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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 29495-1-III

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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STATE OF WASHINGTON,

Respondent,

vs.

ROBERT LEE DONEY, JR.,

Appellant.

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APPELLANT'S OPENING BRIEF

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**A. ASSIGNMENT OF ERROR**

1. The trial court erred in holding that a sentencing jury could be empanelled to hear aggravating sentencing factors.

2. The trial court erred in empanelling a jury to hear and decide the aggravating sentencing factors.

3. The trial court erred in imposing an exceptional sentence upward.

**B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial judge have the authority to create its own sentencing procedure and to empanel a jury to hear aggravated sentencing factors?

2. Did the violate Doney's right to due process, equal protection and general principles of equity by empanelled a jury to hear aggravating sentencing factors?

**C. STATEMENT OF THE CASE**

**1. Prior history of case.**

This is the second time this case has been before this Court. *See State v. Doney*, 142 Wn. App. 450, 174 P.3d 1261 (2008).

On March 16, 2005, several days into a jury trial, Doney pleaded guilty to first degree murder of V.R. *Doney*, 142 Wn. App. at 451. Prior to trial, the State amended its information putting Doney on notice of its

intent to seek an exceptional sentence. *Id.* In his guilty plea, Doney did not admit guilt to the aggravating factors and did not waive his right to a jury determination of the aggravating factors. *Id.* at 451-52.

Over Doney's objection, the trial court allowed the trial jury to hear testimony on the alleged aggravating factors. *Id.* at 452. On March 18, 2005, the jury found aggravating factors including: (1) that Doney had manifested deliberate cruelty to V.R. during the commission of the crime; (2) that Doney know or should have know the V.R. was particularly vulnerable and incapable of resistance due to extreme youth; and (3) that Doney showed an egregious lack of remorse after commission of the murder. *Id.* at 452.

On April 15, 2005, the "Blakely fix" went into effect. Laws of 2005, Chapter 68 (SB 5477), codified at RCW 9.94A.537. Before sentencing, the trial court struck the original jury's aggravating findings because of procedural deficiencies with the sentencing trial.

On July 6, 2006, the State filed a motion to empanel another sentencing jury, this time arguing that the "Blakely fix" authorized the empanelling of a jury to consider aggravating circumstances in Doney's case, even though he plead guilty before thee effective date of the *Blakely* fix. *Id.* at 453. Although Doney opposed empanelling a new aggravating

factors jury, the trial court held that a new sentencing jury was authorized by the *Blakely* fix.” *Id.* at 452.

The *Blakely* decision gave sentencing judges no guidance as to whether a defendant could still be sentenced to an exceptional sentence. Sentencing judges were left to interpret *Blakely* and determine how the decision could be implemented. After *Blakely*, the procedures that had been used for many years no longer met constitutional standards, and there was a significant amount of confusion regarding the state of the law. The Supreme Court held that the *Blakely* fix was not retroactive. *State v. Hughes*, 154 Wn.2d 118, 133-34, 148-49, 11P.3d 192 (2005), *overruled in part on other grounds by Washington v. Recuenco*, 548 U.S. 2006, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

A new aggravating factor jury returned with verdicts finding Doney’s conduct toward V.R. (1) manifested deliberate cruelty and (2) that V.R. was particularly vulnerable or incapable of resistance. *Id.* at 453. Because the jury was unable to agree on whether Doney demonstrated an egregious lack of remorse after commission of the murder, the court dismissed that aggravating factor. *Id.* 453.

At an October 12, 2005, sentencing hearing the court found that the crime supported the two aggravating factors found by the jury. The

court imposed an exceptional sentence of 420 months on a standard range of 250-333 months. *Id* at 453.

Doney appealed. While his appeal was pending, the Supreme Court decided *Pillatos*. *State v. Pillatos*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). The State Legislature responded with the “Pillatos fix.” *Laws of 2007, Chapter 205*.

Ultimately, the Supreme Court vacated Doney’s exceptional sentence finding that the trial court had no authority to empanel the sentencing jury. *State v. Doney*, 165 Wn.2d 400, 198 P.3d 483 (2008). In vacating Doney’s sentence, the Supreme Court did not make a holding that RCW 9.94A.537(2) applied to Doney’s resentencing.

## **2. Retrial on sentencing factors**

After Doney’s case was remanded, the State made a motion to empanel a jury. The court heard the motion on May 22, 2009. 5/29/09 RP at 12-41. Over Doney’s objection, the trial court granted the motion. 5/29/09 RP at 41-46.

A jury heard the aggravating factors trial in August 2010. Report of proceedings for trial, volumes I, II, and III. The jury found that Doney manifested deliberate cruelty to V.R. and that Doney knew or should have known that V.R. was a particularly vulnerable victim. CP 20, 23-24. The

trial courts resentenced Doney to an exceptional sentence of 420 months.

CP 28. 36-56.

**D. ARGUMENT**

**BECAUSE THE TRIAL JUDGE LACKED AUTHORITY TO  
CREATE ITS OWN SENTENCING PROCEDURES,  
ROBERT DONEY IS ENTITLED TO HAVE THE  
FINDINGS AND SENTENCE STRICKEN**

1. *The exceptional sentence proceeding which occurred in Mr. Doney's case was contrary to the statutory scheme in effect at the time*

At the time Doney pled guilty, the exceptional sentencing provisions of Washington's Sentencing Reform Act (SRA) specifically required the trial judge to weigh the evidence regarding potential aggravating sentence factors and determine whether they were sufficient for an exceptional sentence. Former RCW 9.94A.535 (2004). The 2004 statute explicitly directed the trial court to make the necessary factual findings and did not include any provision permitting the use of a jury to make those determinations either during trial or during a separate sentencing proceeding.<sup>1</sup> The United States Supreme Court held, however, that this procedure violated the Sixth Amendment right to trial by jury.

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<sup>1</sup> *State v. Hughes*, 154 Wn.2d 118, 133-34, 148-49, 11P.3d 192 (2005), overruled in part on other grounds by *Washington v. Recuenco*, 548 U.S. 2006, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

*Blakely v. Washington*, 542 U.S. 296, 302-07, 124 S. Ct. 2531, 155 L. Ed. 2d 403 (2004).<sup>2</sup>

Following *Blakely*, and notwithstanding the contrary statutory directive of Former RCW 9.94A.535 (2004), the trial judge charged the jury with special interrogatories regarding the potential aggravating factor alleged by the prosecutor. Our state Supreme Court has since twice rejected the idea that Washington courts had the inherent authority to implement such procedures and reiterated “it is the function of the legislature and not of the judiciary to alter the sentencing process.” *State v. Hughes*, 154 Wn.2d at 149, quoting *State v. Monday*, 85 Wn.2d 906, 909-10, 540 P.2d 416 (1975); *State v. Pillatos*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007).

In *Hughes*, the Court explained that “[w]here the legislature has not created a procedure for juries to find aggravating factors and has, instead, explicitly provided for judge to do so,” the Court was unable to imply such a procedure on remand. 154 Wn.2d at 150.

To create such a procedure out of whole cloth would be to usurp the power of the legislature.

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<sup>2</sup> *Blakely*, and *Apprendi* upon which it was based, held that any fact, other than the fact of a prior conviction, increasing the penalty beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

<sup>2</sup> *State v. Martin*, 94 Wn.2d 1, 614 P.2d 164 (1980)

*Hughes*, 154 Wn.2d at 151-52. For that reason, when presented the specific question of whether Washington courts had the inherent authority to empanel juries in these circumstances, the Court unanimously conclude that:

Consistent with our decisions in *Hughes* and *Martin*<sup>3</sup>, we conclude that trial courts do not have inherent authority to empanel sentencing juries.

*Pillatos*, 159 Wn.2d at 470 (emphasis added). This reluctance to rewrite statutes where the legislature has described a particular path is grounded in respect for the separation of powers and should be observed.<sup>4</sup>

2. *Laws of 2005, Chapter 68 (SB 5477, the "Blakely fix," cannot be applied retroactively to save the prior proceeding*

The Legislature did not express an intention that the Laws of 2005, Chapter 68, (SB 5477)<sup>5</sup>, the "Blakely fix" be applied retroactively.

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<sup>3</sup> *State v. Martin*, 94 Wn.2d 1, 614 P.2d 164 (1980)

<sup>4</sup> As recognized in *Hughes*, "separation-of-powers" principles preclude a court from rewriting the language of a statute to bring it up to constitution minimums. 154 Wn.2d at 150-52 (citing *State v. Martin, supra* and *State v. Frampton*, 95 Wn.2d at 476-79); see also, e.g., *In re. Custody of Smith*, 137 Wn.2d 1, 11-13, 969 P.2d 21 (1988), *aff'd sub nom, Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed 2d. 49 (2000); *Miller v. Cam*, 135 Wn.2d 193, 203, 955 P.2d 791 (1998) (courts cannot "amend" or "rewrite a statute to avoid difficulties in construing and applying them") (internal quotation omitted); *State v. Groom*, 133 Wn.2d 679, 689, 698, 947 P.2d 240 (1997) ("however much members of this court may think a statute should be rewriting....we simply have no such authority.").

Instead, this Court concluded that the legislation “by its terms, applies to all pending criminal matters where trials have not begun or pleas not yet accepted.” *Pillatos*, 159 Wn.2d at 470, citing Laws of 2005, ch. 68, § 4(1) (“At any time prior to trial or entry of the guilty plea...”). The statute, by its terms, does not retrospectively grant authority to the trial court that it did not otherwise have at the time of Doney’s plea on March 16, 2005, before the legislation was even passed. “The act clearly contemplates that either the entry of the plea or the trial is the precipitating event.” *Pillatos*, 159 Wn.2d at 471. “[T]he court must ask whether the new provision attaches new legal consequences to events completed before its enactment.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70, 114 S.Ct. 1483, 128 L.Ed. 2d 229 (1994). To apply the statute retrospectively to events completed, i.e., the guilty plea in this case, would be impermissible.

3. *Laws of 2007, Chapter 205 (EHB 2070), the “Pillatos fix,” would violate separation of powers if applied to Doney’s case*

Newly enacted statutes such as this are presumed not to apply retroactively. *State v. Cruz*, 139 Wn.2d 186, 190, 985 P.2d 384 (1999). This presumption is “deeply rooted in our jurisprudence, and embodies a

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<sup>5</sup> Codified at RCW 9.94A.537, effective April 15, 2005

legal doctrine centuries older than our Republic.” *Id.* (quoting *Lynce v. Mathis*, 519 U.S. 433, 439, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997) and *Landgraf v. USI Film Prods.*, 511 U.S. at 265); *State v. T.K.*, 139 Wn.2d 320, 329, 987 P.2d 63 (1999).

This presumption may be overcome only if: (1) the Legislature clearly conveyed its intent for retrospective application; (2) the amendment is “curative”; or (3) the amendment is remedial. *PRP of Stewart*, 115 Wn.App. 319, 332, 75 P.3d 521 (2003). Even if these requirements are satisfied, an amendment may still not apply retroactively if to do so would run afoul of any constitutional prohibition. *In re. F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992). In this case, that constitutional prohibition is the separation of powers doctrine.

a. The 2007 amendment is not “curative.

A curative amendment clarifies or technically corrects an ambiguous statute. *State v. Smith*, 144 Wn.2d 665, 674, 30 P.3d 1245 (2001); *F.D. Processing*, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992). An amendment must be “clearly curative” for it to be retroactively applied. *F.D. Processing*, 119 Wn.2d at 461; *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 47, 785 P.2d 815 (1990). Compare, *Stewart*, 115 Wn.App. at 337-39.

The 2007 amendments in EHB 2070 seek to significantly expand the scope of the 2005 amendments after *Pillatos* found it by its terms applied only to cases in which the trial or guilty plea occurred after the effective date. *Pillatos* found the statutory mandate in the Laws of 2005, chapter 68, was clear, so legislative attempts to “clarify” the scope of the statute should be viewed with suspicion. Furthermore, where ambiguity is lacking in statutory language, as in the previous amendments to RCW 9.94A.535, the Court presumes an amendment to the statute constitutes a substantive change in the law, and the 2007 amendment presumptively is not to be applied retroactively. *F.D. Processing*, 119 Wn.2d at 462; *Overton v. Economic Assistance Auth.*, 96 Wn.2d 662, 667, 637 P.2d 642 (1981).

b. The 2007 amendment is not “remedial.”

Generally, an amendment is deemed remedial and applied retroactively when it relates to practice, procedure or remedies, and does not affect a substantive or vested right. *In re Mota*, 114 Wn.2d 465, 471, 799 P.2d 538 (1990); *Addleman v. Board of Prison Terms & Parole*, 107 Wn.2d 503, 510, 730 P.2d 1327 (1986). Procedural rules, therefore, apply to pending causes of action only insofar as they “do not affect a

contractual or vested right or do not impose a penalty.” *State v. Matlock*, 27 Wn.App. 152, 157, 61 P.2d 684 (1980) ; *Godfrey v. State*, 84 Wn.2d 959, 961, 530 P.2d 630 (1975).<sup>6</sup> EHB 2070 clearly has as its goal the imposition of a penalty – an exceptional sentence – it cannot, therefore, be deemed a mere procedural rule that applied to pending cases.<sup>7</sup> Thus, the legislation passed in direct response to *Pillatos* falls outside the rule that a mere procedural amendment may be applied to pending cases.

c. The subsequent amendments cannot be invoked to save an improperly obtained exceptional sentence.

The state Supreme Court ruled that former RCW 9.94A.535 does not permit a sentence outside the standard range for persons whose case

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<sup>6</sup> *Matlock* held that an amendment to CrR 3.3 excluding time between dismissal and arraignment on a re-filed charge was procedural and could be applied to pending cases. *Matlock* relied on: (1) a definition of “vested right” as something more than an expectation that the existing law would continue; and equitable or legal entitlement “to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another;” and (2) the provision in CrR 1.3(b) specifying that the criminal rules apply to pending proceedings unless “the former procedure should continue to be made applicable in a particular case in the interests of justice.” 27 Wn.App. at 157. The court distinguished its analysis of the procedural rule from “cases concerned with application of case law or the adoption of a new rule.” *Id.*

<sup>7</sup> This proposition derived from the United States Supreme Court:

While...cases do not explicitly define what they mean by the word “procedural,” it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes.

*Collins v. Youngblood*, 497 U.S. 37, 45, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990) (citing *Dobbert v. Florida*, 432 U.S. 282, 292, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977); *Beazell v. Ohio*, 269 U.S. 167, 46 S. Ct. 68, 70 L. Ed. 216 (1925); *Mallott v. North Carolina*, 181 U.S. 589, 597, 21 S. Ct. 730, 45 L. Ed. 1015 (1901)).

were pending at the time of the *Blakely* decision. *Hughes*, 154 Wn.2d at 148-52. In *Hughes*, the court concluded that former RCW 9.94A.535 did not allow a jury to be empanelled to consider aggravating factors and impose an exceptional sentence. *Pillatos*, 159 Wn.2d at 469-470, *citing Hughes*, 154 Wn.2d at 151-52. For this reason, the defendants could receive a sentence no greater than the top of the standard range. *Hughes*, 154 Wn.2d at 149.

By its express terms, Laws of 2005, Chapter 68, was enacted to create a process that complied with *Blakely*. EHB 2070 now seeks to apply this process to further sentencing proceedings held after *Pillatos*. Where these types of amendments to the SRA disadvantage an accused, however, they may not be retroactively applied without running afoul of ex post factor prohibitions. *State v. Parker*, 132 Wn.2d 182, 191-92, 927 P.2d 575 (1997). In a circumstance such as this, the new statute violates ex post factor prohibitions because it inflicts a greater punishment for the commission of a crime than that which was originally constitutionally permitted when committed. WA Const. Art. 1, § 23; U.S. Const. Art. 1, § 9; *In re Personal Restraint of Smith*, 139 Wn.2d 199, 207-09, 986 P.2d 131 (1999); *State v. Ward*, 123 Wn.2d 488, 497, 870 Pl.2d 295 (1994); *In re Powell*, 117 Wn.2d 175, 184, 814 P.2d 635 (1991); *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 251 (1987) (Florida's revised

sentencing guidelines were not merely procedural, since they increased the quantum of punishment).

- d. Retroactive application of the new amendments violates the Bill of Attainder clauses of the state and federal constitution.

Related to the separation of powers doctrine is the prohibition against bills of attainder set forth at Article 1, § 10 of the Federal Constitution and Article 1, § 23 of the Washington Constitution. *United States v. Brown*, 381 U.S. 437, 442, 14 L. Ed. 2d 484, 85 S. Ct. 1707 (1965). As utilized in the federal constitution, the prohibition against bills of attainder also includes a prohibition against bills of pains and penalties. *See, e.g., Nixon v. Administrator of General Services*, 433 U.S. 425, 473-74, 53 L. Ed. 2d 867, 97 S. Ct. 2777 (1976).

The Bill of Attainder Clause prohibits “legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial...” *United States v. Lovett*, 328 U.S. 303, 315, 90 L. Ed. 1252, 66 S. Ct. 1073 (1946). Stated another way, “[t]he prohibitions on “Bills of Attainder” in Art 1, §§ 9-10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct.” *Landgraf*, 511 U.S. at 266; see also, *Nixon*, 433 U.S. at 468 (key features of a bill of attainder are “a law that legislatively

determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.”) Here, EHB 2070 seeks to punish a small but readily identifiable class of individuals, those persons whose cases were pending prior to the 2005 enactment, where such a punishment would not be available. The amendment, therefore, violates the constitutional prohibitions against bills of attainder.

4. *The use of an unauthorized procedure requires striking of the exceptional sentence findings and sentence*

The court has held that where a court fails to comply with the procedures of the SRA, and in the absence of an express waiver by the defendant, the remedy is either to remand for resentencing, or where a proper objection was raised in the trial court to reduce the sentence. *State v. Ford*, 137 Wn.2d 472, 482-83, 973 P.2d 452 (1999); *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996) (imposition of penalty without compliance with sentencing statute subject to appellate review). In those instances in which courts have applied something akin to harmless error analysis, they have simply concluded the resulting sentence did not or would not change as a matter of law. The court did not reweigh the evidence or otherwise assess the facts supporting the sentence imposed.<sup>8</sup>

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<sup>8</sup> *See State v. Argo*, 81 Wn.App. 552, 569, 915 P.2d 1103 (1996) (concluding remand for resentencing was unnecessary where even if correct, appellant’s challenge to offender score calculation would only result in reduction from 16 to 13 points).

In Doney's case, however, it is complete speculation for an appellate court to say that despite the procedural errors in the earlier consideration of evidence, an alternate fact-finder acting under a new legislative mandate would reach the same result. Instead, where sentencing errors turn on factual errors or errors in the procedure by which the jury and sentencing court considered the proof, remand should be required.<sup>9</sup>

**EMPANELLING A JURY TO DETERMINE  
AGGRAVATING FACTORS VIOLATES THE DUE  
PROCESS CLAUSE, PRINCIPALS OF EQUITY, AND  
THE EQUAL PROTECTION CLAUSE**

Defendants are guaranteed due process of the law under the federal constitution and the state constitution. *State v. Turner*, 145 Wn. App. 899, 907, 187 P.3d 835, 838 (2008). "Due process requires governments to treat citizens in a fundamentally fair manner." *Valley View Ind. Park v. City of Redmond*, 107 Wn.2d 621, 636, 733 P.2d 182 (1987).

Principals of equity are also applied in criminal law to prevent an unfair

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<sup>9</sup> See, e.g., *State v. Beals*, 100 Wn.App. 189, 195-96, 997 P.2d 941, review denied, 141 Wn.2d 1006 (2000) (Appellant challenged the trial court's determination of the comparability of an out-of-state offense and its reliance on that offense as a prior "most serious offense." The state had provided and the trial court had considered the facts of the prior offense, but the state did not provide and the sentencing court failed to examine the actual language of the foreign statute. The Court of Appeals concluded the failure to first consider the statutory language was error that required reversal.)

result. See *State v. Dalseg*, 132 Wn. App. 854, 864, 134 P.3d 261 (2006); *Commonwealth v. Neely*, 15 Phila. 405, 414 (1987); *Herrera v. Commonwealth*, 24 Va. App. 490, 496 (1997); *State v. Reece*, 625 NW.2d 822 (2001). “Equity is defined as ‘[f]airness; impartiality; evenhanded dealing....The body of principles constituting what is fair and right.’” *Delagrave v. Employment Sec. Dep’t*, 127 Wn. App. 596, 612, 111 P.3d 879 (2005).

The “*Pillatos fix*” legislation, codified at RCW 9.94A.537(2), violates due process and principals of equity because it requires resentencing in remanded cases where an exceptional sentence was previously imposed by the sentencing court, but does not require resentencing upon remand in cases where an exceptional sentence was not imposed by the sentencing court.<sup>10</sup> This creates a fundamentally unfair result. The statute reads in full:

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

(2) In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is

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<sup>10</sup> This situation could arise in 2005 cases where the sentencing court ruled that it did not have authority to empanel a jury to consider aggravating circumstances, a decision that could have been appealed by the State. If the case was remanded because the defendant’s offender score was not properly calculated, the State could still not seek an exceptional sentence.

required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

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

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

(5) If the superior court conducts a separate proceeding to determine the existence of aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t), the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.

(6) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.0219 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

RCW 9.94A.537.

By its clear terms, RCW 9.94A.537(2) only permits an exceptional sentence on remand if an exceptional sentence was previously imposed. This is fundamentally unfair because RCW 9.94A.537(2) requires that two defendants who are virtually identical in all relevant respects, be treated differently, based solely on how the sentencing judge interpreted the law as it applied to individuals who pled guilty before the “*Blakely* fix” went into effect. If a judge, at the time of sentencing in 2005, decided that the “*Blakely* fix” was not retroactive and declined to impose an exceptional sentence and the State appealed that decision, that defendant would not be eligible to receive an exceptional sentence under RCW 9.94A.537(2). If a judge, at the time of sentencing in 2005, decided that the “*Blakely* fix” was retroactive and imposed an exceptional sentence and the defendant appealed the decision, that defendant would be eligible to receive an exceptional sentence under RCW 9.94A.537(2). The different outcome in these two scenarios would occur because RCW 9.94A.537(2) only allows an exceptional sentence in cases “where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required.” Thus, whether a defendant receives an exceptional sentence depends on the decision of the sentencing judge.

To illustrate further, assume that defendant “A” and defendant “B” both pled guilty on March 16, 2005 to first degree murder. Several months later, the court held argument regarding sentencing. In case “A”, the sentencing court judge found that the law did not allow him to empanel a jury to find aggravating circumstances and sentenced defendant “A” within the standard range. In case “B”, the sentencing judge found that the law did allow him to empanel a jury to find aggravating circumstances and after empanelling a jury which found aggravating circumstances, sentenced defendant “B” to an exceptional sentence. In case “A”, assume that the State appealed the court’s ruling that aggravating circumstances could not be imposed and assume in case “B” that the defendant appeals the sentencing court’s empanelling of the sentencing jury. By the time cases “A” and “B” reach the court of appeals, the 2007 “*Pillatos* fix” has gone into effect. By its clear and unambiguous terms, RCW 9.94A.537(2) would only allow for defendant “B” to be subjected to an exceptional sentence upon remand.<sup>11</sup> Defendant “B” would only be subjected to the possibility of an exceptional sentence because the sentencing judge interpreted the “Blakely fix” to allow a jury

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<sup>11</sup> The sentencing error requires the case be remanded for resentencing and the “*Pillatos* fix” capitalizes on the error by then permitting an exceptional sentence to be imposed on remand. Contrast this with the sentencing judge that did not err at sentencing and thus, an exceptional sentence could not be imposed on remand because an exceptional sentence was not previously imposed.

to consider aggravating circumstances. This disparity between the similar defendants that is created by the statute is fundamentally unfair. The result is even more unjust considering that defendant B's case would only be remanded because of the error made by the sentencing judge.

In Doney's case, he, like defendant "B" in the above hypothetical is subject to an exceptional sentence, but only because the sentencing judge interpreted the "*Blakely* fix" to apply retroactively. The Washington State Supreme Court has since held that a jury should not have been empanelled and Doney should not have been subjected to an exceptional sentence.<sup>12</sup>

In short, RCW 9.94A.537(2) subjects Doney to an exceptional sentence on remand, because the superior court erred in imposing an exceptional sentence. The "*Pillatos* fix" permits this injustice to occur because had the trial court correctly interpreted the 2005 "*Blakely* fix" to have no applicability in Doney's case, Doney would not be subject to an exceptional sentence under RCW 9.94A.537(2). The harsh and unfair reality of the "*Pillatos* fix," is that Doney was subject to an exceptional sentence because the trial court erroneously impaneled a jury in 2005. This violates all notions of fundamental fairness.

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<sup>12</sup> It bears mentioning that in 2005 there was significant confusion regarding the state of the law after *Blakely* was decided.

RCW 9.94A.537(2) violates Doney's right to equal protection. Equal protection under the law is required by both the Fourteenth Amendment to the United States Constitution and Article I, Section 12 of the Washington Constitution. *O'Hartigan v. Dep't of Personnel*, 118 Wn.2d 111, 121, 821 P.2d 44 (1991). Equal protection requires that "all persons similarly situated should be treated alike." *Id.* (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)). The equal protection clause is aimed at "securing equality of treatment by prohibiting hostile discrimination." *Andersen v. King County*, 158 Wn.2d 1, 15, 138 P.3d 963 (2006). The appropriate level of scrutiny depends on the nature of the classification or rights involved. *Id.* at 18. If a suspect classification or fundamental right is not involved, rational basis review applies. *Id.* at 18. A classification passes rational basis review "so long as it bears a rational relation to some legitimate end." *Id.* at 23 (quoting *Romer v. Evans*, 517 U.S. 620, 631, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996)).

"A legislative distinction will withstand a minimum scrutiny analysis if, first, all members of the class are treated alike; second, there is a rational basis for treating differently those within and without the class; and third, the classification is rationally related to the purpose of the legislation." *O'Hartigan*, 118 Wn.2d at 122.

Doney is similarly situated to other defendants who committed their crimes and pled guilty before the “*Blakely* fix” legislation went into effect on April 15, 2005. Depending on the decision by the sentencing judge, there were two potential outcomes in the cases of defendants who pled guilty before the effective date of the “*Blakely* fix”.<sup>13</sup> The sentencing judge could have either (1) empanelled a jury believing he had the authority to submit aggravating factors to the jury or (2) declined to empanel a sentencing jury believing that there was no power to create procedures to bring the SRA into conformity with *Blakely*. For example, in *Pillatos*, which involved four cases consolidated for appeal, in three of the four cases, the sentencing judges found that the defendants were not subject to exceptional sentences, thus, no exceptional sentence was imposed.<sup>14</sup> In the cases of these individuals, where the sentencing judge did not empanel a jury, the “*Pillatos* fix” would not have allowed an

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<sup>13</sup> The “*Blakely* fix” did not subject Doney or those similarly situated to him to exceptional sentences, because it was not retroactive.

<sup>14</sup> Defendants *Pillatos* and *Butters*, were not given an exceptional sentence by the sentencing judge. *State v. Pillatos*, 159 Wn.2d 459, 466-67, 150 P.3d 1130 (2007). Defendant *Base* was given an exceptional sentence. *Id.* Defendant *Metcalf* had not yet plead guilty or gone to trial and thus was subject to an exceptional sentence under the “*Blakely* fix.” *Id.* at 470.

exceptional sentence to be imposed, because “an exceptional sentence above the standard range” was not imposed. See RCW 9.94A.537(2).<sup>15</sup>

It goes without question that there are defendants in prison who are serving standard range sentences, but defendants with factually similar cases who have received exceptional sentences. The only difference between the defendants is that the sentencing judges, at the time of sentencing, interpreted the law differently.

There is no rational basis for treating the similarly situated defendants differently. First, the “*Pillatos* fix” violates equal protection, because there is also no rational basis for the arbitrary classification create by the “*Pillatos* fix” legislation. RCW 9.94A.537(2) only allows an exceptional sentence above the standard range to be imposed at resentencing in cases “where an exceptional sentence above the standard range was imposed.” If an exceptional sentence above the standard range had not been imposed upon Doney by the sentencing judge in 2005, then under RCW 9.94A.537(2) an exceptional sentence could not have been imposed at the current sentencing hearing. Yet, because the sentencing court erroneously believed that it could impanel a jury in 2005, the 2007

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<sup>15</sup> It is conceivable that a case in which the sentencing judge did not impose an exceptional sentence could be remanded for resentencing. For example, in the event a defendant’s offender score was miscalculated

“*Pillatos* fix” permitted the trial court to empanel a jury at this resentencing.

The statute creates a totally arbitrary classification among similarly situated defendants: the first class of defendants are those, like Doney, who were erroneously subjected to an exceptional sentence and would again be subjected to an exceptional sentence on remand, solely because of the previous error, and the second class of defendants are those, like the defendants in *Pillatos*, where the sentencing judge properly found that a jury could not be empanelled and who will not be subjected to the possibility of an exceptional sentence.

The 2005 sentencing error required that Doney’s case be remanded and the “*Pillatos* fix” permits an exceptional sentence only because of the previous error. There is no rational basis for a statute that requires a sentencing jury to be empanelled for one class of individuals (those where an exceptional sentence was previously imposed) and not the other (those cases where an exceptional sentence was not imposed), when the two are similarly situated.

RCW 9.94A.537(2) does not apply to all cases that are remanded for resentencing. Instead, RCW 9.94A.537(2) only applies if an exceptional sentence was previously imposed. A defendant whose case was remanded because his offender score was miscalculated would not be

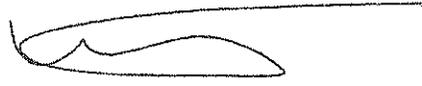
subject to an exceptional sentence at resentencing if an exceptional sentence was not previously imposed. There is no rational basis for imposing an exceptional sentence upon remand of one case, but not another. For no apparent reason, similarly situated defendants are clearly treated differently under the statute. The statute, on its face, clearly violates equal protection.

The classification is arbitrarily based on how quickly a defendant or the State pursued an appeal after the sentence was imposed. The 2007 “*Pillatos* fix” creates a longer sentence for certain individuals solely based on whether they were able to appeal their case to the Washington State Supreme Court before the April 27, 2007 effective date of the “*Pillatos* fix.” There is no rational basis for creating this totally arbitrary classification based on how quickly an appeal was pursued. Those defendants who were able to appeal their sentences before the effective date of the “*Pillatos* fix” were not subjected to exceptional sentences. For example, in *State v. Hughes*, which involved three cases that were consolidated for appeal, the exceptional sentences of all three defendants were vacated and remanded for sentencing within the standard range, because the “*Pillatos* fix” was not yet law. *Hughes*, 154 Wn.2d 118. Thus, similarly situated defendants have been treated differently based on how quickly their case was appealed.

**E. CONCLUSION**

Doney's case should be remanded for imposition of a standard range sentence.

Respectfully submitted this 6th day of September 2011.

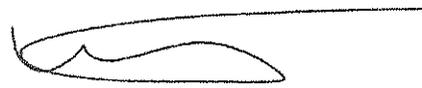


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**CERTIFICATE OF MAILING**

I certify under penalty of perjury under the laws of the State of Washington that the following is true and correct. I emailed this document to: (1) Mark Lindsey, Spokane County Prosecutor's Office at KOWens@spokanecounty.org; and (2) the Court of Appeals, Division Three; and (3) that I mailed this document U.S.P.S., first class postage pre-paid, to Robert L. Doney Jr./DOC#887689, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520 on September 6, 2011.



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