show waiver. As we have noted, Steele: (1) waived his right to a jury; (2) acknowledged that the court could impose a sentence outside the standard range; and (3) expressed his desire to take advantage of the plea agreement. In the plea agreement, which was incorporated by reference in his Statement, Steele stipulated to the existence of the aggravating factors...And Steele's counsel acknowledged, both at the time of plea and at sentencing, that grounds for an exceptional sentence existed. Thus, Steele's plea agreement cannot be separated from his statement, and his waiver of a jury was effective as to sentencing as well.

*Id.* at 851. The Court of Appeals affirmed Steele's sentence. *Id.* at 853.

In the present case, Hickey entered into a plea deal with the State where she agreed to plead guilty to Murder in the Second Degree with a deadly weapon enhancement and the aggravating factor of a particularly vulnerable victim. 1RP 6-12; CP 14-24. As part of this plea deal Hickey received the benefit of a reduced standard sentencing range and the State was free to argue for an

exceptional sentence. CP 23-24. Hickey reviewed and signed the SDPG. 1RP 7-9; CP 14-24. The SDPG and the trial court's colloquy with Hickey establish that she was entering into the plea voluntarily and it was a knowing and intelligent decision to enter the plea of guilty and admit to the aggravating factor of a particularly vulnerable victim. 1RP 7-12; CP 14-24. As part of this plea Hickey agreed to waive her right to a jury trial. 1RP 8-9; CP14-22. Because Hickey waived her right to a jury trial as part of an indivisible plea agreement allowing her to plead guilty to the lesser crime of Murder in the Second Degree with a deadly weapon enhancement and the aggravating factor of a particularly vulnerable victim, Hickey waived her Sixth Amendment right to a jury determination of the aggravating factor. There is no violation of *Blakely* or Hickey's Sixth Amendment rights. This Court should affirm Hickey's sentence.

**2. Hickey Admitted That The Baby She Killed Was A Particularly Vulnerable Victim As Part Of Her Plea Of Guilty To The Charge Of Murder In The Second Degree And This Admission Is Sufficient To Support The Trial Court's Finding Of A Particularly Vulnerable Victim And The Exceptional Sentence.**

Hickey's plea of guilty/admission that the victim in this case was particularly vulnerable was sufficient to support the exceptional sentence the trial court handed down. The State was not required

to have Hickey stipulate to further facts and any additional fact finding engaged in by the trial court was also invited by Hickey and her trial counsel.

An aggravating factor cannot be a factor inherent in the crime, as part of the elements necessary to prove the offense. *State v. Jennings*, 106 Wn. App. 532, 555, 24 P.3d 430 (2001) (citation omitted). An aggravating factor is something that distinguishes the behavior of the defendant from the behavior inherent in the commission of that crime. *Jennings*, 106 Wn. App. at 555.

A victim's particular vulnerability must be known to the defendant at the time of the commission of the crime. *State v. Ross*, 71 Wn. App. 556, 565, 861 P.2d 473 (1993) (citations omitted). A defendant must use that vulnerability as a substantial factor to accomplish the crime. *Ross* 71 Wn. App. at 565. When focusing on vulnerability the courts often look to age, whether advanced age or extreme youth, a person's health or a disability that would make the person more vulnerable than other victims. *Id.* Extreme youth may be a factor considered, even if the crime requires the victims to be under a certain age. *State v. Fisher*, 108 Wn.2d 419, 423-424, 739 P.2d 683 (1987). Where the crime

requires a person to be under a certain age but there is a wide age range given, such as under 14 years of age, a seven year old, school age child, would not be considered a particularly vulnerable victim due to age alone. *State v. Woody*, 48 Wn. App. 772, 742 P.2d 133 (1987). Yet, “[v]ulnerability can be the result of characteristics other than the victim’s physical condition or stature.” *Ross*, 71 Wn. App. at 565.

The courts have found a five and a half year old victim of indecent liberties to be a particularly vulnerable victim due to extreme youth. *Fisher*, 108 Wn.2d at 424-25. The court in *Fisher* reasoned that while the Legislature contemplated a stiffer penalty for those who commit indecent liberties against a person under 14 years of age, the Legislature could not have considered the particular vulnerabilities of a specific victim due to their extreme youth. *Id.* at 424. In contrast, the court in *Woody* held that under the same indecent liberties prong (under 14 years of age) that a seven year old victim was not a particularly vulnerable victim due to his or her youth. *Woody*, 48 Wn. App. at 777. The court explained that a child of school age has achieved a level of reason that a younger child has not, thereby setting a grade-school aged child apart from a younger child. *Id.*

Hickey's argument to this Court in regards to the factual basis for the exceptional sentence is twofold, first, she argues that the stipulated fact of particular vulnerability was insufficient to prove the aggravating factor without the trial court engaging in improper fact-finding. Brief of Appellant 10-12. Second, that the trial court did engage in improper fact finding because Hickey did not agree or stipulate that the trial court may consider facts outside her SDPG and the trial court based its decision to impose an exceptional sentence and finding of fact in support of the exceptional sentence, was based upon the autopsy report, which was not stipulated to by Hickey. Brief of Appellant 10. Hickey cites primarily to three cases to support her position, *Sate v. Hagar*, *State v. Hughes* and *State v. Suleiman*, all which are distinct from the facts of her case.<sup>3</sup> Brief of Appellant 10-15. As argued below, Hickey's plea of guilty/admission that the victim in this case was particularly vulnerable is sufficient to establish the aggravating factor of a particularly vulnerable victim. Further, by submitting her own sentencing memorandum, Hickey invited the trial court to rely on facts outside of her statements during her guilty plea hearing in determining her sentence. See CP 25-52. This invitation was furthered during the sentencing hearing

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<sup>3</sup> *State v. Suleiman*, 158 Wn.2d 280, 143 P.3d 795 (2006); *State v. Hagar*, 158 Wn.2d 369, 144 P.3d 298 (2006); *State v. Hughes*, 154 Wn.2d 118, 110 P.3d (2005).

when her trial counsel, in arguing for a low end sentence, addressed a number of facts which were not contained within the plea statement, including addressing Hickey's statements to police and Hickey's impaired state of mind due to her drug use.<sup>4</sup> 2RP 7-12.

None of the defendants in *Hughes*, *Suleiman* or *Hagar* stipulated to the aggravating factor that was found and used by the trial court in their respective cases as a basis for the exceptional sentence handed down by the trial court. *State v. Suleiman*, 158 Wn.2d 280, 143 P.3d 795 (2006); *State v. Hagar*, 158 Wn.2d 369, 144 P.3d 298 (2006); *State v. Hughes*, 154 Wn.2d 118, 110 P.3d (2005). In *Hughes* three defendants raised, for the first time on appeal, the issue of whether the trial court violated the Sixth Amendment when it imposed exceptional sentences based upon aggravating factors found by a judge not a jury. *Hughes*, 154 Wn.3d at 126-30. In *Hughes*, none of the defendants, Selvidge, Anderson or Hughes, stipulated to or admitted the aggravating factors the judge in each of the cases used as justification for the exceptional sentence handed down. *Id.* at 126-30.

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<sup>4</sup> Hickey's trial counsel even addresses her statement to police by page number and date, "And that's set forth in page 14 of her second statement made on the 9<sup>th</sup> of March." 2RP 9.

Anderson agreed to plead guilty to one count of child molestation in the first degree, one count of incest and one count of child molestation in the second degree. *Id.* at 126. The State agreed to recommend a standard range sentence. *Id.* Anderson requested a SSOSA, which the State opposed. *Id.* at 127. The trial court imposed an exceptional sentence of 240 months. *Id.* The trial court, to facilitate the imposition of the exceptional sentence, found facts to supporting several aggravating factors. *Id.* The Court of Appeals held this was a violation of Anderson's Sixth Amendment rights as interpreted by the United States Supreme Court in *Blakely*. *Id.* at 136-37. The court vacated Anderson's sentence. *Id.* at 137.

Selvidge was charged with and convicted of two counts of first degree child molestation. *Id.* at 128. The trial court imposed an exceptional sentence of 222 months on each count. *Id.* The trial court found aggravating circumstances warranted the exceptional sentence. *Id.* The Court of Appeals held that Selvidge's Sixth Amendment Rights were violated by the trial court's finding of aggravating circumstances and vacated the sentence. *Id.* at 138-40.

Hughes had cut down old growth cedar trees and was charged with and found guilty of theft in the first degree. *Id.* at 29. A forest technician testified at trial that the market value of the trees was \$4,465. *Id.* At the sentencing hearing the State produced testimony from a United States Forest Service ecologist. *Id.* The ecologist testified that the actual value of the cedar trees stolen, ecologically and monetarily, was \$145,599. *Id.* The trial court imposed an exceptional sentence of 90 months (the standard range sentence would have been three to nine months) and found several aggravating factors in support of the exceptional sentence. *Id.* at 129-30. The Court of Appeals found that the trial court violated Hughes's Sixth Amendment rights and vacated his sentence. *Id.* at 140-42.

Each of the defendant's in *Hughes* were found to have committed aggravating factors by the trial court. *Id.* at 126-30. These aggravating factors were not stipulated to or agreed upon by the defendants. *Id.* None of the defendant's pleaded guilty to an aggravating factor as part of a plea deal for a reduction in the charges filed. *Id.* The facts of each of case, for each defendant in *Hughes* is distinct from the facts in Hickey's case. Without a stipulation or agreement, the trial courts in *Hughes* violated the

defendants' rights to have the aggravating factor found by a jury. This is not the case for Hickey because she admitted to the aggravating factor of a particularly vulnerable victim.

Hagar was charged with 20 counts of theft in the first degree and four counts of theft in the second degree. *Hagar*, 158 Wn.2d at 371. The charges stemmed from Hagar's participation in an embezzlement scheme. *Id.* As part of a plea deal the State amended the charges to three counts of theft in the first degree in exchange for Hagar's plea of guilty. *Id.* The plea agreement informed Hagar that the State would seek an exceptional sentence of 43 months but that the judge would have to sentence Hagar within the standard range unless the judge found compelling and substantial reasons to depart from the standard range. *Id.* at 372. Hagar stipulated to the facts in the probable cause statement, the appendix to the agreement and the prosecutor's summary. *Id.* at 371-72. The trial court sentenced Hagar to an exceptional sentence of 30 months on each count. *Id.* at 372. The trial court found the aggravating factor of major economic offense in support of the exceptional sentence. *Id.* The Supreme Court found that while Hagar stipulated to certain facts, he did not stipulate that the crimes constituted a major economic offense. *Id.* at 374. The trial court

therefore had to engage in improper fact finding which *Blakely* forbids and was contrary to the Sixth Amendment. *Id.* The Supreme Court reversed Hagar's sentence and remanded the case back to the trial court for an imposition of a sentence within the standard range. *Id.*

As with *Hughes*, the facts of Hickey's case are distinct from the facts presented in *Hagar*. Hickey admitted to the aggravating factor. Hagar admitted to facts, but did not admit to or stipulate that his crimes constituted a major economic offense. *Hagar*, 158 Wn.2d at 374. This is a key distinction between the two cases. At no time did Hagar agree to admit to or stipulate to an aggravating factor which would subject him to an exceptional sentence. *Id.* at 371-74. Hickey on the other hand, both in her SDPG and her colloquy with the trial court admitted to the aggravating factor of a particularly vulnerable victim. 1RP 11; CP 14-24.

Similarly to *Hagar* in *Suleiman* the defendant agreed to stipulate to the material and real facts as written in the probable cause statement and the prosecutor's summary. *Suleiman*, 158 Wn.2d at 285. Suleiman's statement of defendant on plea of guilty said the stipulation was only in regards to the plea of guilty on the three counts of vehicular assault and it was "*without stipulating that*

*those facts are a legal basis for an exceptional sentence.” Id.* (emphasis original). The trial court sentenced Suleiman to an exceptional sentence after making the finding that aggravating factors supported the exceptional sentence. *Id.* at 286-87. One of these aggravating factors was a particularly vulnerable victim. *Id.* The Supreme Court held that the trial court violated *Blakely*. *Id.* at 292-94. The Supreme Court concluded,

[I]n order for Suleiman’s plea to comply with the *Blakely* stipulation exception, he must have stipulated to the underlying facts. He must also have stipulated to the enumerated factual bases for particular vulnerability...Finally, he must have stipulated that the record supported a determination of particular vulnerability. Otherwise the trial court engaged in decision making that this court has labeled as fact finding.

*Id.* at 292. The Supreme Court held that because Suleiman’s exceptional sentence relied upon facts outside of Suleiman’s stipulation, it was in violation of *Blakely* and remanded the case back to the Court of Appeals to determine if the violation was harmless. *Id.* at 294-95.

While *Suleiman* dealt with a guilty plea and the finding of a particularly vulnerable victim, the facts are distinct from the facts in Hickey’s case. There was no *Blakely* violation in the present case. Further, the trial court need only find that the particularly vulnerable

victim aggravating factor that Hickey admitted to warranted an exceptional sentence. While the trial court did rely upon facts outside of the stipulation, those facts can also be found, or at the very least implied upon from Hickey's statement in the sentencing memorandum, the doctor's reports in Hickey's sentencing memorandum, the words of her trial counsel who spoke on Hickey's behalf at sentencing and finally Hickey's own statement to the trial court during sentence. 2RP 7-16; CP 25-52.

The Court of Appeals has previously held,

[w]hen a defendant stipulates to an exceptional sentence, that is enough, "in and of itself to constitute a substantial and compelling reason to justify an exceptional sentence, so long as the sentence is authorized by statute and the findings also show that the sentence is consistent with the goals of the Sentencing Reform Act of 1981."

*State v. Brandenburg*, 153 Wn. App. 944, 948-49, 223 P.3d 1259 (2009), *citing State v. Ermels*, 156 Wn.2d 528, 536, 131 P.3d 299 (2006). Brandenburg, who was charged with possession of a controlled substance with the aggravating factor of unscored misdemeanor criminal history, pleaded guilty to possession of methamphetamine. *Brandenburg*, 153 Wn. App. at 946. In the plea statement Brandenburg stated, "On September 16, 2008 in Benton County WA I knowingly and unlawfully possessed

methamphetamine. There was a residue amount that I had in my possession. Also, I have unscored misdemeanor criminal history.” *Id.* The trial court asked Brandenburg during the plea hearing whether he possessed methamphetamine and whether he had unscored misdemeanor criminal history, which Brandenburg answered yes to both questions. *Id.* at 946-47. The trial court imposed an exceptional sentence and the judgment and sentence stated that the aggravating factor was stipulated by the defendant. *Id.* at 947. The Court of Appeals held that Brandenburg stipulated to the aggravating factor and “[h]e cannot now complain that the court wrongly imposed an aggravated exceptional sentence.” *Id.* at 949 (citation omitted). Brandenburg’s exceptional sentence was affirmed. *Id.*

In the present case Hickey admitted to the aggravating factor of a particularly vulnerable victim. Page one of the SDPG states, “I am charged with Murder 2 with Deadly Weapon. The elements are 1) with intent to cause death 2) caused the death of another person with aggravating factor that the victim was particularly vulnerable.” CP 14. Below that statement was a list of the Hickey’s rights that she gave up when she pleaded guilty to Murder in the Second Degree. CP 14-15. Among these rights was the right to a trial by

jury. CP 14. Attached to the SDPG was the letter from the Prosecuting Attorney to Hickey's trial counsel outlining the requirements of the plea deal. CP 23-24. The letter states that in order to get the benefit of the plea bargain, Hickey would have to plead guilty to the amended charge of Murder in the Second Degree with a deadly weapon enhancement and the aggravating factor of a particularly vulnerable victim. CP 23.

At the guilty plea hearing the trial court went over the plea form with Hickey. 1RP 7-11. The trial court established that Hickey went over every line of the SDPG with her attorney and understood it. 1RP 7. Hickey understood her rights as listed on page one and two of the SDPG. 1RP 8. Hickey also agreed that she reviewed the elements of the charge of Murder in the Second Degree as well as the elements of the aggravating factor. 1RP 8. Hickey understood the State was free to argue for an exceptional sentence and that the trial court was not bound by any deal she had made with the State and could sentence her to a sentence of up to life in prison. 1RP 8-9. The trial court asked Hickey if she was threatened or forced into changing her plea to guilty, which she affirmed she was not. 1RP 9-10. The trial court then stated:

THE COURT: In paragraph 11 [of SDPG] you're asked to state in your own words what it is that you did that makes you guilty of this offense and here's what appears there: On March 2<sup>nd</sup>, 2011 I gave birth to a small, premature child in Lewis County. I felt the baby would not survive and chose to cut off his head with a knife to prevent any other suffering. I'm very truly sorry for what I have done.

Is that your statement?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And this may be obvious from what you stated there, but you did this intentionally with the intent to kill the child; is that correct?

THE DEFENDANT: (no response.)

THE COURT: I know the explanation was to prevent further suffering, but your intent was to kill the child; is that correct?

THE DEFENDANT: Yes.

THE COURT: All right. With that addition is that your statement?

THE DEFENDANT: Yes.

THE COURT: Is it a true statement?

THE DEFENDANT: Yes.

THE COURT: Then to the charge in the Amended Information of murder in the second degree, what is your plea, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Do you also admit to the special allegation that you were armed with a deadly

weapon?

THE DEFENDANT: Yes.

THE COURT: And do you also admit that the victim here was particularly vulnerable due to an incapable of resistance due to its age?

THE DEFENDANT: Yes.

1RP 10-11. The trial court found that Hickey's plea was knowingly, intelligently and voluntarily made. 1RP 11-12.

The State submitted a sentencing memorandum, which included the autopsy report for the victim. CP 134-444. The autopsy report contained the information that the baby had been born with acute methamphetamine intoxication. CP 140-41. Hickey's trial attorney also submitted a sentencing memorandum to the trial court. CP 25-52. The sentencing memorandum states that Hickey admitted an aggravating factor of a particularly vulnerable victim. CP 25. The memorandum goes onto state that Defendant's impaired state of mind should be considered as a mitigating circumstance. CP 27-29. Dr. Muscatel's report was cited to for this argument, which in part states, "She [Hickey] was also high on methamphetamine..." CP 27, 50. Attached, as part of the sentencing memorandum, were the Western State Hospital (WSH) Forensic Psychiatric Evaluation and the Forensic Psychological

Test Report from Dr. Kenneth Muscatel. CP 32-50. The WSH report stated that “[b]y the time of alleged incident, Ms. Hickey had been using meth and staying up all day and all night continuously for two months straight.” CP 35. The report from Dr. Muscatel stated:

Ms. Hickey discovered that she was pregnant in January when she went to the hospital. She was not sure how far along she was in January but indicated that the last time she had sex was in October. She was still using drugs, and noted the quality of the drugs was pretty good. She was using on a daily basis, filling up a bowl in her pipe, smoking it, smoking a cigarette, and then going to another bowl.

CP 42. The report went on to state:

In the incident, she indicated that she was smoking methamphetamine at Eddie’s and had not seen her children since early February... I asked her if she recognized that smoking methamphetamine while she was pregnant was harmful to her developing child, and she replied that from her previous pregnancies she had done it and it did not have any ill effects on the kids.

CP 43. The report goes on to talk about a review of the records and drug toxicology report. RP 47.

The drug toxicology screening indicated that Ms. Hickey had the presence of methamphetamine in her blood stream, 0.16 mg/L. A test was performed on the baby boy as well, and the child had a level of methamphetamine of 0.18 mg/L. Thus, both mother and child had a significant amount of methamphetamine in their blood stream in and around the time of the incident.

CP 47. Hickey’s own letter to the judge stated:

I am disgusted in myself for letting meth take a hold of my life. Because of my long term meth use, I could not think clearly or make rational decisions... I should have been holding him close, praying for him, and comforting him like a good mother. Instead, I took a life that wasn't even mine to take. I am sorry for what I have done.

CP 52.

At the sentencing hearing, after hearing from the Prosecuting Attorney, Hickey's trial counsel, the father of the baby (through his attorney), Hickey's grandmother and Hickey the trial court imposed an exceptional sentence of 30 years. 2RP 1-17. The trial court explained its ruling orally:

The defendant stipulated to the aggravating factor of the victim being particularly vulnerable. And that would be an easy conclusion to reach, of course, since that stipulation or concession has been conceded by the defendant.

In fact, it's hard to think of a more vulnerable being than a fetus or a newborn. And here the defendant repeatedly and habitually exposed this unborn child to methamphetamine to such an extent that, as I read the autopsy doctor's statement, he opined that the baby was already addicted to methamphetamine. And that, of course, would not be surprising given that what a mother puts into her body ends up in the baby as a matter of course. So when you engaged in a two-month spree on methamphetamine while you're pregnant you're going to have problems with the birth here.

Frankly, I could, if I were allowed to, make a finding of deliberate cruelty on that alone. But the law does not allow that. Our U.S. Supreme Court has said that

determination absent a stipulation must be made by a jury. We didn't have a jury trial in this case. That aside, and it is aside, it does operate to support the stipulated aggravation of - - aggravating factor of particular vulnerability.

That support really isn't necessary, though, as there can really be no more vulnerable person than a newborn. And again, the facts clearly support that she obviously did not - - took advantage of this situation.

2RP 18-19. The Prosecuting Attorney drafted findings based upon the trial court's oral ruling. Hickey's trial counsel reviewed those findings and argued to the court that while Hickey stipulated to the aggravating circumstance of a particularly vulnerable victim, and Hickey had no problem with that being a finding of fact, the portion about baby being intoxicated by methamphetamine was not stipulated to. 2RP 22. The judge then entered the findings of fact for the exceptional sentence that stated: "The exceptional sentence is justified by the following aggravating circumstances: (a) The victim was a particularly vulnerable premature baby boy, who was drug intoxicated (methamphetamine)." CP 456.

Hickey clearly stipulated that the victim was a particularly vulnerable victim, both through her own words and the words of her attorney. Hickey's stipulation was on the plea form and affirmed by Hickey during the trial court's colloquy with Hickey during her guilty plea hearing. 1RP 7-11; CP 14-24. Hickey's attorney, speaking on

her behalf in the sentencing memorandum and during sentencing, acknowledged that Hickey had stipulated to the aggravating circumstance of a particularly vulnerable victim. 2RP 22; CP 25. Hickey's guilty plea states, in her own words, that she killed the victim, her premature baby, by cutting his head off. CP 21. A victim in a murder in the second degree case that is a premature baby alone is sufficient to find a particularly vulnerable victim. If a five and a half year old can be considered a particularly vulnerable victim in an indecent liberties case where the victim must be under 14 years of age, than it would stand to reason that a premature newborn victim, in a crime where age is not an element of the crime, is a particularly vulnerable victim. *See Fisher*, 108 Wn.2d at 424-25.

While Hickey's attorney did raise that she did not stipulate that the baby was intoxicated by methamphetamine, Hickey's sentencing memorandum contained information regarding the baby's condition. CP 27, 35, 42, 43, 47, 52. The information was presented, by Hickey in hopes of persuading the trial court that there were mitigating factors that would make a sentence below the standard range appropriate. CP 25-52. It is striking to the State that Hickey's trial counsel did not object to the State's sentencing

memorandum and provided extrinsic evidence to support a mitigated exceptional sentence below the standard range and would now argue that the judge, by including one fact out of the extrinsic material, invalidates Hickey's entire stipulation of the aggravating factor of a particularly vulnerable victim. See 2RP. If this is really what Hickey is complaining about, then this would be a case of invited error. The invited error doctrine "prohibits a party from setting up an error at trial and then complaining of it on appeal." *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), citing *State v. Boyer*, 91 Wn.2d 342, 588 P.2d 1151 (1979). The Supreme Court has held that even when the alleged error involves a constitutional issue, if that error was invited, appellate review is precluded. *State v. Boyer*, 91 Wn.2d at 345. Hickey cannot submit documentation for the trial court's consideration and now complain that the trial court actually considered it. This Court should dismiss such an argument.

The stipulation to the aggravating factor was sufficient for the trial court to impose the exceptional sentence of 30 years. Additionally, the trial court was within its right to consider, at the very least, the information Hickey presented to it when crafting its findings for a particularly vulnerable victim, therefore the trial court's

findings are not in error, or beyond the scope of the stipulation and the sentence should be affirmed.

If this Court were to find the addition of the fact that the victim was drug intoxicated was beyond the stipulation, the exceptional sentence should still remain intact. The trial court stated when explaining the reason behind the exceptional sentence that there was no more vulnerable victim than a newborn baby (which Hickey stated the victim was as part of guilty plea) and that alone was sufficient for the exceptional sentence. 2RP 18-19. The supporting finding that the baby was intoxicated by methamphetamine was not necessary for the particularly vulnerable victim finding and the imposition of the exceptional sentence, therefore this court should affirm Hickey's sentence.

**3. If Violation Occurred, The Proper Remedy Is To Remand Back To The Trial Court For Resentencing.**

While the State is not conceding that there was an error by the trial court when it found the victim was a particularly vulnerable baby, who was drug intoxicated, the State argues in the alternative that if there was such an error the proper remedy is to remand back to the trial court for resentencing with the ability to impose an exceptional sentence. Hickey argues to this Court that the proper remedy is to remand for resentencing within the standard range.

Brief of Appellant 15-17. This is not the proper remedy in Hickey's case.

If this court were to find that the stipulation was not sufficient to present the additional evidence that the baby was intoxicated by methamphetamine, then the State should be able to argue what was stipulated to at resentencing. Hickey stipulated to the aggravating factor of a particularly vulnerable victim. That stipulation coupled with her SDPG and any statements she made during the original colloquy with the trial court during the plea hearing should be available for the trial court to evaluate whether that evidence, itself, is sufficient for the trial court to find the aggravating circumstances and impose an exceptional sentence. The correct remedy is to excise the portion of record that was unlawful, which in this case would be the extrinsic evidence presented by the State and possibly Hickey, and not allow any further evidence to be introduced. *State v. Ford*, 137 Wn.2d 472, 485, 973 P.2d 452 (1999) (citation omitted). This gives the State the ability to argue for the exceptional sentence based upon the admissible evidence from the original guilty plea hearing. This evidence, because Hickey did stipulate to the aggravating factor, is sufficient to prove particularly vulnerable victim and the State

should be free to argue the aggravating circumstance upon remand for resentencing.

**IV. CONCLUSION**

For the reasons argued above this court should affirm Hickey's exceptional sentence.

RESPECTFULLY submitted this 11<sup>th</sup> day of September, 2012.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney



by: \_\_\_\_\_  
SARA I. BEIGH, WSBA 35564  
Attorney for Plaintiff

# LEWIS COUNTY PROSECUTOR

## September 11, 2012 - 9:48 AM

### Transmittal Letter

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