

ORIGINAL

No. 77756-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CA No. 29915-1-II

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

BRIAN EGGLESTON,

Defendant/Petitioner.

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SUPREME COURT
STATE OF WASHINGTON
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POST-ARGUMENT MEMORANDUM

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**I. POST-ARGUMENT MEMORANDUM REGARDING
STATE'S PRIOR REQUEST FOR EXCEPTIONAL
SENTENCE**

In response to the question posed at oral argument, the state did seek an exceptional sentence above the standard range for Mr. Eggleston's second-degree murder conviction before, in 1998. At the same time, the defense sought an exceptional sentence below the range. The trial court rejected both requests. This memo summarizes both requests.

As this Court is aware, Mr. Eggleston was originally charged with aggravated, premeditated murder, and the state sought the death penalty.

The first jury, however, deadlocked on that count. The jury convicted Mr. Eggleston of assault and drug crimes, but was unable to agree on premeditated murder and the aggravating factor. CP:1121 (verdict forms on murder and the aggravating factor). Hence, the state did not seek any sentence – exceptional or otherwise – for murder after the first trial. The court imposed a standard range sentence of 238 months on the assault and drug crimes, and ran them concurrently.¹

¹ For Count II, assault, the court used a criminal history score of 4, a seriousness level XII, a standard range of 129-171 months and a firearm enhancement of 60 months, imposing a total sentence of 160 plus 60 months or 220 months. For Count III, the court used a criminal history score of 8, a seriousness level of III, a range of 67-81 months plus 24 months for the school zone enhancement, and imposed a sentence of 57 plus 24 months or 81 months. For Count IV, the court used a criminal history score of 8, a seriousness level of III, a standard range of 67-81 months plus 24 months for the school zone enhancement, and 18 months for a firearm enhancement; the court imposed a total sentence of 48 + 24 + 18 months, or 90 months. On Count V, the court used a criminal history score of 8, a seriousness level of III, a standard range of 43-57 months, and

Mr. Eggleston was then retried on the remaining premeditated, aggravated, murder count. This time the jury acquitted. It wrote "Not Guilty" on the premeditated murder verdict form and "NO" on the question regarding the aggravating factor verdict; it convicted Mr. Eggleston of second-degree murder, instead. CP:1494, 1495.

The state did seek an exceptional sentence for this second-degree murder conviction. Its "Notice of Intent to Seek Exceptional Sentence," filed on June 22, 1998, briefly states that it will seek an exceptional sentence above the range (Sub No. 611); and its "State's Sentencing Memorandum Following Retrial on Count One," filed on June 24, 1998 (copy attached for this Court's convenience as Appendix A) provides the argument in support of such an exceptional sentence above the range. The defense, in contrast, sought an exceptional sentence below the standard range, based in part on imperfect self defense and in part on the severity of the gunshot wounds Mr. Eggleston had already suffered. Sub No. 615 (copy attached as Appendix B).

The trial court rejected both requests and imposed a standard range sentence of 288 months, plus 60 months for the firearm enhancement (using the prior convictions as criminal history). CP:1520-1530.

imposed 57 months. On Count VI, the court used an criminal history score of 4, a seriousness level of I and a range of 3-8 months, and then imposed only 3 months. Sub No. 417 (CP:1204-1215).

After the third and last trial, when Mr. Eggleston was again convicted of second-degree murder along with assault, the state again requested an exceptional sentence. CP:1601-13.

This time, the judge agreed. She imposed an exceptional sentence on the murder count and a standard range sentence on the assault count. The total sentence entered following the third trial was 582 months – 399 months on the murder (the exceptional sentence) and 183 months on the consecutive assault count. CP:878-894.²

As discussed at oral argument, Washington courts have consistently ruled that North Carolina v. Pearce, 395 U.S. 711, 713, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), creates a “rebuttable presumption of vindictiveness”

² For Count 1, murder 2, the court used a criminal history score of 4, an offense level of XIII, a standard range of 165-219 months, and a firearm enhancement of 60 months; she imposed an exceptional sentence of 339 months plus that 60-month enhancement. For Count 2, assault 1, the court use a criminal history score of 0, an offense level of XII, a standard range of 93-123 months, and a firearm sentence enhancement of 60 months; she imposed a high end sentence of 123 + 60 or 183 months. For Count 3, delivery of marijuana in a school zone, the court used a criminal history score of 9, an offense level of III, a standard range of 51-68 months, and an enhancement of 24 months for a range of 75-92 months; she imposed a sentence of 68 + 24 months, or 92 months. For Count 4, possession with intent to distribute marijuana in a school zone, the court again used a criminal history score of 9, an offense level III, and a standard range of 51-68 months plus the enhancements for a total range of 93-110 months; she imposed a sentence of 68 + 18 + 24 months, or 110 months. For Count 5, delivery of marijuana, the court used a criminal history score of 9, an offense level III, a standard range of 51-68 months and a sentence of 68 months. For Count 6, possession of mescaline, the court used a criminal history score of 5, and offense level of I, a standard range of 4-12 months, and a sentence of 12 months. Counts I and II were ordered to run consecutively. Sub No. 884 (CP:878-894).

With respect to the sentencing enhancements, the J&S states at page seven that the enhancements on Counts 3 and 4 run concurrently, but the enhancements on Counts 1 and 2 run consecutive to the base sentences and consecutive to each other.

when the sentence following appeal is more harsh than the earlier sentence. State v. Ameline, 118 Wn. App. 128, 133, 75 P.3d 589 (2003). “Under Pearce, a more severe sentence establishes a rebuttable presumption of vindictiveness. Wasman v. United States, 468 U.S. 559, 104 S.Ct. 3217, 3220-24, 82 L.Ed.2d 424 (1984).” State v. Franklin, 56 Wn. App. 915, 920, 786 P.2d 795 (1989).

II. CONCLUSION

The murder and assault convictions should be reversed; alternatively, the sentence should be vacated and the matter remanded for resentencing no higher than the standard range.

DATED this 10th day of October, 2007.

Respectfully submitted,



Sheryl Gordon McCloud, WSBA #16709
Attorney for Appellant
Brian Eggleston

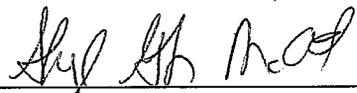
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of October, 2007, a copy of the foregoing Post-Argument Memorandum was forwarded to the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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Sheryl Gordon McCloud

APPENDIX A

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

BRIAN THOMAS EGGLESTON,

Defendant.

CAUSE NO. 95-1-04883-0

STATE'S SENTENCING MEMORANDUM
FOLLOWING RE-TRIAL ON COUNT
ONE

I. BACKGROUND.

On May 20, 1998, the defendant was convicted of Murder in the Second Degree following a retrial on Count I on the charge of Aggravated Murder in the First Degree. The jury also returned a special verdict which found that the defendant was armed with a firearm deadly weapon at the time of commission of the murder. The defendant is currently scheduled for sentencing on Count I on July 2, 1998.

At the first trial the defendant was convicted and sentenced for the following offenses:

STATE'S SENTENCING MEMORANDUM -- 1

ORIGINAL

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930 Tacoma Avenue South, Room 946
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Main Office: (253) 798-7400

6 JUN 24 1998

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1 attached for the court's convenience.

2
3 For the charge of Murder in the Second Degree for Count I, the
4 state seeks an exceptional sentence above the standard range. As is
5 discussed in more detail below, the circumstances under which the
6 defendant executed a deputy sheriff in this case justify an
7 exceptional sentence under at least two statutory and one common law
8 aggravating factor. The defendant's actions in this case in firing
9 not just one but three shots into the head of a prostrate and
10 defenseless deputy sheriff are the kind of circumstances that separate
11 this case from the usual case of Murder in the Second Degree.
12

13 A starting place for analysis of the appropriate sentence for the
14 defendant is the proper computation of his standard range sentence.
15 For comparison purposes the state presents below a summary showing the
16 standard range sentence the defendant would have faced had he been
17 convicted of Murder in the Second Degree and sentenced in a single
18 hearing:
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Count I	Murder in the Second Degree with a firearm deadly weapon sentence enhancement	Offender score of 4 and a standard range of 165 - 219 months plus 60 months for the enhancement
Count II	Assault in the First Degree with a deadly weapon sentence enhancement	Offender score of 0 and a standard range of 93 - 123 months plus 60 months for the enhancement
Count III	Unlawful Delivery of a Controlled Substance, Marijuana with a school zone sentence enhancement	Offender score of 9 and a standard range of 51 - 68 months plus 24 months for the enhancement
Count IV	Unlawful Possession of a Controlled Substance With Intent to Deliver, Marijuana with a firearm deadly weapon enhancement and a school zone enhancement and a non-firearm deadly weapon enhancement	Offender Score of 9 and a standard range of 51 - 68 months plus 18, 24, and 6 months for the three enhancements
Count V	Unlawful Delivery of a Controlled Substance, Marijuana	Offender score of 9 and a standard range of 51 - 68 months
Count VI	Unlawful Possession of a Controlled Substance, Mescaline	Offender score of 5 and a standard range of 4 - 12 months

1432

1 Because both the murder and assault convictions are serious
2 violent offenses; the base sentences for Counts I and II therefore
3 would have run consecutive to each other and concurrent with the
4 remaining counts. The base sentences for these two offenses would
5 have had a standard range of 258 - 342 months. With each firearm
6 sentence enhancement also running consecutive and the school zone
7 enhancements running concurrent, the final standard range would have
8 been 396 - 480, or 33 - 40 years. (e.g. $258 + 60 + 60 + 18 = 396$ and
9 $342 + 60 + 60 + 18 = 480$)

10
11
12 In order to achieve this result in light of the mistrial, the
13 defendant would be required to be re-sentenced on the assault charge.
14 At the time Judge McPhee imposed the sentence on Count 2 the defendant
15 had not yet been convicted of the murder and thus the special
16 sentencing provision for other current serious violent offenses did
17 not yet apply. As will be discussed more fully below, it is the
18 state's position that the defendant should be sentenced on the murder
19 and re-sentenced on the assault and the remaining counts as if there
20 had been a single trial and sentencing hearing on all counts.
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II. ISSUES PRESENTED.

1. Should the defendant be sentenced on Count I and re-sentenced on Counts II through VI as though convicted in one trial and sentenced in one sentencing hearing?
2. Should the defendant be sentenced to a term of incarceration above the standard range when two separate aggravating factors apply to the murder of Deputy John Bananola?

III. ARGUMENT.

A. Standard Range Sentence.

The State has been unable to find a case which addresses the precise issue presented in this case. In this case, the court is called upon to sentence a defendant for murder when he has previously been convicted of a serious violent offense that was charged and joined with the murder. It is expected that the defense will concede that neither party bears any responsibility for the mistrial. Where this is the case, it seems inequitable for the sentencing to work to the detriment of either party. Nevertheless, because the current offense policy of the Sentencing Reform Act mandates a higher offender score for multiple current convictions, anything other than a re-sentencing would produce potentially an inequitable result.

The pertinent provisions of RCW 9.94A.400 which apply to serious violent offenses provide in pertinent part as follows:

- (b) Whenever a person is convicted of two or more serious violent

1 offenses, as defined in RCW 9.94A.030, arising from separate and
2 distinct criminal conduct, the sentence range for the offense
3 with the highest seriousness level under RCW 9.94A.320 shall be
4 determined using the offender's prior convictions and other
5 current convictions that are not serious violent offenses in the
6 offenders score and the sentence range for other serious violent
7 offenses shall be determined using and offender score of zero.
8 The sentence range for any offenses that are not serious violent
9 offenses shall be determined according to (a) of this subsection.
10 All sentences imposed under (b) of this subsection shall be
11 served consecutively to each other and concurrently with
12 sentences imposed under (a) of this subsection. (Emphasis
13 supplied)

14 The official comments to this provision make it clear that
15 serious violent offenses are an exception to the general rule of the
16 SRA:

17 Under the SRA, a sentencing judge must impose concurrent
18 sentences. There are two exceptions to this policy: under
19 subsection (b), a person convicted of two or more serious violent
20 offenses arising from separate and distinct criminal conduct must
21 be sentenced consecutively . . .

22 * * *

23 Unless the offenses fall under the exceptions listed in
24 subsection (1)(b) or subsection (3), consecutive sentences
25 imposed for current offenses constitute exceptional sentences and
26 must comply with the exceptional sentence provisions of the
27 Act

28 Sentencing Guidelines Commission, Implementation Manual, pp II-84 -
II-85(1995). As is clear from the text of the statute and these
comments, other current offenses generally count against each other
for the offender score but the sentences for each count are served
concurrently. See RCW 9.94A.360(1) and 400(a). In the case of

1 serious violent offenses the legislature adopted the more stringent
2 policy of requiring that serious violent offenses be served
3 consecutively.
4

5 While it is consistent with the intent of the SRA for the
6 defendant to be sentenced as though the mistrial had not occurred, it
7 is possible to argue that Counts II through VI should be treated as
8 prior convictions thus giving the defendant an offender score of 7. It
9 can be argued that this case falls squarely within the terms of RCW
10 9.94A.400(3) which provides in pertinent part as follows:
11

12 . . . whenever a person is sentenced for a felony
13 that was committed while the person was not under
14 sentence of a felony, the sentence shall run
15 concurrently with any felony sentence which has been
16 imposed by any court in this or another state or by a
17 federal court subsequent to the commission of the crime
18 being sentenced unless the court pronouncing the
19 current sentence expressly orders that they be served
20 consecutively. (Emphasis added)

21 The official comments from the Sentencing Guidelines Commission
22 suggest that this section was added to the statute to control two
23 situations that are not present in this case. The comments state:

24 Subsection (3) will often be relevant where the defendant has
25 been charged in multiple informations or has committed a series
26 of crimes across court jurisdictions (crimes in more than one
27 county, more than one state, or crimes for which he or she has
28 been sentenced under both state and federal jurisdictions) and
29 where the defendant will be sentenced by more than one judge.
30 The purpose of this subsection is to allow the judge some
31 flexibility within the guidelines in order to minimize the

1 incidental factors of geographical boundaries and jurisdictions.
2 (Emphasis supplied)

3 Sentencing Guidelines Commission, Implementation Manual, p.
4 II-85(1995).

5
6 The courts that have analyzed this section have stated that RCW
7 9.94A.400(3) applies "when (1) a person who is not under sentence of
8 a felony' (2) commits a felony and (3) before sentencing (4) is
9 sentenced for a different felony." State v. Schilling, 77 Wn. App.
10 166, 889 P.2d 948 (1995).

11
12 A legal analysis of this situation must start with the definition
13 of "prior" and "current" offenses. RCW 9.94A.360(1) states:

14 (1) A prior conviction is a conviction which
15 exists before the date of sentencing for the offense
16 for which the offender score is being computed.
17 Convictions entered or sentenced on the same date as
18 the conviction for which the offender score is being
19 computed shall be deemed "other current offenses"
20 within the meaning of RCW 9.94A.400. (Emphasis supplied)

21 Case law clearly indicates that the only significant factor in
22 determining whether a conviction is a "prior" or "current" conviction
23 is the date of sentencing. State v. Collicott, 118 Wn.2d 649, 827
24 P.2d 263 (1992); State v. Shilling, 77 Wn. App. 166, 889 P.2d 948
25 (1995). In Shilling the Washington Supreme Court discussed the effect
26 of a conviction which occurred between the original sentencing and re-
27 sentencing on remand after and appeal. The court stated at 174:

28 STATE'S SENTENCING MEMORANDUM -- 9

1 The offender score includes all prior convictions
2 (as defined by RCW 9.94A.030(9)) existing at the time
3 of that particular sentencing, without regard to when
4 the underlying incidents occurred, the chronological
5 relationship among the convictions, or the sentencing
6 or re-sentencing chronology.

7 State v. Schilling, supra.

8 In this case all requirements of RCW 9.94A.400(3) are met.
9
10 Should the court adopt this approach, the court has the option to
11 sentence the defendant either concurrently or, if the court expressly
12 orders, consecutively for Count I. The trial court has unfettered
13 discretion in that decision, and an exceptional sentence finding is
14 not necessary. State v. Linderman, 54 Wn. App. 137, 772 P.2d 1025,
15 review denied, 113 Wn.2d 1004, 777 P.2d 1051 (1989).

16 The trial court can decide to run the subsequent sentence
17 consecutively without specifying the reasons behind the decision to
18 impose the consecutive sentence. State v. Kern, 55 Wn. App. 803, 780
19 P.2d 916 (1989). Under the authority of RCW 9.94A.400(3), the later
20 sentencing court always sets the relationship of its sentence to the
21 former sentence, and has discretion to order that its sentence run
22 consecutively. State v. Mireles, 73 Wn. App. 605, 871 P.2d 162 (1994).

23 No case has been found which creates an exception to RCW
24 9.94A.400 where the two sentences arose from the same incident or were
25 contained in the same information. In fact, in Mireles the court
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28 STATE'S SENTENCING MEMORANDUM -- 10

1 commented that there is no evidence that the trial court "deliberately
2 delayed the trial or otherwise manipulated the sequence of trials in
3 order to 'get the last shot'" at the defendant. State v. Mireles,
4 supra. This certainly suggests that the courts of appeals may not
5 apply this subsection in some cases where procedural issues cause an
6 inequitable result.
7

8
9 An equitable solution should be the guiding principle in unusual
10 sentencing situations. For instance, in State v. Moore, 63 Wn. App.
11 466, 820 P.2d 59 (1991), the court used RCW 9.94A.400(3) to impose
12 consecutive sentences on a defendant who had absconded after his first
13 convictions, thus resulting in his being sentenced at the same time
14 for the first convictions and a subsequent offense (the effect of
15 which was to invoke the presumption in favor of concurrent sentences
16 and reduce the sentence). The Moore court first imposed concurrent
17 sentences for the earlier convictions which occurred prior to
18 defendant Evans' absconding, then imposed a consecutive sentence for
19 the felony committed after Evans had absconded. These sentences were
20 affirmed. The court stated at 470:
21
22

23 . . . Evans absconded to avoid sentencing on the
24 1987 convictions. By doing so, he prevented those
25 sentences from being entered when they normally would
26 have been. This situation differs, consequently, from
27 one in which multiple independent charges in a single
jurisdiction are pending against a defendant due to
routine delays in sentencing and are sentenced at the

1 same hearing. To order the 9-month sentence for the
2 assault conviction to run concurrently with the 18-
3 month burglary sentences would in effect reward Evans
4 for evading the punishment for the burglary
5 convictions. This could not have been the
6 Legislature's intent when it created the presumption of
7 concurrent sentences in subsection (1)(a). . . .

8 Clearly, we would not countenance a prosecutor's action
9 of deliberately scheduling sentencing hearings for a
10 defendant's multiple convictions in such a way as to
11 avoid the presumptions of concurrent sentences under
12 the provisions of the SRA. Here, however, Evans
13 directly caused the sentencing delay for the burglary
14 convictions. . . .

15 State v. Moore, supra.

16 This case presents the opposite circumstance from Moore. RCW
17 9.94A.400(3) may apply to this situation, and no exception appears to
18 exist here. However, no party manipulated the system to achieve this
19 result. The fortuity of the mistrial on Count I caused defendant
20 Eggleston to be sentenced on different days for Count I and the
21 remainder of his offenses. While Moore and Mireles hint at some
22 ability of the court to consider whether such a result was
23 contemplated to fall within RCW 9.94A.400(3), we can find no case
24 authorizing a departure from the clear provisions of this statute.
25 See State v. Smith, 74 Wn. App. 844, 875 P.2d 1249 (1994) (convictions
26 entered or sentenced on the same date as the conviction for which the
27 offender score is being computed shall be deemed "other current
28

1 offenses", citing RCW 9.94A.360(1)); State v. Bates, 51 Wn. App. 251,
2 752 P.2d 1360 (1988) (court was unpersuaded by contention that
3 sentences should run consecutively because the charges are contained
4 in separate informations).

5
6 The state urges the court to adopt the more equitable approach to
7 the defendant's sentencing. Rather than apply subsection (3) to a
8 circumstance it was not intended to cover, the state urges the court
9 to sentence the defendant as though he were being sentenced in a
10 single sentencing hearing on all counts. This result is the most
11 logical since it minimizes the effect of the mistrial on the length of
12 the defendant's sentence. It does not seem equitable that the
13 defendant should receive either a longer or a shorter sentence solely
14 because the mistrial occurred and the defendant's sentencing on the
15 Murder charge was therefore delayed. As is indicated above, the
16 defendant's standard range, not taking into account the two
17 aggravating factors which justify an exceptional sentence, should be
18 computed as 33 to 40 years in prison.

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22 B. Aggravating Factors for Exceptional Sentence.

23 The defendant's actions and the manner in which he murdered
24 Deputy John Bananola justify an exceptional sentence for at least
25 three separate reasons. Two of these are based on statutory
26 aggravating circumstances and the third is based on common law.

1 Because each of these aggravating circumstances alone would justify an
2 exceptional sentence, the court would be well within its discretion in
3 ordering a substantial increase in the penalty to be served in this
4 case for the intentional murder of a deputy sheriff.
5

6 1. Deputy Bananola's Status As A Law Enforcement Officer Who
7 Was Performing Official Duties At The Time Of His Murder
8 Justifies an Exceptional Sentence.

9 As the court no doubt recalls from the evidence at trial, the
10 murder of Deputy John Bananola took place immediately after a group of
11 deputy sheriffs entered the residence while shouting as loudly as
12 possible, "Police. . . Sheriff's Department . . . Search Warrant."
13 Additionally, Deputy Bananola was wearing an unmistakable reflective
14 traffic vest with four-inch high yellow letters spelling the word,
15 "SHERIFF" on both the front and back. He was in fact shot in the back
16 through this vest twice and once through the reflective lettering
17 itself. Finally, during the shooting itself, Deputy Bananola was
18 heard by multiple members of the entry team shouting, "Police, put the
19 gun down." In the face of this overwhelming notice to the defendant,
20 the defendant intentionally murdered the man in front of him under
21 circumstances in which he must have known he was a law enforcement
22 officer. As will be discussed more fully below, while there may have
23 been a lack of sufficient evidence of premeditation, there was
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1 overwhelming evidence that the defendant intentionally murdered a
2 police officer.
3

4 A victim's status as a law enforcement officer has been held to
5 constitute an aggravating circumstance through court decision. State
6 v. Anderson, 72 Wn.App. 453, 864 P.2d 1001, rev. den. 124 Wn.2d 1013,
7 879 P.2d 293(1994), and State v. Kidd, 57 Wn.App. 95, 786 P.2d 847,
8 rev. den. 115 Wn.2d 1010, 797 P.2d 511(1990). This factor is not
9 separately listed in the non-exclusive list found in RCW 9.94A.390.
10 Nonetheless, in Kidd, the court strongly suggested that where an
11 offender knowingly shoots at a person whom he knows is a police
12 officer who is performing his official duties, this circumstance would
13 justify an exceptional sentence. Kidd declined to uphold an
14 exceptional sentence on this basis only because it was unclear from
15 the facts of the case whether or not the defendant had the requisite
16 knowledge that he was shooting at a law enforcement officer. State v.
17 Kidd, 57 Wn.App. at 104.
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21 Where the evidence is clear that an offender does in fact know
22 that he is shooting at a law enforcement officer, this knowledge
23 justifies an exceptional sentence. State v. Anderson, supra. In
24 Anderson, the defendant was a prisoner at the King County Jail who was
25 to be transferred for medical treatment to Harborview Hospital.

26 During the transfer he managed to free himself from his restraints and
27

28 STATE'S SENTENCING MEMORANDUM -- 15

1 then surprised the corrections officer as he was being taken out of
2 the transport vehicle. A struggle ensued in which the corrections
3 officer was assaulted. The defendant was convicted at trial of
4 Assault in the Second Degree and the state obtained an exceptional
5 sentence.
6

7 The court of appeals upheld the exceptional sentence and
8 specifically approved a law enforcement officer aggravating
9 circumstance. State v. Anderson, 72 Wn.App. at 465-66. The court's
10 reasoning in both Kidd and Anderson is instructive as it applies with
11 full force in this case:
12

13 The Legislature statutorily provides enhanced penalties for
14 acts against police officers in those situations it deems
15 appropriate. Significantly, these statutes include an
16 element of knowledge that the victim was an officer acting
17 in the course of official duty. E.g., RCW 10.95.020(1)
18 (aggravated first degree murder when defendant knew or
19 should have known that the victim was a law enforcement
20 officer performing official duties); RCW 9A.76.030
21 (misdemeanor to refuse to summon aid upon request of person
22 known to be a peace officer). Here Kidd did not know that
23 his pursuers, who were in an unmarked car and were not in
24 uniform, were police officers. Absent this knowledge, we
25 refuse to accept the victim's police officer status as a
26 basis for imposing an exceptional sentence. . . .

27 Unlike the defendant in Kidd, Anderson knew his victim was a
28 corrections officer. The reasoning of Kidd, supports the
conclusion that a defendant's assault on a victim he knows is a
police officer justifies an exceptional sentence.

State v. Anderson, 72 Wn.App. at 466, quoting State v. Kidd, 57

Wn.App. at 104.

STATE'S SENTENCING MEMORANDUM -- 16

1 In this case, much like the circumstances in Anderson, the
2 defendant knew he was shooting a police officer at the time he was
3 intentionally murdering Deputy Bananola. It would be an ironic
4 circumstance for the law to mandate death or life imprisonment for a
5 premeditated murder of a police officer, but allow only 123 - 164
6 months in prison (assuming an offender score of zero) for the
7 intentional murder of a police officer. See, RCW 9.94A.310. The
8 reasoning of Kidd and Anderson applies to this case and allows the
9 court to close the gap between these two penalties through an
10 exceptional sentence. An enhanced penalty is justified when the
11 defendant knows his victim is a police officer on duty. This is the
12 precise circumstance in this case.
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16 The defense may claim in this case that the jury found against
17 the state with respect to the defendant's knowledge that he was
18 shooting a law enforcement officer. The state concedes that the jury
19 improperly filled out one of the special verdict forms. The
20 aggravating circumstance verdict form did not apply to the crime of
21 Murder in the Second Degree and there is every possibility that the
22 jury was simply confused as to whether they had to answer the question
23 or not. This does not mean that they necessarily found that the
24 defendant did not know that Deputy Bananola was a law enforcement
25 officer. The jury's special verdict is ambiguous on this point. The
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28 STATE'S SENTENCING MEMORANDUM -- 17

1 jury may have answered the question in the negative simply because the
2 question assumes they found the defendant guilty of premeditated
3 murder. The court should not take a superfluous answer on a special
4 verdict form as an indication of the jury's opinion of the evidence on
5 knowledge.
6

7
8 Even if the court finds that the verdict form shows the jury
9 found a lack of knowledge, this court at sentencing is not bound by
10 such a determination. A court considering an exceptional sentence is
11 required to find an aggravating circumstance by a preponderance of the
12 evidence. State v. Sanchez, 69 Wn.App. 195, 848 P.2d 735, rev. den.
13 121 Wn.2d 1031, 856 P.2d 382 (1993). The special verdict by contrast
14 required proof beyond a reasonable doubt. This court as the finder of
15 fact in a sentencing hearing is entitled to weigh the evidence of the
16 defendant's knowledge independently of the jury's decision. Should
17 the court disagree with the jury about the quantum of proof on this
18 issue, or should the court find that under a lesser standard of proof
19 there is sufficient evidence, the court would be in a position to
20 grant an exceptional sentence. As was suggested above, the state's
21 position is that the evidence is overwhelming that the defendant knew
22 he was shooting an on-duty police officer. Regardless of which
23 evidentiary finding the court makes, this circumstance justifies an
24 exceptional sentence.
25
26
27

28 STATE'S SENTENCING MEMORANDUM -- 18

1 2. The Defendant Acted With Deliberate Cruelty In The
2 Infliction Of Multiple Gunshot Wounds And Thus Deserves An
3 Exceptional Sentence.

4
5 It has been recognized for some time that the infliction of
6 multiple injuries on a single victim in the course of a single
7 criminal event can justify an exceptional sentence. State v.
8 Armstrong, 106 Wn.2d 547, 723 P.2d 1111(1986), State v. Dunaway, 109
9 Wn.2d 207, 743 P.2d 1237(1987). In multiple injury cases the facts
10 frequently satisfy several statutory exceptional sentence
11 circumstances, namely deliberate cruelty to the victim, and multiple
12 injuries. See, RCW 9.94A.390 (2) (a) and (c). In such cases the
13 court is encouraged to consider whether the defendant's acts
14 distinguish his particular crime from others of the same class. State
15 v. McClure, 64 Wn.App. 528, 827 P.2d 290(1992).
16
17

18 In this case the defendant's crime culminated with three shots to
19 the head of Deputy Bananola. This can only be described as a coup de
20 grace. Deputy Bananola was prostrate on the floor at the time the
21 defendant bent down and fired the last shot into his forehead from a
22 distance of less than three feet. This shot was fired after the
23 defendant had previously shot the deputy eight times, including two
24 shots that penetrated the clearly visible and readily apparent traffic
25 vest bearing the word "SHERIFF." The court will recall that the
26
27

1 autopsy listed gunshot wounds A through O, a total of 15 wounds to
2 virtually every major area of Deputy Bananola's body. The defendant
3 displayed deliberate cruelty by firing these shots and his conduct in
4 firing the last shot to the deputy's head separates this case from the
5 usual case of Murder in the Second Degree.
6

7 The defense may argue that the gunshot wounds in the head of
8 Deputy Bananola are nothing more than what is required in an
9 intentional killing. The fallacy in this argument is apparent when
10 one considers that a single distant gunshot wound is no less deadly.
11 Here the defendant did not just inflict a single deadly gunshot wound;
12 he inflicted 15 gunshot wounds. This case is very similar to the
13 cases that have upheld an exceptional sentence for multiple injuries
14 or deliberate cruelty. The sheer quantity of wounds together with
15 virtually point blank shooting of the last bullet to Deputy Bananola's
16 forehead justifies an exceptional sentence.
17
18

19
20 IV. STATE'S RECOMMENDATION.

21 The State obviously believes that the highest possible sentence
22 should be imposed on this defendant. This is the man who executed one
23 deputy sheriff and then fired his last bullet at Deputy Dogeagle. A
24 sentence of 40 years in prison would be the most that could be imposed
25 in a standard range sentence. Under the circumstances, and in light
26 of the egregious nature of the defendant's conduct when he chose to
27

28 STATE'S SENTENCING MEMORANDUM -- 20

1 fire point blank into a deputy sheriff's forehead, a sentence of sixty
2 years is justified. The state asks that the court impose an
3 exceptional sentence of an additional 20 years in prison on Count I
4 above the high end of the standard range base sentence of 219 months.
5

6 The conditions already imposed for Counts II through IV should be
7 imposed on Count I as well: no contact with John Bananola's family, no
8 possession of firearms or weapons, no use or possession of alcohol or
9 drugs unless prescribed, CCO should monitor the defendant's compliance
10 by urinalysis and other appropriate means as determined by the CCO.
11 Community supervision of 24 months following release is required.
12

13 RESPECTFULLY SUBMITTED this 23rd day of June, 1998.

14
15 JOHN W. LADENBURG
16 Prosecuting Attorney

17 By: 
18 Lilah M. Amos
19 James S. Schacht
20 Deputy Prosecuting Attorneys
21 WSB # 17298

APPENDIX B

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,)	No. 95-1-04883-0
)	
Plaintiff,)	DEFENDANT'S PRESENTENCE
)	REPORT
vs.)	
)	
BRIAN THOMAS EGGLESTON,)	
)	
Defendant.)	

FILED
IN COUNTY CLERK'S OFFICE
A.M. JUL - 1 1998 P.M.
PIERCE COUNTY, WASHINGTON
TED RUTZ COUNTY CLERK
BY _____ DEPUTY

COMES NOW the defendant, Brian Eggleston, through his attorneys, and presents the following presentence report:

Sentencing Judge: The Honorable Leonard W. Kruse

Sentencing Date: July 2, 1998

A. NATURE OF THE CONVICTION

Mr. Eggleston appears before this court for sentencing following his conviction for one count of murder in the second degree.

B. OFFENDER SCORE

Mr. Eggleston has an offender score of 7. This is based on five prior convictions: one count of assault in the second degree which counts as three points pursuant to RCW 9.94A.360(10); and four counts of VUCSA which count as one point each.

LAW OFFICES OF
MONTE E. HESTER, INC., P.S.
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1 C. STANDARD RANGE

2 The standard range sentence for second degree
3 murder, where the defendant has an offender score of seven is
4 216- 288 months. The firearm enhancement applicable to this
5 offense adds an additional five years (60 months). RCW
6 9.94A.310.

7 D. DEFENSE RECOMMENDATION

8 1. Request For Exceptional Sentence.

9 Mr. Eggleston respectfully requests that this court
10 exercise its discretion pursuant to RCW 9.94A.390(1) and
11 impose a sentence below the standard range. Mr. Eggleston
12 requests a base sentence of 120 months. This request is
13 supported by argument contained in section E, infra.

14 2. Standard Range / Concurrent Sentence.

15 If this court is unwilling to depart from the
16 standard range, Mr. Eggleston requests that he be sentenced
17 to the bottom of the standard range, and that the sentence
18 run concurrent with the sentences imposed for his prior
19 convictions. This request is supported by argument contained
20 in section E, infra.

21 E. BASIS FOR DEFENSE RECOMMENDATION

22 1. The sentence imposed on this count should
23 run concurrent with the sentence
24 Eggleston is presently serving.

25 On June 12, 1997 Eggleston was sentenced for five
prior convictions. Although these prior convictions were

1 entered under the same cause number as the present
2 conviction, they must be considered "prior offenses" for
3 purposes of calculating Eggleston's offender score for the
4 present offense. RCW 9.94A.360(1) defines a "prior
5 conviction" as "a conviction which exists before the date of
6 sentencing for the offense for which the offender score is
7 being computed." There is no question that Eggleston's
8 convictions for one count of assault and four counts of VUCSA
9 "exist" before the date of sentencing for the murder
10 conviction. Under RCW 9.94A.360(1), the assault and VUCSA
11 convictions are "prior" convictions rather than "other
12 current offenses" for purposes of calculating the offender
13 score for the murder conviction. This is so notwithstanding
14 the fact that all of the charges share a common cause number.

15 Because the assault and VUCSA convictions are
16 defined as "prior convictions" under RCW 9.94A.360(1), this
17 court should order the sentence for the murder conviction to
18 run concurrently with the sentence for the assault and VUCSA
19 convictions. RCW 9.94A.400(3) governs this situation, and
20 states that

21 Subject to subsections (1) and (2) of
22 this section, whenever a person in
23 sentenced for a felony that was committed
24 while the person was not under sentence
25 of a felony, the sentence shall run
concurrently with any felony sentence
which has been imposed by any court in
this or any other state or by a federal
court subsequent to the commission of the

1 crime being sentenced unless the court
2 pronouncing the current sentence
3 expressly orders that they be served
4 concurrently.

5 RCW 9.94A.400(3).

6 [I]n its comments to on RCW 9.94A.400,
7 the Sentencing Guidelines Commission
8 states:

9 Subsections (2) and (3) cover situations,
10 where at the time the defendant is
11 sentence on a present conviction, he or
12 she has not yet completed a sentence for
13 another felony conviction.

14 D. Boerner, Sentencing in Washington, I -
15 30 (1985). The comments indicate that
16 both subsections (2) and (3) were
17 intended to apply in a situation in which
18 the defendant has an uncompleted sentence
19 from a prior felony.

20 In Re Caley, 56 Wn. App. 853, 856, 785 P.2d 1151 (1990),
21 cited with approval in In Re Long, 117 Wn.2d 292, 305, 815
22 P.2d 257 (1991). The Caley court noted that the purpose of
23 subsection (3) is to allow a sentencing judge the same
24 flexibility that he or she would have had if all the crimes
25 were being sentenced at the same time. Such an approach
helps to "minimize" the "incidental factors" that in some
occasions lead to different sentencing dates for crimes
committed at or near the same time. See Caley, supra, 56 Wn.
App. at 856-57.

Here, Eggleston is being sentence for second degree
murder. At the time the murder was committed, Eggleston was
not "under sentence of a felony." The sentence for the

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1 assault and VUCSA was imposed "subsequent to the crime being
2 sentenced." Therefore, RCW 9.94A.400(3) is applicable to the
3 murder sentencing. State v. Shilling, 77 Wn. App. 166, 889
4 P.2d 948 (1995)." Accordingly, the sentence for the murder
5 will run concurrently with the sentence for the assault and
6 VUCSA charges unless this court orders that they be served
7 consecutively.

8 Eggleston respectfully requests that this court
9 exercise its discretion not to order the murder sentence to
10 run consecutive to his sentences for the assault and VUCSA
11 charges.

12 2. Significant and Compelling Reasons Exist
13 to Depart Downward from the Standard
14 Sentencing Ranges.

15 RCW 9.94A.120(2) specifies that the court may
16 impose a sentence outside the standard range if the court
17 finds there are "substantial and compelling reasons
18 justifying an exceptional sentence." RCW 9.94A.390 sets
19 forth a list of "illustrative factors which the court may
20 consider in the exercise of its discretion to impose an
21 exceptional sentence." At least two of the illustrative
22 mitigating factors apply to the assault conviction in this
23 case.

24 RCW 9.94A.390(1)(a) states that a trial court may
25 depart downward from the standard range sentence if "the
victim was an initiator . . . aggressor, or provoker of the

1 incident." In this case, it is the defendant's position that
2 Pierce County Sheriff's Deputies were the initiators of a gun
3 battle inside defendant's home. The officers admittedly
4 entered the house at daybreak in the hope that the occupants
5 would be asleep and would be surprised by the entry. The
6 officers entered with guns drawn. The officers shot Mr.
7 Eggleston first, and he fired his weapon only after he had
8 been severely wounded. There is nothing in the record
9 suggesting that the deputies could not have effected the
10 search of the Eggleston residence and arrested Mr. Eggleston
11 without resorting to this deadly strategy that resulted in
12 this tragedy. Because the victim of the assault was an
13 initiator or provoker of the assault, this court should
14 depart downward from the standard sentence range. While the
15 court has found that the search warrant was valid and thus
16 the officers had a right to be there this does not alter the
17 fact that Brian Eggleston did not know who had entered his
18 house as the jury found and fired only after he was fired
19 upon.

20 RCW 9.94A.390(c) states that a trial court may
21 depart downward from the standard sentence range if "the
22 defendant committed the crime under . . . threat . . .
23 insufficient to constitute a complete defense but which
24 significantly affected his or her conduct." Here, the jury
25 apparently found that Eggleston did not act in self-defense

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1 when he fired at Deputy Bananola. Nonetheless, the defense
2 presented substantial evidence that Eggleston acted in
3 response to what he perceived as a imminent threat that he
4 was about to be murdered. Although Eggleston's testimony and
5 the other evidence that he acted in self-defense was
6 apparently "insufficient to constitute a complete defense"
7 there is no question that the threat posed by the raid team
8 significantly affected Eggleston's conduct. This
9 illustrative factor provides another statutory basis for the
10 court to depart downward from the standard range sentence in
11 this case. State v. Pascal, 108 Wn.2d 125, 137, 736 P.2d 1065
12 (1987) ("Although [defendant's claim of self] defense failed,
13 and she was convicted of manslaughter, the trial judge in
14 performing his sentencing function could evaluate the
15 evidence of these mitigating factors and find that her
16 actions significantly distinguished her conduct from that
17 normally present in manslaughter").

18 In addition to these statutory factors, other
19 significant and compelling reasons exist for the court to
20 exercise discretion, and to depart downward from the standard
21 sentence range in this case. Prior to October 16, 1995,
22 Brian Eggleston had no prior criminal history. Brian has no
23 history of violence or other history of hostile acts. He was
24 a peaceful person.

25

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1 In deciding whether to depart downward from the
2 standard sentence range, this court should take into account
3 the consequences Eggleston has already suffered as a result
4 of his actions on October 16, 1995. First, he was shot
5 numerous times by the raiding officers, and suffered severe
6 medical problems as a result. Second, for nearly three years
7 after that date Eggleston sat wondering whether he would
8 ultimately be put to death for his actions. Third, Eggleston
9 has had to face the ordeal of two capital trials. These
10 circumstances distinguish this case from the average second
11 degree murder offense, and justify a downward departure.

12 F. THERE ARE NO CIRCUMSTANCES WARRANTING AN UPWARD
13 DEPARTURE

14 The State has filed notice of its intent to seek an
15 exceptional sentence.

16 They first argue that the victim's status as a law
17 enforcement officer performing his official duty requires an
18 exceptional sentence. The Government claims that Brian
19 Eggleston during, those few seconds on October 16, 1995 that
20 the gun fire occurred, was faced with "overwhelming notice
21 that the person he was shooting at was a police officer."
22 The Government argues in their brief that State v. Kidd and
23 State v. Anderson, citations omitted, mandate a sentence
24 above the standard range in this case. While Anderson
25 suggests that an assault on a police officer by one who knows

1 that he is assaulting a police officer may justify and
2 exceptional sentence, the facts in Anderson are substantially
3 different from the facts in this case. In the instant case
4 the defense Brian Eggleston did not know who the individuals
5 were who were entering his house and fired his weapon only
6 after being shot by an unknown intruder.

7 In its decision the jury specifically found that
8 the Government had not proven the charge of premeditated
9 murder with aggravating circumstances and specifically found
10 that the Government had not proven that Brian Eggleston knew
11 or should have known that Deputy Bananola was a police
12 officer. The Government suggests that the fact that the jury
13 "improperly" filled out the special verdict form should not
14 influence this decision because the verdict did not apply to
15 the crime of murder in the second degree and that the jury's
16 answer to the question posed was ambiguous. There is nothing
17 ambiguous about the jury's response to the special verdict
18 form and it is clear that the jury found that the Government
19 did not prove knowledge of Deputy Bananola's status on the
20 part of Brian Eggleston.

21 With regard to this court's separate decision on
22 the knowledge issue, this court has heard the evidence in the
23 case and the defense does not believe the court requires
24 further argument on the issue.

25

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1 The facts of this case do not support a finding of
2 deliberate cruelty to the decedent.

3 Deliberate and extreme cruelty means "gratuitous
4 violence, or other conduct which inflicts physical,
5 psychological or emotional pain as an end in itself." State
6 v. Kidd, 57 Wn.App. 95 (1990), citing State v. Stouse, 54
7 Wn.App. 408, 418 (1989). There is simply no evidence in this
8 case of gratuitous infliction of multiple injuries as an end
9 in themselves. The evidence, by anybody's version, indicates
10 that Deputy Bananola was struck by multiple shots fired from
11 Brian Eggleston's gun. The evidence further indicates that
12 these shots were fired in rapid succession by an individual
13 who had himself suffered a serious gunshot wound. This
14 incident can best be described as a gun battle. There is no
15 evidence that Brian Eggleston shot at Deputy Bananola simply
16 to inflict pain or to be deliberately cruel. The Government
17 argues that the shots to the head satisfy the deliberate
18 cruelty test and indicate that they could only be described
19 as a "Coup De Grace" and that the shots occurred while Deputy
20 Bananola was lying on the floor and that the last shot was
21 fired into his forehead from less than three feet. Again the
22 court has heard the evidence in this case. The manner in
23 which the shots were fired and the location of the
24 participants was a hotly contested issue and it is the
25 defendant's position that the Government's evidence was not

1 persuasive. Indeed, the jury failed to find premeditated
2 murder.

3 The Government's manipulation of the facts to
4 formulate their argument does not change the evidence heard
5 by this court during the trial. As the court is aware the
6 decedent was not shot 15 times. It is clear that the two
7 individuals were engaged in a gun battle. Brian Eggleston
8 fired 9 shots and Deputy Bananola fired 7. These facts do
9 not fit the facts in the cited cases of State v. Armstrong
10 and State v. Dunaway, citations omitted.

11 There is no question that the incident that
12 occurred on October 16, 1995 was a great tragedy to many
13 individuals. The Government's request for an exceptional
14 sentence was made when they filed the charge of first degree
15 murder with aggravating circumstances and requested the death
16 penalty. The jury rejected the Government's claims of
17 aggravating circumstances and of first degree murder and
18 essentially rejected the claims made by the Government in
19 support of their request for an exceptional sentence. This
20 court should do the same.

21 ***

22 ***

23 ***

24 ***

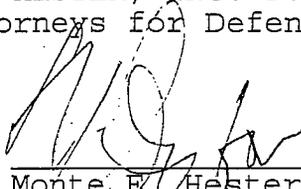
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1 G. CONCLUSION

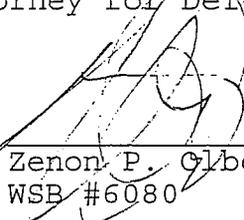
2 For the foregoing reasons, this court should impose
3 the sentence recommended by the defense.

4 DATED this 30 day of June, 1998.

5 LAW OFFICES OF MONTE E.
6 HESTER, INC. P.S.
7 Attorneys for Defendant

8 By: 
9 Monte E. Hester
WSB #121

10 LAW OFFICE OF
11 ZENON PETER OLBERTZ
12 Attorney for Defendant

13 By: 
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15 WSB #6080

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