No. 75800-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition

of

RONALD A. HALL,

Petitioner.

PETITION FOR RELIEF FROM PERSONAL RESTRAINT IMPOSED PURSUANT TO JUDGMENT AND SENTENCE ENTERED IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR PIERCE COUNTY

Superior Court Cause No. 96-1-00042-8

The Honorable Bruce W. Cohoe, Judge

PETITIONER'S REPLY BRIEF

STATE OF WASHINGTON
2003 JUN 26 AM 8:03
BY C. LINDEMUTH
CLERK

By:

RONALD A. HALL
Petitioner, Pro Se

DOC #624453
McNeil Island Corrections Center
P.O. Box 881000, D-234-1
Steilacoom, Washington 98388-1000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. ARGUMENT IN REPLY 1

A. BLAKELY V. WASHINGTON RENDERS RCW 9.94A.535(2) UNCONSTITUTIONAL ON ITS FACE; THE STATUTE MUST BE DECLARED TOTALLY INOPERATIVE. 1

B. PETITIONER'S EXCEPTIONAL SENTENCE IS NOT SUSCEPTIBLE TO HARMLESS ERROR REVIEW. 10

1. Sentences Imposed Under a Statute that is Unconstitutional on its Face are not Susceptible to Harmless Error Review. . . 10

2. This Court's Decision in State v. Thomas Precludes Harmless Error Review. 11

3. The Supreme Court's Decision in Sullivan v. Louisiana Precludes Harmless Error Review. 13

4. This Court has Never Permitted Harmless Error Review of Illegal Sentences. 19

C. PETITIONER'S CASE MUST BE REMANDED FOR RESENTENCING WITHIN THE STANDARD RANGE. 20

1. Trial Court's Lack Statutory Authority to Impose Exceptional Sentences Because the Authorizing Statute is Unconstitutional on its Face. 20

2. The Separation of Powers Doctrine Prevents the Courts from Crafting Sentencing Procedures not Authorized by the Legislature. 21

3. Aggravating Circumstances Cannot be Submitted to a Jury Because They Were not Charged in the Information. 23

4. Impaneling a Jury on Remand to Try Aggravating Circumstances Would Violate RCW 10.43.050. 24

II. CONCLUSION 25

CERTIFICATE OF SERVICE BY MAIL 26

TABLE OF AUTHORITIES

Page

Cases:

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

Arizona v. Fulminante,
499 U.S. 279, 111 S.Ct. 1246,
113 L.Ed.2d 302 (1991) 16

Blakely v. Washington,
542 U.S. ---, 124 S.Ct. 2531,
159 L.Ed.2d 403 (2004) . . . . . passim

Brooks v. Rhay,
92 Wn.2d 876, 602 P.2d 356 (1979) 19

Carrick v. Locke,
125 Wn.2d 129, 882 P.2d 173 (1994) 21

Chapman v. California,
386 U.S. 18, 87 S.Ct. 824,
17 L.Ed.2d 705 (1967) 14

City of Redmond v. Moore,
151 Wn.2d 664, 91 P.3d 875 (2004) 2, 3, 10

Geraghty v. United States Parole Commission,
719 F.2d 1199 (3rd Cir. 1983),
cert. denied, 465 U.S. 1103 (1984) 21

In re Benn,
134 Wn.2d 868, 952 P.2d 116 (1998) 19

In re Casey,
27 Wash. 686, 68 P. 185 (1902) 19

In re Goodwin,
146 Wn.2d 861, 50 P.3d 618 (2002) 19

In re Johnson,
131 Wn.2d 558, 933 P.2d 1019 (1997) 19

In re Moore,
116 Wn.2d 30, 802 P.2d 1353 (1991) 23

Neder v. United States,
527 U.S. 1, 119 S.Ct. 1827,
144 L.Ed.2d 889 (1999) 10, 13, 16-18

TABLE OF AUTHORITIES (CONT'D)

Page

Cases (Cont'd):

State v. Ammons,
105 Wn.2d 175, 713 P.2d 719,
718 P.2d 796 (1986) 22

State v. Barnett,
139 Wn.2d 462, 987 P.2d 626 (1999) 20

State v. Blilie,
132 Wn.2d 484, 939 P.2d 691 (1997) 21

State v. Brown,
147 Wn.2d 330, 58 P.3d 889 (2002) 10, 17

State v. Bryan,
93 Wn.2d 177, 606 P.2d 1228 (1980) 21

State v. Chester,
133 Wn.2d 15, 940 P.2d 1374 (1997) 4, 5

State v. Cody,
35 P.3d 800 (Kan. 2001) 6

State v. Delgado,
148 Wn.2d 723, 63 P.3d 792 (2003) 4, 5

State v. Ford,
137 Wn.2d 472, 973 P.2d 452 (1999) 19

State v. Frampton,
95 Wn.2d 469, 627 P.2d 922 (1981) 5, 6, 10

State v. Furth,
5 Wn.2d 1, 104 P.2d 925 (1940) 7, 8

State v. Goodman,
150 Wn.2d 774, 83 P.3d 410 (2004) 23, 24

State v. Gould,
23 P.3d 801 (Kan. 2001) 5, 6, 10, 11

State v. Hairston,
133 Wn.2d 534, 946 P.2d 397 (1997) 19

State v. Kessler,
73 P.3d 761 (Kan. 2003) 7, 20

State v. Kneil,
35 P.3d 797 (Kan. 2001) 7

TABLE OF AUTHORITIES (CONT'D)

Page

Cases (Cont'd):

State v. Le Pitre,
54 Wash. 166, 103 P. 27 (1909) 22

State v. Martin,
94 Wn.2d 1, 614 P.2d 164 (1980) 5, 6, 8, 10, 22, 23

State v. Monday,
85 Wn.2d 906, 540 P.2d 416 (1975) 22

State v. Mulcare,
189 Wash. 625, 66 P.2d 360 (1937) 21

State v. Padilla,
84 Wn. App. 523, 928 P.2d 1141,
rev. denied, 132 Wn.2d 1002 (1997) 24, 25

State v. Pelkey,
109 Wn.2d 484, 745 P.2d 854 (1987) 24

State v. Smith,
150 Wn.2d 135, 75 P.3d 934 (2003) 7, 8

State v. Thomas,
150 Wn.2d 821, 83 P.3d 970 (2004) 11-13

State v. Thorne,
129 Wn.2d 736, 921 P.2d 514 (1996) 5

State v. Xaviar,
117 Wn. App. 196, 69 P.3d 901 (2003) 5

Sullivan v. Louisiana,
508 U.S. 275, 113 S.Ct. 2078,
124 L.Ed.2d 182 (1993) 13-18

United States v. Ameline,
376 F.3d 967 (9th Cir. 2004) 8, 9

United States v. Buckland,
289 F.3d 558 (9th Cir. 2002) (en banc) 8, 9

TABLE OF AUTHORITIES (CONT'D)

Page

Statutes:

RCW 9.94A.530(2) 4

RCW 9.94A.535 . . . . . .3, 4

RCW 9.94A.535(2) . . . . . passim

RCW 10.43.050 . . . . . .24, 25

RCW 46.20.289 2

RCW 46.20.324(1) 2

Others:

Black's Law Dictionary
(8th ed. 2004) 4

I. ARGUMENT IN REPLY

A. BLAKELY V. WASHINGTON RENDERS RCW 9.94A.535(2) UNCONSTITUTIONAL ON ITS FACE; THE STATUTE MUST BE DECLARED TOTALLY INOPERATIVE.

In Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court held: "Other 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." The Court further held "that the 'statutory maximum' for Apprendi purposes 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. ---, 124 S.Ct. 2531, 159 L.Ed.2d 403, 413 (2004) (citations and emphasis omitted). Thus, to impose an exceptional sentence above the standard sentencing range established by the Sentencing Reform Act ("SRA") in a manner consistent with the federal constitution, the facts supporting the upward departure must be submitted to a jury and proved beyond a reasonable doubt. Blakely, 159 L.Ed.2d at 414-15, 420.

Petitioner argued that these cases render RCW 9.94A.535(2), the SRA exceptional sentencing statute, unconstitutional on its face and totally inoperative. See Petitioner's Opening Brief ("Opening Brief") at 7-9. He further argued that his exceptional sentence is therefore not susceptible to harmless error review, must be vacated,

and his case remanded for resentencing within the standard range. Opening Brief at 17-19.

The State, however, contends that RCW 9.94A.535(2) is only unconstitutional as-applied to petitioner and can be saved by judicial construction. See State's Response to Personal Restraint Petition ("Response") at 20-25. The State asserts that exceptional sentences imposed under the statute are subject to harmless error review and that remand for a jury determination of the facts supporting such sentences is permissible. Response at 6-10, 13-25. The State is wrong.

This court recently described the difference between facial and as-applied challenges to the constitutionality of a statute:

> An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional. Holding a statute unconstitutional as-applied prohibits future application of the statute in a similar context, but the statute is not totally invalidated. In contrast, a successful facial challenge is one where no set of circumstances exist in which the statute, as currently written, can be constitutionally applied. The remedy for holding a statute facially unconstitutional is to render the statute totally inoperative.

City of Redmond v. Moore, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004) (citations omitted).

In Moore, this court determined that the defendants were challenging the facial validity of RCW 46.20.289 and .324(1) by alleging that both statutes failed to "afford any driver facing a suspension of his or her license" a

hearing as required under the due process clause of the Fourteenth Amendment. Moore, 151 Wn.2d at 669 (emphasis in original). The court agreed with defendants challenge and held the statutes in question totally inoperative. Id. at 670-77.

Petitioner is likewise challenging the facial validity of RCW 9.94A.535(2) by alleging that the statute does not provide any defendant facing an exceptional sentence "the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." Blakely, 159 L.Ed.2d at 420 (emphasis in original). On the other hand, the State asserts that the statute is not facially unconstitutional because it "can be read as silent on the issue of whether a jury determination is required for certain aggravating circumstances." Response at 24. The plain language of the statute does not support the State's argument.

RCW 9.94A.535 provides in pertinent part as follows:

> The court may impose a sentence outside the standard sentence range for the offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law . . . .

The statute goes on to list aggravating circumstances "the court may consider" in determining whether to impose a sentence above the standard range. RCW 9.94A.535 and .535(2). Another provision directs the sentencing court

to resolve factual disputes relevant to a particular sentence and states that such facts "shall be deemed proved by a preponderance of the evidence." RCW 9.94A.530(2).

An unambiguous statute is not subject to judicial construction and its meaning must be derived from the language of the statute alone. State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997). Criminal statutes are given "literal and strict interpretation." State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Thus, "[t]he court may not add language to a clear statute, even if it believes the Legislature intended something else but failed to express it adequately." Chester, 133 Wn.2d at 21; see also Delgado, 148 Wn.2d at 727.

RCW 9.94A.535(2) unambiguously states that the sentencing "court" may impose an exceptional sentence "if it finds" substantial and compelling reasons for doing so. The statute provides a non-exclusive list of aggravating factors "the court may consider" in making this determination. If it decides to impose a sentence above the standard range, the statute directs the court to "set forth the reasons for its decision" in written findings and conlusions. See RCW 9.94A.535 and .535(2).

The statute clearly and unequivocally places the duty of finding facts in support of an exceptional sentence upon the court, not a jury. See Black's Law Dictionary at 378 (8th ed. 2004) (defining "court" as a "governmental body consisting of one or more judges who sit to adjudicate

disputes and administer justice"); State v. Xaviar, 117 Wn. App. 196, 205, 69 P.3d 901 (2003) (noting that trial court finds facts to support exceptional sentence); State v. Thorne, 129 Wn.2d 736, 782, 921 P.2d 514 (1996) (noting that "court, not a jury," makes sentencing determinations under SRA). RCW 9.94A.535(2) is therefore facially unconstitutional because it does not afford any defendant the rights guaranteed him or her under the federal constitution as interpreted in Blakely. Cf. State v. Gould, 23 P.3d 801, 811-14 (Kan. 2001) (declaring statute nearly identical to RCW 9.94A.535(2) "unconstitutional on its face" under Apprendi).

The State asks this court to ignore the plain language of RCW 9.94A.535(2) and read into the statute a jury trial guarantee that simply does not exist. However, the court cannot rewrite a statute in order to render it constitutional. See Chester, 133 Wn.2d at 21; Delgado, 148 Wn.2d at 727. For example, in State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980) and State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981), this court declined to read into the former death penalty statute a procedure for impaneling a jury after a guilty plea where that procedure had not been enacted by the Legislature. The court held that, however attractive the solution of rewriting the death penalty statute might be, "we do not have the power to read into a statute that which we may believe the legislature has omitted." Martin, 94 Wn.2d at 8.

In Martin, the court held that a person who entered a plea of guilty at arraignment could not be subjected to the death penalty or a sentence of life without the possibility of parole because the former death penalty statute required that the same jury which found the defendant guilty of first degree murder had to be reconvened to consider punishment. Since there was no mechanism for impaneling a jury after a guilty plea, the more severe sentences of death or life without parole could not be imposed after a guilty plea. 94 Wn.2d at 7-9.

In Frampton, the court held that the entire death penalty scheme was unconstitutional because it impermissibly chilled or punished the right to trial because a person who pled guilty at arraignment was not subjected to a possible sentence of death or life without parole. As in Martin, the court refused to read into the statute a means of impaneling a jury after a guilty plea in order to render the statute constitutional. 95 Wn.2d at 474-80.

The Kansas Supreme Court has reached a similar conclusion. In Gould, 23 P.3d at 809-14, the court declared a statute nearly identical to RCW 9.94A.535(2) facially unconstitutional under Apprendi because it did not afford defendants the right to a jury determination of facts supporting exceptional sentences. Subsequently the court held, in State v. Cody, 35 P.3d 800 (Kan. 2001), that a defendant who admitted to the existence of sentencing factors as part of a plea agreement could not receive an

exceptional sentence because the Kansas Legislature had not granted authority to depart from the presumptive range by any means other than the provision which had been declared unconstitutional on its face in Gould. See also State v. Kneil, 35 P.3d 797 (Kan. 2001).

Then, in State v. Kessler, 73 P.3d 761, 771-72 (Kan. 2003), the court held that a trial court did not have authority to develop a procedure for imposing an exceptional sentence by reconvening the jury which convicted the defendant and submitting the aggravating factors to that jury for determination. The court reasoned:

> The State argues that Gould did not render the statute vesting the trial court with the authority to impose upward durational departures unconstitutional, but rather only the scheme employed by courts in doing so. The State points out that the procedure employed by the trial court was in accordance with the requirements articulated in Apprendi and consistent with the Kansas Legislature's response to Gould.
>
> In accordance with this court's decision in Gould, Cody, and Kneil, we deny the State's invitation to work around a flawed sentencing scheme. A district court's authority to impose sentence is controlled by statute. Thus, where the statutory procedure for imposing upward durational departure sentences has been found unconstitutional, the district court has no authority to impose such a sentence.

Kessler, 73 P.3d at 772.

Citing State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003) and State v. Furth, 5 Wn.2d 1, 104 P.2d 925 (1940), the State argues: "Washington case law recognizes that when a defendant has a constitutional right to a jury, a jury should be impaneled regardless of whether the right

to jury has been incorporated into a statute." Response at 21. In Smith, the defendant argued that Const. Art. I, § 22, as interpreted in Furth, guarantees the right to a jury trial on the issue of recidivist, "three strikes" sentencing independent of any statutory authority. The Smith court held, however, that Furth was based on statutory interpretation, not a constitutional guarantee, and that any language to the contrary in that decision was dicta. See Smith, 150 Wn.2d at 144-46. Thus, the decisions cited by the State are not persuasive and do not change the rule that this court does not "have the power to read into a statute that which . . . the legislature has omitted." Martin, 94 Wn.2d at 8.

The State's reliance on United States v. Buckland, 289 F.3d 558 (9th Cir. 2002) (en banc) and United States v. Ameline, 376 F.3d 967 (9th Cir. 2004) is also unpersuasive. In Buckland, the defendant argued that the federal drug statute is facially unconstitutional because it does not require a jury to find the quantity of drugs possessed which is used to impose the sentence. 289 F.3d at 563-64. Although the Ninth Circuit found the statute facially constitutional, it did so only because the statute does not "specify who shall determine drug quantity or identify the appropriate burden of proof for these determinations." 289 F.3d at 565.

In contrast, RCW 9.94A.535(2) unambiguously states that the sentencing court must find aggravating factors

and is therefore facially unconstitutional. Cf. Buckland, 289 F.3d at 565 (noting that statute at issue in Apprendi was facially unconstitutional because it "explicitly provided for a hate crime sentencing enhancement to be imposed based upon a finding of the trial court by a preponderance of the evidence.").

In Ameline, the issue raised by the government was whether the Federal Sentencing Guidelines as a whole are invalid under Blakely. 376 F.3d at 980. The Ameline court rejected this approach, holding that the Guideline provisions that do not violate Blakely are severable from those that do. 376 F.3d at 981-83. Petitioner does not quarrel with this holding and even agrees that it should be applied to the SRA. In doing so, this court should hold only RCW 9.94A.535(2) facially unconstitutional and leave the remainder of the SRA intact. To hold otherwise would "establish by judicial fiat an indeterminate sentencing scheme" contrary to the legislative intent underlying the SRA. 376 F.3d at 982.

As the State notes, the Ameline court did permit the government to impanel a jury and try the drug quantity issue on remand. 376 F.3d at 983-84. This holding is not surprising in light of the court's previous conclusion in Buckland that the Guidelines do not specify who must determine sentencing factors. RCW 9.94A.535(2), on the other hand, places the duty of finding such facts on the trial court. Ameline therefore does not alter the rule

announced in Martin and Frampton that this court will not read into a statute a jury trial guarantee that the Legislature has not provided.

Based upon the foregoing, this court should hold that the Blakely decision renders RCW 9.94A.535(2) unconstitutional on its face because the statute explicitly places the duty of finding aggravating circumstances upon the sentencing court, not a jury. The statute must therefore be declared "totally inoperative." Moore, 151 Wn.2d at 669.

B. PETITIONER'S EXCEPTIONAL SENTENCE IS NOT SUSCEPTIBLE TO HARMLESS ERROR REVIEW.

Citing Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) and State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002), the State argues that petitioner's exceptional sentence is subject to harmless error review and may be affirmed despite the admitted Blakely violation. Response at 6-13. For the reasons below, the court should reject the State's invitation to review petitioner's sentence for harmless error and instead hold that automatic reversal is required.

1. Sentences Imposed Under a Statute that is Unconstitutional on its Face are not Susceptible to Harmless Error Review.

In State v. Gould, after declaring its exceptional sentencing statute unconstitutional on its face, the Kansas Supreme Court rejected the State's invitation to review sentences imposed under that provision for harmless error:

> The State, in essence, urges this court to apply principles of harmless error. This we cannot do. The Kansas scheme for imposing upward departure sentences . . . is unconstitutional on its face. Gould received a sentence beyond the statutory maximum based upon a court finding of certain aggravating factors found by a preponderance of the evidence. Apprendi, on the other hand, requires "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Any other procedure "is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system." 530 U.S. at 497. Gould's sentence was imposed pursuant to an unconstitutional sentencing scheme and cannot stand.

Gould, 23 P.3d at 814.

The same result must obtain here, since petitioner was also sentenced under a facially unconstitutional statute. The State recognizes this fact, but nonetheless argues that harmless error review is appropriate because RCW 9.94A.535(2) is not unconstitutional on its face. Response at 9. But petitioner has proven that the statute is facially unconstitutional. See Section I(A), supra. Harmless error review simply is not permissible. Gould, 23 P.3d at 814.

2. This Court's Decision in State v. Thomas Precludes Harmless Error Review.

In State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004), this court recently held that the denial of the right to trial by jury recognized in Apprendi can never be subject to harmless error review. Thus, the court vacated both Thomas' death sentence and the aggravating factors upon which it was predicated:

> To do harmless error analysis to uphold Thomas' death sentence and conviction for aggravated first degree murder would be to find facts (aside from prior convictions) that increase the penalty for the crime charged beyond the statutory maximum, here, life with the possibility of parole. Under Apprendi and Ring, the jury must decide whether aggravating factors have been proved beyond a reasonable doubt for Thomas to be sentenced to life in prison without the possibility of parole or death because both of these sentences are more severe than life with the possibility of parole.

Thomas, 150 Wn.2d at 849.

This court distinguished between errors affecting Thomas' convictions for first degree murder and burglary, and errors affecting the determination that he was guilty of aggravated murder and thus eligible to receive a sentence above the statutory maximum. The former were subject to harmless error review, while the later were not:

> We hold that "to convict" instructions may be subjected to harmless error analysis to affirm convictions without aggravating circumstances. Thus, for purposes of Thomas' underlying convictions for first degree murder and residential burglary, we find that the errors in the "to convict" and accomplice liability instructions are harmless beyond a reasonable doubt. For purposes of affirming Thomas' conviction for aggravated first degree murder and his death sentence, we do not perform a harmless error analysis since to do so would violate the Supreme Court's holdings in Apprendi and Ring.

Thomas, 150 Wn.2d at 849-50.

Petitioner was likewise sentenced beyond the statutory maximum when he received an exceptional sentence above the top-end of the standard range. See Blakely, 159 L.Ed.2d at 413. As in Thomas, performing harmless error review "would be to find facts . . . that increase the penalty

for the crime charged beyond the statutory maximum" in violation of Apprendi and Blakely. 150 Wn.2d at 849. Thus, petitioner's sentence must be reversed.

3. The Supreme Court's Decision in Sullivan v. Louisiana Precludes Harmless Error Review.

It is well settled law that even when a jury makes the determination of facts, but is given a deficient instruction on the State's burden of proving such facts beyond a reasonable doubt, the error can never be subject to harmless error review. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); Neder, 527 U.S. at 8. In Sullivan, a jury found the defendant guilty of first degree murder. However, the instruction defining "reasonable doubt" was constitutionally deficient. The Louisiana Supreme Court held that the error was subject to harmless error review, found the error to be harmless beyond a reasonable doubt, and affirmed the conviction. The U.S. Supreme Court granted certiorari and reversed, holding that this type of error is never subject to harmless error review. 508 U.S. at 276-77, 281-82.

Sullivan holds that the right to a jury determination of the facts and the right to demand proof beyond a reasonable are interrelated Fifth and Sixth Amendment rights:

> It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine

> . . . whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilt beyond a reasonable doubt.

Sullivan, 508 U.S. at 278.

The defendant in Sullivan received half of these constitutional guarantees. He had a jury decide the facts, but it did not decide whether his guilt was proved beyond a reasonable doubt because the instruction defining that standard was deficient. The Supreme Court held that such a violation was not susceptible to harmless error review because it is impossible to apply the harmless error standard to a case where the jury was never properly instructed on the burden of proof:

> Consistent with the jury-trial guarantee, the question [Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)] instructs reviewing courts to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless-error review looks, we have said, to the basis on which the jury actually rested its verdict. The inquiry, in other words, is not whether the guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered--no matter how inescapable the findings to support that verdict might be-- would violate the jury-trial guarantee.
>
> Once the proper role of an appellate court engaged in the Chapman inquiry is understood, the illogic of harmless error analysis in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of Chapman review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question

> whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object so to speak, upon which harmless error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt--not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's actions, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

Sullivan, 508 U.S. at 279-80 (internal quotation marks and citations omitted; emphasis in original).

The State's suggestion that harmless error review may be performed in the present case is even more illogical than the argument rejected in Sullivan. In that case, the Court noted that "the illogic of harmless error analysis" was revealed by the fact that the jury verdict that had been returned was not based on the proper standard of proof beyond a reasonable doubt. 508 U.S. at 280. But at least in that case there was a jury verdict.

In petitioner's case, on the other hand, there was never any jury verdict at all regarding the aggravating circumstances used to justify his exceptional sentence. Thus, it would be doubly illogical to perform harmless error review here. Since no jury ever returned a verdict regarding the aggravating circumstances, much less a verdict beyond a reasonable doubt, for two reasons it would be "utterly meaningless" to ask "whether the same verdict" of aggravating-circumstances-beyond-a-reasonable-doubt

"would have been rendered absent the constitutional error[s]." 508 U.S. at 280. Here, as in Sullivan, there is simply "no object, so to speak, upon which harmless error scrutiny can operate." Id.

The foregoing notwithstanding, the Supreme Court has provided a second, independent reason why harmless error review is not permissible in this case. In Sullivan, the Court held that the giving of a defective reasonable doubt instruction is structural error that can never be harmless:

> In [Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)], we distinguished between, on the one hand, structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards, and, on the other hand, trial errors which occur during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented. Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort, the jury guarantee being a basic protection whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. . . . The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate unquestionably qualifies as structural error.

Sullivan, 508 U.S. at 281-82 (internal quotation marks and citations omitted).

Because petitioner was denied his right to have a jury determine the existence of aggravating circumstances under the beyond a reasonable doubt standard, he has suffered a structural error that is not susceptible to harmless error review. Automatic reversal is required. See Neder, 527 U.S. at 8.

The State's citation to Neder, 527 U.S. 1, where the Court held that the omission of one element of an offense from a jury instruction is susceptible to harmless error review, and Brown, 147 Wn.2d 330, in which this court adopted Neder, is not persuasive. The State simply ignores the distinction the Neder Court made between removing one element from jury consideration and removing the entire decision from the jury and allowing a judge to take its place in the fact finding process.

In Neder, the Court acknowledged the continuing validity of Sullivan and stated that its decision was "consistent with the holding" in that case. 527 U.S. at 10. In Sullivan, the Court found the error was not subject to harmless error review because the defective reasonable doubt instruction "'vitiates all of the jury's findings.'" Neder, 527 U.S. at 11 (quoting Sullivan, 508 U.S. at 281 (emphasis in original)). "By contrast, the jury-instruction error" in the omitted element situation at issue in Neder "did not 'vitiat[e] all the jury's findings.'" Id.

While the Court admitted that there was no logic to drawing the line between total deprivation of the right to a jury determination of the facts and the partial deprivation of the right, it found the illogic of this distinction untroubling since "the life of the law has not been logic but experience." Neder, 527 U.S. at 15. Accordingly, the Supreme Court has drawn a line between removing from the jury's consideration one element of the

crime and all elements of the crime, and no matter how illogical this distinction may be, the Court has decided that this distinction will determine whether an error is or is not subject to harmless error review.

In the present case, we have a total deprivation of the right to a jury determination under the beyond a reasonable doubt standard. This is not a case where the jury was allowed to make some of the findings upon which the exceptional sentence was based. For example, this is not a case where the jury was properly instructed on the question whether the defendant's conduct exhibited deliberate cruelty, but was not instructed on the question whether he intended to inflict multiple injuries. On the contrary, this is a case where no jury determination that the aggravating circumstances were proved beyond a reasonable doubt was even attempted because all of those elements were found by the sentencing judge. Accordingly, this case falls within the scope of the Sullivan no-harmless-error rule, not within the Neder rule as suggested by the State.

The State also relies on various circuit court cases applying the Neder harmless error rule to sentences imposed in violation of Apprendi. Response at 8-9. These cases, however, do not discuss Sullivan and for the reasons above appear inconsistent with the Supreme Court's holding in that case. The cases cited by the State are not authoritative and should not be followed. See State v.

Hairston, 133 Wn.2d 534, 540, 946 P.2d 397 (1997) (noting that this court will not follow circuit court precedent that "conflicts" with Supreme Court precedent). Moreover, the cases are inconsistent with this court's decision in Thomas and should be disregarded for that reason as well. See In re Benn, 134 Wn.2d 868, 937, 952 P.2d 116 (1998) (noting that this court will not follow circuit court precedent inconsistent with its own case law).

4. This Court has Never Permitted Harmless Error Review of Illegal Sentences.

"'It has been the consistent holding of this court that the existence of an erroneous sentence requires resentencing.'" State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999) (quoting Brooks v. Rhay, 92 Wn.2d 876, 877, 602 P.2d 356 (1979)). Even on collateral review, where the burden of proof is on the petitioner, the court has held that an illegal sentence requires relief. In re Goodwin, 146 Wn.2d 861, 867-68, 50 P.3d 618 (2002) (citing In re Johnson, 131 Wn.2d 558, 568-69, 933 P.2d 1019 (1997)). In fact, since the early days of statehood when collateral review was limited to jurisdictional issues, relief was afforded the petitioner upon the showing of an illegal sentence. Goodwin, 146 Wn.2d at 868 (citing In re Casey, 27 Wash. 686, 68 P. 185 (1902)).

Here, in light of the State's concession that petitioner's sentence violates the constitution, the court should not endeavor to determine whether that error is harmless. Instead, the court should adhere to its

long-standing rule that an illegal sentence requires resentencing.

C. PETITIONER'S CASE MUST BE REMANDED FOR RESENTENCING WITHIN THE STANDARD RANGE.

The State argues that if the court vacates petitioner's exceptional sentence, it should remand the case for a jury trial on the aggravating circumstances. Response at 13-25. For the reasons below, the court should reject the State's suggested remedy and instead order petitioner resentenced within the standard range.

1. Trial Courts Lack Statutory Authority to Impose Exceptional Sentences Because the Authorizing Statute is Unconstitutional on its Face.

"A trial court may impose only a sentence which is authorized by statute." State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999) (citation omitted). "Thus, where the statutory procedure for imposing [exceptional] sentences has been found unconstitutional, the [trial] court has no authority to impose such a sentence." Kessler, 73 P.3d at 772.

RCW 9.94A.535(2) is unconstitutional on its face. Thus, regardless of the procedure employed by the trial court on remand, it simply does not have statutory authority to impose a sentence above the standard range. Remand for resentencing within that range is the only available remedy.

Even the State agrees that a standard range sentence is required if RCW 9.94A.535(2) is declared facially unconstitutional. Response at 20. While the State attempts to convince this court to save the statute by judicial

construction, petitioner has proven that the statute must be declared totally inoperative. See Section I(A), supra. The State's suggested remedy should be rejected.

2. The Separation of Powers Doctrine Prevents the Courts from Crafting Sentencing Procedures not Authorized by the Legislature.

"The separation of powers doctrine is not specifically enunciated in either the Washington or federal constitutions, but is universally recognized as deriving from the tripartite system of government established in both constitutions." State v. Blilie, 132 Wn.2d 484, 489, 939 P.2d 691 (1997) (citations omitted). While the doctrine does not require the different branches of government to be "hermetically sealed off from one another," it does "ensure that the fundamental functions of each branch remain inviolate." Blilie, 132 Wn.2d at 489 (quoting Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)).

The creation of sentencing procedures is solely a legislative function. See State v. Bryan, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). "Unlike interpreting the constitution or adjudicating disputes, sentencing is not inherently or exclusively a judicial function." Geraghty v. United States Parole Commission, 719 F.3d 1199, 1211 (3rd Cir. 1983), cert. denied, 465 U.S. 1103 (1984). It is the Legislature that has the power to fix punishment for crimes, subject only to certain constitutional limitations. State v. Mulcare, 189 Wash. 625, 628, 66 P.2d 360 (1937). The legislature provides the minimum and maximum

terms within which the trial court may exercise its discretion in fixing sentence. State v. Le Pitre, 54 Wash. 166, 169, 103 P. 27 (1909). Thus, it is the function of the Legislature, not the judiciary, to alter the sentencing process. State v. Monday, 85 Wn.2d 906, 909-10, 540 P.2d 416 (1975).

In State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986), this court upheld the SRA against a challenge that it violated the separation of powers doctrine. In doing so, the court relied on the above authority for the proposition that: (1) the Legislature has the sole authority to set the terms under which the trial court may impose punishment for crimes, and (2) the trial court has no inherent, independent authority to punish for crimes. Ammons, 105 Wn.2d at 180-81.

In light of the above authority, it is clear that since the Legislature has not provided a constitutionally adequate means of imposing exceptional sentences, the trial court has no inherent authority to create such a procedure from whole-cloth. Rather, "[t]he trial court's discretion in sentencing is that which is given by the Legislature." Ammons, 105 Wn.2d at 181. The State's requested remedy would violate the separation of powers doctrine by ignoring this fundamental principle.

For example, in State v. Martin, 94 Wn.2d 1, this court held that the former death penalty statute did not permit a defendant who pled guilty at arraignment to be

sentenced to life without parole or death because those punishments could only be imposed by the trial jury. The court refused to read into the statute a jury trial procedure following guilty pleas, holding that doing so "would be a clear judicial usurpation of the legislative power." 94 Wn.2d at 8. Thus, the remedy was to sentence such a defendant to the only legally available sentence--life with parole. See In re Moore, 116 Wn.2d 30, 38-39, 802 P.2d 1353 (1991).

The situation is no different here. If this court could not authorize jury trials in Martin without violating the separation of powers doctrine, it certainly cannot authorize the trial court to impanel a jury to try aggravating circumstances without enabling legislation. Rather, the case must be remanded with instructions that the trial court impose the only statutorily authorized sentence available to it--a standard range sentence.

3. Aggravating Circumstances Cannot be Submitted to a Jury Because They Were not Charged in the Information.

An information is constitutionally sufficient only if it includes all of the elements of the crime charged, regardless of whether they are statutory or non-statutory elements. State v. Goodman, 150 Wn.2d 774, 784, 83 P.3d 410 (2004). Aggravating circumstances that increase a sentence beyond the top-end of the standard range are elements that increase the punishment beyond the statutory maximum and must therefore be charged in the information.

See Blakely, 159 L.Ed.2d at 413-15; Goodman, 150 Wn.2d at 785-86.

Once the State has rested its case-in-chief, and certainly after the jury has returned a guilty verdict, it is too late to amend the information to charge and obtain a conviction for any crime other than a lesser included or a lesser degree of the same offense. State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). Aggravating circumstances are elements that "turn a second-degree offense into a first-degree offense," and therefore do not fall within the Pelkey exceptions. See Apprendi, 530 U.S. at 494. Because the jury long ago returned its guilty verdict in this case, it is simply too late for the State to charge and try the aggravating factors on remand. Cf. Pelkey, 109 Wn.2d at 491.

4. Impaneling a Jury on Remand to Try Aggravating Circumstances Would Violate RCW 10.43.050.

RCW 10.43.050, which partially codifies double jeopardy law in Washington, provides in pertinent part as follows:

> Whenever a defendant shall be acquitted or convicted upon an indictment or information charging a crime consisting of different degrees, he cannot be proceeded against or tried for the same crime in another degree, nor for an attempt to commit such crime, or any degree thereof.

"This statute bars successive prosecutions for different degrees of the same crime but does not apply to lesser included offenses." State v. Padilla, 84 Wn. App. 523, 526, 928 P.2d 1141, rev. denied, 132 Wn.2d 1002 (1997) (citation omitted; emphasis added). In Padilla,

for example, the defendant was charged with both first and second degree assault. He pled guilty to second degree assault and moved to dismiss the greater charge under RCW 10.43.050. The trial court granted the motion and the State appealed. 84 Wn. App. at 525. The Court of Appeals affirmed, holding that "[t]he statute plainly bars successive convictions under the information in this case." Id. at 526.

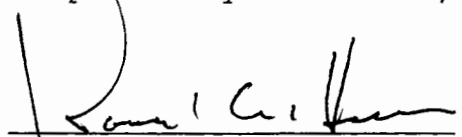
As discussed above, aggravating circumstances essentially elevate the charged offense to a higher degree of the same crime. See Apprendi, 530 U.S. at 494. Petitioner has already been convicted of first degree assault. Thus, impaneling a jury to try him on the aggravating circumstances at issue in this case would violate RCW 10.43.050's prohibition against retrying a defendant for the "same crime in another degree." Cf. Padilla, 84 Wn. App. at 526.

II. CONCLUSION

Based upon the foregoing, as well as the argument set forth in the opening brief, this court should vacate petitioner's exceptional sentence and remand this case for resentencing within the applicable standard range.

DATED this 27 day of September, 2004.

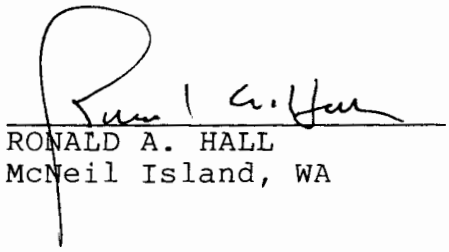
Respectfully submitted,



RONALD A. HALL
Petitioner, Pro Se

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies under penalty of perjury that he mailed via the U.S. Postal Service, postage prepaid, a true and correct copy of the foregoing brief to John M. Sheeran, Deputy Prosecutor, at the Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Room 946, Tacoma, WA 98402-2171, on this 27 day of September, 2004.



RONALD A. HALL
McNeil Island, WA