

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re the Personal Restraint of

RONALD A. HALL

Petitioner,

v.

THE STATE OF WASHINGTON,

Respondent.

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

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SUPPLEMENTAL BRIEF OF PETITIONER

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RITA J. GRIFFITH  
JEFF ELLIS  
Attorneys for Petitioner

ELLIS, WITCHLEY, AND HOLMES  
705 Second Avenue, Suite 401  
Seattle, WA 98104  
206-325-7900

RITA J. GRIFFITH, PLLC  
1305 .N.E. 45th Street, #205  
Seattle, WA 98105  
206-547-1742

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**A. ISSUES ON REVIEW**

1. Can Ronald Hall be sentenced for a non-existent crime?
2. Can Ronald Hall be sentenced for an uncharged crime?
3. Where state law precludes a jury from finding whether an aggravating factor has been proved beyond a reasonable doubt, but instead requires that relevant finding(s) be made by a judge using a preponderance of the evidence standard, is it impossible for a reviewing court to find the failure to submit the sentencing factor to a jury harmless error?
4. Does independent interpretation of our state constitutional right to a jury trial dictate that omission of a sentencing element from a jury instruction is a structural error?
5. When a defendant is not given notice prior to the time that evidence is presented regarding aggravating factors, is it impossible to conduct harmless error review given the defendant's lack of knowledge or opportunity to defend?
6. Would remanding this case for another trial or hearing violate double jeopardy and the mandatory joinder rule?

**B. STATEMENT OF THE CASE<sup>1</sup>**

In 1996, the Pierce County Prosecutor charged Ronald Armon Hall by information with first-degree assault while armed with a firearm. At trial, the jury was instructed on the first-degree assault charge. Although the information charged that Hall was armed with a firearm, the jury was also asked to determine whether Hall committed the assault while armed with a deadly weapon. The jury found Hall guilty of first-degree assault and returned a special verdict that he was armed with a deadly weapon.

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<sup>1</sup> The facts set out here are documented in the appellate decisions in the case.

Based on what was later determined to be a miscalculated offender score of “4,” Hall’s standard range was 129 to 171 months.

The trial court sentenced Hall to 390 months. The trial court’s sentence was the result of the court finding, utilizing a preponderance of the evidence standard, that the crime was deliberately cruel, involved multiple injuries, and that the severity of the injuries justified an exceptional sentence. At no point prior to or during trial did the State seek to amend the information to include any of the above allegations. Hall never stipulated or admitted to any of the exceptional sentence findings and did not waive his right to a jury trial.

Hall appealed. The Court of Appeals reversed Hall’s sentence concluding that “the deadly weapon enhancement must be stricken,” because the State had charged Hall with a firearm, but not a deadly weapon enhancement. *See State v. Hall*, 96 Wn. App. 1051, 1999 WL 527739 (1999). The Court of Appeals reasoned: “Because the amended information contains no notice that the State sought penalties under RCW 9.94A.310(3) [the former section containing the deadly weapon enhancement], and no allegations supporting a non-firearm enhancement, the trial court erred in imposing an uncharged deadly weapon enhancement. *State v. Theroff*, 95 Wn.2d 385, 392, 622 P.2d 1240 (1980) (“when prosecutors seek enhanced penalties, notice of their intent must be

set forth in the information).” The Court of Appeals also reversed the trial judge’s finding that the severity of the crime justified an exceptional sentence. In addition, the State conceded on appeal that one of Hall’s prior convictions “washed out” and should not have been included in his offender score. Thus, Hall’s case was “remanded for re-sentencing consistent with this opinion.”

After a brief re-sentencing hearing on August 4, 2000, before a judge sitting without a jury where no testimony was presented, the trial court sentenced Hall to 366 months, this time based on an offender score of “2” and supported by judicial findings that Hall committed the crime in a deliberately cruel manner and that he inflicted multiple injuries. Hall appealed.

Once again, the Court of Appeals reversed, this time finding that Hall’s offender score was incorrectly calculated because all of his prior felony convictions “washed out.” Thus, Hall’s correct standard range was 93 to 123 months, rather than the 111 to 147 months used at his second sentencing hearing. Because the Court of Appeals could not “tell whether the trial court imposed the exceptional sentence, at least in part, on the erroneous offender score,” the “appropriate remedy is vacation of the sentence and remand for re-sentencing using the correct offender score.”

Interestingly, Hall contended during his second appeal that the trial court erred in not allowing him to present evidence and to cross-examine his accuser at the re-sentencing hearing. (“Hall asserts that the trial court denied him the opportunity to introduce mitigating evidence to counter” the deliberate cruelty finding “by having the victim present at re-sentencing.”). The Court of Appeals affirmed the trial court’s denial of a hearing and the right to confront, finding that Hall “did not have a right to demand the victim’s presence at re-sentencing.”

Hall then returned to Pierce County for his third sentencing hearing, which took place on September 13, 2002. As it had done previously, the trial court imposed a 366-month sentence, once again following a short hearing where the court made findings and imposed its sentence without hearing any testimony. Once again, Hall appealed. This time, Hall’s sentence was affirmed on appeal. 118 Wn. App. 1041, 2003 WL 22137294 (2003). Hall’s petition for review was later denied by this Court.

Hall filed a Personal Restraint Petition (PRP) challenging his exceptional sentence based on *Blakely v. Washington*, 542 U.S. 296, 124 U.S. 2531, 159 L. Ed. 2d 403 (2004). On August 24, 2005, this Court granted Mr. Hall’s PRP and remanded his case to the trial court “for re-

sentencing consistent with *State v. Hughes*, Supreme Court Number 74147-6 [154 Wn.2d 118, 110 P.3d 192 (2005)].”

The Pierce County Prosecutor petitioned the United States Supreme Court for a writ of *certiorari* on the issue of whether “the absence of a jury factual finding should be subject to a harmless error analysis.” During the pendency of prosecutor’s petition for *certiorari*, on December 21, 2005, the trial court sentenced Mr. Hall to a term within the standard range, consistent with the decision of this Court. On June 30, 2006, the United States Supreme Court granted *certiorari*, vacated the judgment, and remanded to this Court “for further consideration in light of *Washington v. Recuenco*, 548 U.S. \_\_\_\_\_, [ 126 S. Ct. 478, 163 L. Ed. 2d 362 (2006)].”

On October 17, 2006, this Court ordered supplemental briefing on the issue of “whether entry of the exceptional sentence in this case, based on findings made by the trial court rather than a jury, can be considered harmless error.”

### **C. ARGUMENT**

Ronald Hall’s sentence exceeded (by 243 months) the maximum sentence authorized by the charges filed and the jury verdict returned in his case. Such a sentence violates the Sixth Amendment, as the United States Supreme Court’s decisions in *Apprendi v. New Jersey*, 530 U.S.

466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and *Blakely v. Washington* have made clear.

In *Hughes*, this Court held that such a *Blakely* Sixth Amendment violation could not be harmless error. Although the United States Supreme Court held in *Recuenco v. Washington*, 548 U.S. \_\_\_, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) that “failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error,” but could be harmless under the Sixth Amendment, *Recuenco* obviously did not determine state law. Instead, *Recuenco* left open the question of whether harmless error analysis is possible for a *Blakely* error based on state law considerations.

For the reasons set forth below, this Court should conclude, as a matter of state law, that harmless error analysis is improper where the Legislature, as in Mr. Hall’s case, has not authorized one of the aggravating factors, where the State did not charge either factor in the information, and where the Legislature has not authorized a procedure that permits submitting the allegations to a jury utilizing a beyond a reasonable doubt standard.

Even if this Court were to find that state law permits harmless error analysis, this Court should conclude that the error here is not harmless beyond a reasonable doubt; the State failed to provide Hall with any

notice—prior to or during trial—that he must defend against either aggravating factor, and the aggravating factors relied on by the court require subjective, qualitative, and comparative determinations by a jury, which this Court cannot say Hall’s jury would necessarily have found.

Finally, because *Recuenco* did not overturn the remedy portion of this Court’s decision in *Hughes*, and re-sentencing has already properly taken place, the trial court can simply re-impose the December 21, 2005 judgment.

**1. Hall cannot be convicted of a non-existent crime.**

It is elementary that a defendant cannot be convicted or sentenced for a non-existent crime, an error which is never harmless. *In re Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004). In this case, Hall was sentenced as if he were convicted of a first-degree assault involving multiple injuries, a non-existent crime.<sup>2</sup>

First-degree assault involving multiple injuries is a substantively distinct offense and carries a greater maximum sentence than simple first-degree assault. Thus, it must be legislatively authorized before increased punishment can follow. While the Legislature enumerated several aggravating factors which, if proven, would permit the imposition of a greater sentence than first-degree assault *simpliciter*, “multiple injuries” is

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<sup>2</sup> Hall was also sentenced on the “aggravating factor” of deliberate cruelty, a factor specifically enumerated by the Legislature. Thus, Hall’s argument here is confined to the multiple injury factor.

not one of them. *See* RCW 9.94A.390(2) (1996). Any Argument that “multiple injuries” is not an element of a crime or that the Legislature delegated the right to create additional aggravators to this Court, which subsequently approved the “multiple injuries” factor, should be rejected.

**a. First degree assault and first degree assault with multiple injuries are different crimes.**

The primary lesson of *Apprendi* and *Blakely* is: where a fact increases the maximum punishment, it cannot be insulated from the protections of the Sixth and Fourteenth Amendment by labeling it a “sentencing factor.” Instead, that fact constitutes an element of a more serious crime.

In *Apprendi*, the United States Supreme Court 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. The *Apprendi* Court began its analysis by noting that “(a)ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding.” *Id.* at 478. Noting that many jurisdictions had recently attempted to re-characterize traditional “elements” as “sentencing factors” and thereby removed the traditional accompanying protections, the Court held that “constitutional limits exist

to States' authority to define away facts necessary to constitute a criminal offense." *Id.* at 486. The *Apprendi* court further observed:

The term ["sentencing factor"] appropriately describes a circumstance, which may be either aggravating or mitigation in character, that supports a specific sentence within the range authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is *the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense.*"

*Id.* at 494 n. 19 (original emphasis omitted; emphasis added).

*Blakely* reinforced *Apprendi* by holding that, under our state sentencing scheme, the top of the guideline represents the maximum sentence authorized by a jury verdict. As *Blakely* emphasized, our state statutes authorized a higher-than-standard sentence on the basis of a factual finding *only if* the fact in question comprised a new element which was not an element of the crime of conviction. 542 U.S., at 301-302, 306-307. A judge applying the SRA could not even consider, much less impose, an exceptional sentence, unless he found facts "other than those which are used in computing the standard range sentence for the offense." *Id.*, at 299 (quoting *State v. Gore*, 143 Wash.2d 288, 315-316, 21 P.3d 262, 277 (2001)). The additional facts which support an increased sentence are no different in kind than the facts that establish a sentence range in the first place.

The Supreme Court's decision in *Recuenco* only serves to reinforce that no distinction exists between aggravating factors justifying an increased sentence and elements of a crime.<sup>3</sup> In fact, the core holding of *Recuenco* is premised on the equivalency of these two types of facts. *Id.* at 2553 (“Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error.”). The following passage makes the point abundantly clear:

The State and the United States urge that this case is indistinguishable from *Neder*. We agree.....Accordingly, we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt. The only difference between this case and *Neder* is that in *Neder*, the prosecution failed to prove the element of materiality to the jury beyond a reasonable doubt, while here the prosecution failed to prove the sentencing factor of “armed with a firearm” to the jury beyond a reasonable doubt. Assigning this distinction constitutional significance cannot be reconciled with our recognition in *Apprendi* that elements and sentencing factors must be treated the same for Sixth Amendment purposes.

Because the Sixth Amendment jury trial right extends to any fact that can increase the length of a sentence, and because the Supreme Court

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<sup>3</sup> In *Recuenco*, the error at issue was not a full *Blakely* error because the State alleged the sentence enhancement in the charging instrument and the issue was actually litigated at trial. *See* 126 S. Ct. at 2549. Thus, the Court did not directly address whether a *Blakely* violation, like the one here, in which the defendant had no notice “from the face of the felony indictment” that he faced the possibility of enhanced punishment, *Apprendi*, 530 U.S. at 478, could be deemed harmless. *See Recuenco*, 126 S. Ct. at 2552 n.3; *id.* at 2554 (Stevens, J., dissenting); Transcript of Oral Argument at 54-56, *Washington v. Recuenco*, No. 05-83 (U.S. Apr. 17, 2006) (State explicitly distinguished between these two types of errors and recognized that failing to put defendant on notice that he was facing an aggravated crime “could have any number of implications” not present in *Recuenco*).

described such a fact as the functional equivalent of an offense element, the perceived distinctions between guilt and sentencing determinations no longer exist.<sup>4</sup> Under *Apprendi* and *Blakely*, a jury determination of a sentencing enhancement factor is part and parcel of a jury trial. When, therefore, a court finds such a fact by a preponderance of evidence during a sentencing proceeding, it effectively finds the defendant guilty of a new and greater crime.

**b. The Legislature did not authorize multiple injuries as an element of a crime.**

At no time prior to Hall's trial (or any of his three sentencing hearings) did state statute provide that a crime resulting in multiple injuries could result in an increased sentence. The State may argue that this makes no difference since this Court approved the use of "multiple injuries" for sentencing purposes prior to Hall's trial. If the State advances such an argument, this Court should reject it.

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<sup>4</sup> These findings reside at the core of the criminal justice system's truth-seeking function. Thus, *Apprendi* and *Blakely* stand next to decisions such as *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968), and *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), which first recognized and incorporate the right to a jury trial and proof beyond a reasonable doubt in state criminal trials. Without *Apprendi*'s and *Blakely*'s prohibitions against "circumvent[ing] [those protections] merely by 'redefin[ing] the elements that constitute different crimes,'" *Apprendi*, 530 U.S. at 485 (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975)), those rights would not have much genuine force. A state, for example, could set up a system under which a judge "could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it – or of making an illegal lane change while fleeing the death scene." *Blakely*, 542 U.S. at 306. Indeed, "when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction" between convictions for a greater and a lesser crime "may be of greater importance than the difference between guilt or innocence for many [minor] crimes." *Mullaney*, 421 U.S. at 698.

While this Court can interpret statutes to discern legislative intent, only the Legislature can create new crimes or their elements. The legislature, not the judiciary, is the branch of government that is responsible for defining the elements of a crime. *See, e.g., McInturf v. Horton*, 85 Wn.2d 704, 706, 538 P.2d 499 (1975). In *McInturf*, this Court stated that "[t]he power to decide what acts shall be criminal, to define crimes, and to provide what the penalty shall be is legislative." *Id.* *See also State v. Carothers*, 9 Wn. App. 691, 696, 514 P.2d 170 (1973) ("The specification of the ways or modes by which a given crime may be committed is a legislative function."), *aff'd*, 84 Wash.2d 256, 525 P.2d 731 (1974). This power may not be delegated to the judiciary. *State v. Wadsworth*, 139 Wn.2d 724, 743, 991 P.2d 80 (2000).

In addition, it is a fundamental principle that the required criminal law must have existed when the conduct in issue occurred. The Due Process Clause requires criminal codes to give "fair warning" of conduct that subjects people to punishment. *Bouie v. City of Columbia*, 378 U.S. 347, 350, 84 S. Ct. 1697, 121 L. Ed. 2d 894 (1964). Enhancing punishment based on statutorily unenumerated aggravators flatly

contravenes that “basic principle,” *id.*, in addition to implicating the jury-trial and beyond-a-reasonable-doubt guarantees.<sup>5</sup>

**c. This court should dismiss the multiple injury factor**

Hall recognizes that the trial court found the additional aggravating factor of deliberate cruelty and noted that it would impose the same sentence based on that finding alone. However, the starting point for this case must be the reversal and dismissal of the multiple injuries factor.

**2. The State failed to charge first-degree assault involving multiple injuries and deliberate cruelty.**

Just as charging second-degree murder cannot result in a conviction for first-degree murder, charging first-degree assault cannot result in a conviction for first-degree assault with multiple injuries or deliberate cruelty.

At no point in these proceedings did the State file an information charging Hall with committing a first-degree assault in a deliberately cruel manner and/or by inflicting multiple injuries.

The holdings of *Apprendi* and *Blakely* that sentencing facts must be treated elements, coupled with long-standing state law regarding the requisites of charging documents, results in the conclusion that the failure to include an aggravating factor in an information means that the state

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<sup>5</sup> Likewise, the fact that the current statute includes this factor does not make any difference since application of the current statute to Hall’s case would violate the *ex post facto* clauses of the state and federal constitutions. *See In re Hinton, supra.*

cannot seek the accompanying enhanced punishment. In fact, the fundamental point of *Recuenco*, *Blakely*, and *Apprendi*, is that courts may not sentence defendants for uncharged transgressions for which juries have not found them guilty.<sup>6</sup>

Once it understood that the SRA's aggravating constitute elements of a crime, it directly follows, as a matter of state law, that those elements must be stated in an information. It is well-established in this state that "(a)ll essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). "This conclusion is based on constitutional law and court rule." *Id.*

While pre-*Blakely* Washington courts did not view "exceptional sentences" as involving an increased maximum punishment (and, hence did not apply the essential elements rule to SRA aggravators), in other situations where proof of a fact increased the maximum punishment Washington courts consistently adhered to the rule that those facts must be alleged in the information. "Where a factor aggravates an offense and

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<sup>6</sup> The Court in *Apprendi* specifically cited to *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), which noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.*, at 243, n. 6. The *Apprendi* Court then held that: "The Fourteenth Amendment commands the same answer in this case involving a state statute." *Id.* at 243.

causes the defendant to be subject to a greater punishment than would otherwise be imposed, due process requires that the issue of whether that factor is present, must be presented to the jury upon proper allegations and a verdict thereon rendered before the court can impose the harsher penalty.” *State v. Nass*, 76 Wn.2d 368, 456 P.2d 347 (1969). “(I)n order to justify the imposition of the higher sentence, it is necessary that the matter of aggravation relied upon as calling for such sentence be charged in the indictment or complaint.” *Id.*

For example, state law has consistently required the charging of a weapon or firearm “enhancement” in an information. In *State v. Frazier*, 81 Wn.2d 628, 503 P.2d 1073 (1972), the Washington Supreme Court held that the state’s intention to charge such an “enhancement” must be set forth in the information. In *State v. Cosner*, 85 Wn.2d 45, 50-51, 530 P.2d 317 (1975), Justice Hamilton, writing for the court, said: “The appellate courts of this state have held that when the State seeks to rely upon either RCW 9.41.025 or RCW 9.95.040,<sup>7</sup> or both, due process of law requires that the information contain specific allegations to that effect, thus putting the accused person upon notice that enhanced consequences will flow with a conviction.”

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<sup>7</sup> Former RCW 9.41.025 and RCW 9.95.040 contained firearm and deadly weapon enhancements that preceded similar enhancements under the Sentence Reform Act.

Notice is not enough. In *State v. Theroff*, 95 Wn.2d 385, 622 P.2d 1240 (1980), the State sought an enhanced sentence based on the use of a deadly weapon during the crime. While the State did not amend the information, it did file a notice of intent to seek the increased sentence. *Id.* at 387. This Court held that the State’s failure to charge the facts in the information was fatal, despite the separate notice. “When prosecutors seek enhanced penalties, notice of their intent must be set forth in the information.” *Id.* at 392. Relying on language from *Frazier*, the Court held that the rule is “clear and easy to follow. When prosecutors seek enhanced penalties, notice of their intent must be set forth in the information. Our concern is more than infatuation with mere technical requirements.” *Id.*<sup>8</sup>

This Court’s post-*Apprendi* jurisprudence is in accord. In *State v. Goodman*, 150 Wn.2d 774, 785-786, 83 P.3d 410 (2004), this Court held that the identity of the controlled substance delivered is an element of the crime which must be alleged in the information where the type of drug determines the length of punishment. *Goodman*, at 785-786. “Axiomatic in Washington law is the requirement that the charging document must “*allege facts supporting*

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<sup>8</sup> Interestingly, the Court of Appeals in this case cited *Theroff* when it dismissed the jury’s deadly weapon verdict because the State failed to include the deadly weapon allegation in the information.

*every element of the offense*” in order to be constitutionally sufficient. 150 Wn.2d at 785 (internal citation removed; emphasis in original).<sup>9</sup>

“Aggravating factors” function in the exact same manner as the nature of the controlled substance in *Goodman*, the weapon in *Theroff*, or the requirement of premeditation which separates first- and second-degree murder. Thus, it is axiomatic under Washington law that the failure to charge precludes the ability to sentence based on that factor.

The remedy for the State’s failure to charge Hall with either aggravating factor is to remand this case for re-sentencing within the standard range. This Court holding in *Theroff* was explicit: “Because the prosecutor here did not follow the rule, he may not now ask the court to impose the rigors of our enhanced penalty statutes upon the defendant.” *Id.* at 393. The same rule should apply here.

**3. Harmless error analysis is impossible where it involves an inquiry that cannot take place under state law.**

The United States Supreme Court remanded this case for consideration in light of *Recuenco*. State law makes *Recuenco* largely irrelevant.

*Recuenco*’s holding is narrow: Failing to submit a sentencing factor to a jury, which is no different than failing to submit any other

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<sup>9</sup> The facts necessary to support an exceptional sentence must be different and apart from the facts which are necessarily considered in the underlying crimes. See *State v. Nordby*, 106 Wn.2d 514, 518, 723 P.2d 117 (1986); *State v. Cardenas*, 129 Wn.2d 1, 7, 914 P.2d 57 (1996) (seriousness of injuries cannot support an exceptional sentence where serious injury is element of the crime). Therefore, simply charging the “basic” crime does not result in alleging facts to support an aggravating circumstance.

element to the jury, is not structural error. Stated conversely, some *Blakely* errors can be harmless as a matter of federal constitutional law.

What *Recuenco* did not, and could not, reach is whether such an error is or can ever be harmless based on state law. *Recuenco*, 126 S. Ct. at 2551 (“Thus, we need not resolve this open question of Washington law.”); *Id.* at 2551 n.1 (“Respondent’s argument that, as a matter of *state* law, the *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), error was not harmless remains open to him on remand”).

- a. It would have violated state law to submit aggravating factors to the jury to be determined beyond a reasonable doubt at the time of Hall’s trial.**

Thus, the harmless error question posed in *Recuenco*—whether, if properly instructed, a jury would have found the requisite element(s) beyond a reasonable doubt—could not have been answered in practice. When Hall went to trial, not only were no instructions, interrogatories, or special verdict forms submitted to the jury on either aggravating factor, it would have violated state law to do so. The question of harmless error does not arise here because there simply was no procedure under which aggravating factors could have been constitutionally submitted to a jury for its determination beyond a reasonable doubt. This Court cannot utilize harmless error review to

sustain a judgment that the State could not have obtained in the first place. Even though *Apprendi/Blakely* errors may be harmless under other circumstances, they cannot be harmless here.

**b. This Court could not remand this case for a jury trial on aggravating factors and cannot evaluate an error assuming an unconstitutional procedure.**

It follows from this Court's holding in *Hughes* that because state statute designates that a judge must decide the existence of aggravating factors using a preponderance standard, a court cannot direct a jury to find those same facts using a reasonable doubt standard.

It is true that this Court in *Hughes* held only that it would not create a procedure to impanel a jury to consider aggravating factors *on remand* and did not reach the issue of whether "juries may be given special verdict forms or interrogatories to determine aggravating factors at trial." The logic that precludes remand for re-sentencing under a judicially substituted regime, however, also precludes a trial court from doing so in the first instance. "To create such a procedure out of whole cloth would be to usurp the power of the legislature." *Hughes*, 154 Wn.2d at 151-52. This Court further noted, even though trial courts have some limited inherent authority to create procedures, such procedures cannot be created contrary to an explicit legislative directive. *Hughes*, 154 Wn.2d at 152 n.16.

It is undisputed that the pre-*Blakely* SRA placed the fact-finding responsibility on the trial court and set the standard of proof as a preponderance of the evidence. RCW 9.94A.530. Thus, even if trial courts had the right under CrR 6.16 to submit factual findings to jurors, the trial court would nevertheless have retained the final responsibility under RCW 9.94A.537 to determine whether aggravating factors were proved. In addition, the trial court did not have the authority to increase the burden of proof beyond that which the legislature mandated. Given the inability of the trial court to alter the burden of proof, there are no circumstances in which submitting interrogatories or special verdict forms could result in constitutionally adequate jury findings of aggravating factors.

*Hughes* relies on previous state appellate decisions which preclude the judicial re-drafting of statutes in order to bring those provisions into compliance with the constitution. *Id.* at 150 n. 13, and 150-151 (citing *State v. Martin*, 94 Wash.2d 1, 614 P.2d 164 (1980), and *State v. Frampton*, 95 Wn.2d 469, 476-79, 627 P.2d 922 (1981)). As recognized in *Hughes* and *Martin*, separation of powers principles preclude a court from re-writing the language of a statute to bring it up to constitutional minimums. *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*, 120 S. Ct. 2054 (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 ([[] (“however much members of this court may think a statute should be rewritten. . . . We simply have no such authority.”).

This Court cannot apply the harmless-error doctrine to allow the government to obtain a result it could not have obtained in the first instance without violating the Constitution and it could not, even theoretically, obtain on remand.

**4. The state constitutional right to a jury trial does not permit harmless error review based on the failure to submit an element of a crime to the jury.**

Article 1, § 21 prohibits Washington courts from finding the error in judicial fact-finding on aggravating factors to be considered harmless error. Article 1, § 21, provides that “[t]he right to trial by jury shall remain inviolate. . .” In construing this state constitutional right, this Court held that it preserves the right to jury trial as it existed at common law in the Washington Territory at the time of its adoption. *Pasco v. Mace*, 98 Wn.2d 87, 96, 653 P.2d 618 (1982). The jury trial right to be held “inviolate” is more extensive than its federal counterpart in the Sixth Amendment, and no legislative act may impair that right. *Pasco v. Mace*, 98 Wn.2d at 99. *Accord State v. Strasburg*, 60 Wash. 106, 116, 110 P.

1020 (1910) (statute which prohibited defendant from presenting an insanity defense held to violate art. 1, § 21 because “the question of insanity . . . is and always has been a question of fact for the jury to determine”); *State v. Stegall*, 124 Wn.2d 719, 724 & n.1, 881 P.2d 979 (1994) (unlike Sixth Amendment right to jury which may be satisfied with juries as small as six persons, the art. 1, § 21 right to jury guarantees the right to a 12-person jury).

Employing the six *Gunwall*<sup>10</sup> criteria leads to the same conclusion. The textual language of the state and federal constitutional provisions are different (factors #1 and #2). Indeed, this Court has already recognized that art. 1, § 21 has no federal counterpart at all. *State v. Schaaf*, 109 Wn.2d 1, 13-14, 743 P.2d 240 (1987). State constitutional and common law history, and pre-existing state law (factors #3 and #4) also show that broader protection has been given to the right to jury trial than under the federal constitution. *Pasco v. Mace, supra; State v. Stegall, supra*.

Differences between the structure of the state and federal constitutions (factor #5) necessarily favor a more expansive construction of state constitutional rights, and thus this factor always favors an independent state analysis. *State v. Smith*, 150 Wn.2d 135, 152, 75 P.2d 934 (2003); *State v. Russell*, 125 Wn.2d 24, 61, 882 P.2d 747 (1994).

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<sup>10</sup> *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

This Court has already recognized that preserving the right to jury trial "inviolate" is "a matter of particular state or local interest" (factor #6), whether it be for juveniles or for adults. *State v. Schaaf*, 109 Wn.2d at 16; *State v. Smith*, 150 Wn.2d at 152.

Long before the Sixth Amendment had even been held applicable to the States by virtue of the Fourteenth Amendment Due Process Clause, this Court noted the absolute nature of the prohibition against any erosion of the right to jury trial. In *Strasburg*, this Court held that the right could not be eroded by action of the Legislature:

Now, this right of trial by jury which our constitution declares shall remain inviolate must mean something more than the preservation of the mere form of trial by jury; else the legislature could, *by a process of elimination in defining crime or criminal procedure, entirely destroy the substance of the right by limiting the questions of fact to be submitted to the jury.*

60 Wash. at 116 (emphasis added).

That which the Legislature is forbidden to do, is also forbidden to the judiciary. "The right to a jury trial may not be impaired by either legislative or judicial action." *Geschwind v. Flanagan*, 121 Wn.2d 833, 840, 854 P.2d 1061 (1993). *Accord State v. Lane*, 40 Wn.2d 734, 736, 246 P.2d 474 (1952). If the legislature cannot cut back on the right to jury trial by legislative action, neither can the judicial branch limit the right by adopting a doctrine of harmless error.

Historically, Washington courts did *not* engage in harmless error analysis when the jury instructions omitted an element of the offense. In *McClaine v. Territory of Washington*, 1 Wash. 345, 25 P. 453 (1890), the to-convict jury instruction in a first degree arson case omitted the element that the defendant knew a person was inside the building at the time he set the fire. This Court said that error was fatal, and reversed. It made no attempt to engage in any harmless error analysis. Thus “common law history, and pre-existing state law” not only favor the *general* conclusion that article 1, section 21 is construed more liberally than the Sixth Amendment; they favor the more *specific* conclusion that the failure to submit every factual question to the jury can never be harmless error in this state. This Court should hold that the violation of the article 1, § 21 right to a jury determination of every factual question is structural error which can never be harmless.

**5. This court cannot determine whether the failure to instruct on the elements of deliberate cruelty and multiple injuries was harmless where Hall had no notice or opportunity to defend against these allegations.**

Assuming for argument’s sake that an information need not allege an aggravating factor, due process mandates at least some form of notice of the aggravator prior to the trial on those alleged facts. *See Graham v. West Virginia*, 224 U.S. 616, 32 S. Ct. 583, 56 L.Ed. 917 (1912); *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). Due process means

notice and an opportunity to respond that is useful. “Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure.” *Lankford v. Idaho*, 500 U.S. 110, 126, 111 S.Ct. 1723, 114 L. Ed. 2d 173 (1991) (failure to give notice of possibility of death sentence violates due process). If timely notice is not given, then the adversary process is not permitted to function properly. *Id.*

If, under the Sixth Amendment, a defendant is entitled to a jury trial on a particular issue of fact, due process mandates that the defendant is likewise entitled to advance notice that this fact will be litigated, and to a sufficient opportunity to prepare for that litigation.<sup>11</sup> Whether notice must be provided pre-trial for a bi-furcated trial is a question for another day, because in this case Hall had no notice of any kind prior to trial and no opportunity to present facts at sentencing.

Here, since Hall was not given pre-trial notice alleging either multiple injuries or deliberate cruelty, due process was clearly violated. Indeed, after Hall’s case was first remanded for resentencing he attempted to

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<sup>11</sup> *State v. Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005), involving comparability analysis, provides a useful analogy. In *Lavery*, this Court held that where a foreign statute is broader than its Washington counter-part, “the foreign conviction cannot truly be said to be comparable.” 154 Wn.2d at 258. In reaching this conclusion, the *Lavery* court considered the case of *State v. Ortega*, 120 Wn. App. 165, 84 P.3d 935 (2004), which considered whether a Texas statute which criminalized contact with children under 17 was comparable to a Washington statute which required the child to be under 12. The court noted that “even if the child in the Texas case had claimed to be 11, Ortega would have had no incentive to challenge and prove that the child was actually 12 at the time of contact.” *Lavery* at 257. The same logic applies to consideration of an aggravating factor that Hall had no incentive or opportunity to defend against.

defend against these accusations by presenting evidence, but was denied the opportunity.

While Hall would normally need to establish prejudice in order to prevail in a PRP, a petitioner's burden to establish actual and substantial prejudice is met where the error gives rise to a conclusive presumption of prejudice. *In re Richardson*, 100 Wash.2d 669, 679, 675 P.2d 209 (1983). Thus, this Court should again grant Hall's PRP.

**6. Both double jeopardy and mandatory joinder prevent retrial on either aggravating factor.**

Double jeopardy bars subsequent prosecutions for a single act. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Double jeopardy also bars successive prosecutions for greater and lesser-included offenses. *Brown v. Ohio*, 432 U.S. 161, 169-70, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). Hall was tried and convicted only of the lesser offense of first-degree assault *simpliciter*. It would violate double jeopardy to now allow the State to charge, prosecute, and convicted him of a greater crime.

In addition, retrial on the greater offense is precluded by the mandatory joinder rule. CrR 4.3.1 (b) (3) requires *all* related offenses to be joined for trial. "CrR 4.3(c) was intended as a limit on the prosecutor. As such, it does not differentiate based upon the prosecutor's intent. Whether the prosecutor intends to harass or is simply negligent in

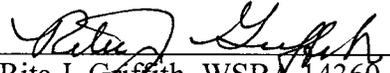
charging the wrong crime, CrR 4.3(c) applies to require a dismissal of the second prosecution.” *State v. Dallas*, 126 Wn.2d 324, 332, 892 P.2d 1082 (1995). Thus, under the plain language of the rule, *after trial* the State is precluded from amending an information to charge *any* related offense. Even if this Court finds that the “ends of justice” exception applies, that exception cannot be read to permit the State to now file more serious charges.

**D. CONCLUSION**

Mr. Hall’s PRP should be granted.

DATED this 14<sup>th</sup> day of November, 2006.

Respectfully submitted,

  
Rita J. Griffith, WSBA 14360  
Attorney for Petitioner

  
Jeff Ellis, WSBA 17139  
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that on the 14<sup>th</sup> day of November, 2006, I caused a true and correct copy of the pleading to which this is attached to be served on the following via prepaid first class mail:

Counsel for the Respondent:  
Hon. Gerald Horne  
John Michael Sheeran  
Pierce County Prosecutor's Office  
930 Tacoma Avenue S. Rm 946  
Tacoma, WA 98402-2171

Ronald A. Hall  
156 Shire Lane  
Port Angeles, WA 98363

 11/14/06  
Rita Griffith      DATE      at Seattle, WA