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No. 52447-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM ROBINSON,

Appellant.

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Catherine Shaffer

SUPPLEMENTAL BRIEF ~~IN SUPPORT OF MOTION TO MODIFY~~

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A. IDENTITY OF MOVANT

Mr. Robinson is the appellant in Court of Appeals no. 524470 and the movant in the November 23, 2004 motion to modify the Commissioner's ruling of February 12, 2004.

B. AUTHORITY TO FILE SUPPLEMENTAL BRIEF

In a supplemental opening brief filed prior to the United States Supreme Court's decision in Blakely v. Washington, Mr. Robinson argued, inter alia, that (1) his exceptional sentences violated his constitutionally guaranteed right to a jury trial where the trial court found the facts supporting the exceptional sentences from the bench, and by a mere preponderance of the evidence; and (2) that the trial court therefore erred in effectively sentencing Mr. Robinson to sentences for aggravated crimes to which he had not entered guilty pleas. Appellant's Supplemental Opening Brief, October 29, 2003.

Following the United States Supreme Court's subsequent June 24, 2004 decision in Blakely v. Washington, the Court of Appeals granted Mr. Robinson's motion to recall the mandate and directed the filing of any appellant's motion to modify the Commissioner's ruling by December 1, 2004. Order Granting Motion to Recall Mandate (November 1, 2004). Appellant's motion

to modify was filed November 23, 2004. Motion to Modify, November 23, 2004. The State responded on December 6, 2004, and the appellant replied on December 9, 2004. Response to Motion to Modify, December 6, 2004; Reply to Response, December 9, 2004. By order of February 9, 2005, the Court of Appeals granted the motion to modify and directed appellant to file a supplemental brief in support of the motion to modify by March 11, 2005, later extended to March 18, 2005. Order of February 9, 2005.

C. SUPPLEMENTAL ARGUMENT

THE DEFENDANT'S EXCEPTIONAL SENTENCES WERE ILLEGAL UNDER BLAKELY V. WASHINGTON AND HIS CASE MUST BE REVERSED AND REMANDED FOR ENTRY OF A STANDARD RANGE SENTENCE.

1. The defendant plead guilty to the crimes charged and knowingly waived his right to appeal the entry of guilty judgments thereto, while expressly reserving his right to appeal any sentence outside the standard range. William Robinson entered guilty pleas to three counts vehicular assault on March 19, 2003. CP 7-30 (statement of defendant on plea of guilty, filed March 24, 2003).

Attached as part of the defendant's statement on plea of

guilty is the document entitled, "Felony Plea Agreement." CP 27. The plea agreement contains the following language, including a stipulation to "real facts" in which Mr. Robinson waived his statutory right to demand a bench hearing in which sentencing facts would have to be determined by the judge under a "preponderance of the evidence" standard pursuant to RCW 9.94A.530:

> REAL FACTS OF HIGHER/MORE SERIOUS AND/OR ADDITIONAL CRIMES: In accordance with RCW 9.94A.530, the parties have stipulated that the following are real and material facts for purposes of this sentencing: The facts set forth in the certification(s) for determination of probable cause and prosecutor's summary as amended and attached to plea [and] The facts set forth in Appendix C[.]"
>
> * * *
>
> OTHER: St. will file no other charges.
> CRIMINAL HISTORY AND OFFENDER SCORE: . . .
> The State makes the sentencing recommendation set forth in the State's sentence recommendation.

CP 27. The defendant's plea included an acknowledgment that the State would proffer a "recommendation" that Mr. Robinson be given exceptional sentences above the standard range, of 90, 60 and 60 months on the respective counts. CP 27, 30. In his statement of defendant on plea of guilty, the defendant acknowledges that the "prosecuting attorney will make the following recommendation to the judge: "Ct I and II 60 months Ct III 20 months," CP 7-30

(statement of defendant, at pp. 4-5) (also stating, "See attached Plea Agreement and State's Sentencing Recommendation"). The document entitled "State's Sentence Recommendation" states that the "State recommends that the defendant be sentenced to" concurrent terms of 60, 60 and 20 months incarceration on the three respective counts. CP 30. The document also references the Court to arguments in support of the State's hoped-for exceptional sentence in the State's "Supplemental Brief." CP 30.

However, the plea expressly provided that each party was assuming a risk that the sentencing court might ignore either party's advocacy at sentencing and do whatever it wished with regard to the length of terms of incarceration imposed on the counts, and that the court could impose sentences above or below the State's recommendation, or indeed sentences above or below the standard range. The defendant's statement on plea of guilty acknowledged that the "judge does not have to follow anyone's recommendation as to sentence." CP 7-30 (statement of defendant, at p. 5).

The plea further provided that any sentence outside the standard range could be challenged on appeal by either party, including by the State.

> If the judge goes outside the standard range, either I or the State can appeal that sentence.

CP 7-30 (statement of defendant, at p. 5).

At sentencing, on May 2, 2003, the court imposed exceptional sentences above the 15-20 month standard ranges, ordering terms of 96, 60, and 60 months incarceration on the three counts, after finding from the bench that the vehicular assaults were committed with the following factual circumstances: profound impairment by drugs and alcohol far beyond the typical vehicular assault; particularly egregious driving; the victims were particularly vulnerable; the defendant was driving without liability insurance; the victim Zachery Moss suffered profound brain injury; and the mental anguish of the victims was extraordinary. CP 60-67 (judgment and sentence, filed May 5, 2003, at p. 2); CP 68-70 (findings in support of exceptional sentence, at pp. 1-2).[1] The sentencing court's

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[1]The written conclusions of law list the following aggravating factors in support of the exceptional sentence above the standard range as follows:

> 1. The facts are far more egregious than the typical vehicular assault under the driving under the influence prong.
> 2. The victims were all particularly vulnerable and the defendant knew or should have know of that vulnerability.
> 3. The lack of liability insurance makes the financial consequences of the vehicular assault significantly greater for the victim.
> 4. The effects of Zachery Moss's injury is significantly more serious than in the usual vehicular assault, even if the injury is viewed under the "serious bodily injury" level.
> 5. The increased mental anguish and psychological harm

imposition of an exceptional sentence of 96 months on count 1 was a sentence above the State's recommendation of 90 months. Id.[2]

Pursuant to his express reservation of rights in the plea agreement, the defendant appeals his exceptional sentences, arguing that the exceptional sentences are illegal under the case of Blakely v. Washington. CP 71 (notice of appeal).

2. Imposing an exceptional sentence on the basis of findings made from the bench by a preponderance of the evidence violates a defendant's Sixth Amendment right to a jury trial. In the United States Supreme Court's 2004 decision in Blakely v. Washington, ___ U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the Court ruled that a Washington defendant's exceptional sentence imposed from the bench on the basis of facts

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> suffered by the three children and their mother in witnessing their family being hurt is a substantial and compelling factor distinguishing this vehicular assault from other vehicular assault.

CP 68-70 (findings in support of exceptional sentence, at pp. 2-3).

[2]In sentencing the defendant, the trial court stated that it relied on the presentence statement of the prosecutor, including the certificate of probable cause, the additional statement of facts set forth in Appendix C to the plea agreement, the initially filed prosecutor's [case] summary and request, and the plea agreement (all the foregoing are attached to the plea, CP 7-30). 5/2/03 at 5-7. The court also considered the State's memorandum in support of an exceptional sentencing, CP 31-42, the defense sentencing memorandum, or "Defense Presentence Report," CP 43-52, the State's memorandum in response to the defendant's presentence report, CP 53-59, and various letters from persons involved in the case or in relation to the parties. 5/2/03 at 5-7.

found by the judge by a preponderance of the evidence violated the Sixth Amendment right to a jury trial. In Blakely, the Court relied on its earlier decisions in Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and Ring v. Arizona, 536 U.S. 584, 604, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and held that an exceptional sentence imposed by a Washington State sentencing court based upon the court's finding of the aggravating factors by a preponderance of the evidence standard, violated the defendant's right to a jury trial because it was a sentence greater than the maximum the court could have imposed based upon the jury's verdict. Blakely v. Washington, 124 S.Ct. at 2537-38. The Court noted that the "statutory maximum" in this context was not the artificially created maximum listed in the statute, but "is the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant." (Emphasis in original.) Blakely v. Washington, 124 S.Ct. at 2537. Thus Mr. Robinson's statutory maximum of 15-20 months on each count is the high end of the standard range.

In the present case the trial court found from the bench, by a preponderance of the evidence, in the absence of any knowing waiver by Mr. Robinson of his Blakely rights to a jury determination

of aggravating facts beyond a reasonable doubt, that the vehicular assaults were committed by Mr. Robinson with the stated aggravating factual circumstances. CP 68-70. Based upon these findings the court imposed exceptional sentences of 96, 60 and 60 months concurrent on the three respective counts, all sentences above the standard range determined by the verdicts. CP 60-67.

This is precisely the process, of imposing a sentence above the standard range based on facts decided from the bench by a preponderance of the evidence, that the United States Supreme Court ruled in Blakely violated the defendant's constitutionally protected right to a jury trial. Accordingly, the trial court's imposition of exceptional sentences violated Mr. Robinson's Sixth Amendment jury right. Blakely v. Washington, 124 S.Ct. at 2537.

3. Mr. Robinson's real facts stipulation under RCW 9.94A.530's preponderance of the evidence standard was a waiver of his statutory right to a bench hearing on sentencing facts under the preponderance standard, and does not represent a valid waiver of the defendant's Sixth Amendment right to demand a jury trial on the aggravating facts and proof thereof beyond a reasonable doubt. Mr. Robinson's waiver of his right under RCW 9.94A.530 to demand a bench hearing on the

alleged sentencing facts and proof thereof by a preponderance, cannot be construed ex post facto as a waiver of his Blakely right to jury proof of sentencing facts beyond a reasonable doubt. Mr. Robinson never purported to waive that right and the State cannot contend it or anyone ever believed he was waiving that right. In addition, an accused cannot validly waive a constitutional right if he did not know he possessed that right.

This Court must entertain every presumption against holding that the defendant executed a valid waiver of his constitutional rights. A waiver of a constitutional right must be knowing, intelligent and voluntary. City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). Absent an adequate record to the contrary, a reviewing court must indulge every reasonably presumption against the validity of an alleged waiver of a constitutional right. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938); State v. Wicke, 91 Wn.2d 638, 645, 591 P.2d 452 (1979). The Court does not "presume acquiescence in the loss of fundamental rights." Johnson v. Zerbst, 304 U.S. at 458.

In order to be effective, therefore, the "waiver of a fundamental constitutional right must be 'an intentional

relinquishment or abandonment of a known right or privilege.'" State v. Thomas, 128 Wn. 2d 553, 558, 910 P.2d 475 (1996) (citing Johnson v. Zerbst, 304 U.S. at 458). The burden is on the State to demonstrate a valid waiver on the record. Id. "Presuming waiver from a silent record is impermissible." Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) (quoting Carnley v. Cochran, 369 U.S. 506, 516, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962)).

The record here is silent. Mr. Robinson did not purport to waive his right to jury proof of aggravating facts beyond a reasonable doubt. He was not advised of his right to have a jury find aggravating factors beyond a reasonable doubt in either the plea statement or the in-court colloquy.

Here, the court found the aggravating factors by a preponderance of the evidence although under Blakely, Mr. Robinson was entitled to have a jury find those factors beyond a reasonable doubt.

> The federal constitution requires any aggravating factors that increase a sentence above the statutory maximum be proven to a jury beyond a reasonable doubt.

Blakely, 124 S.Ct. at 2536 (citing Apprendi, 530 U.S. at 490).

> [I]f the legislature defines some core crime and then provides for increasing punishment of that crime upon

> a finding of some aggravating fact[,] . . . the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.

Apprendi, 530 U.S. at 501 (Thomas J., concurring). Mr. Robinson, however, was never informed of his jury trial right as to the aggravating facts. Thus, Mr. Robinson did not waive this right to have all elements of the aggravated crime found beyond a reasonable doubt. Boykin, 395 U.S. at 242. He could not waive a right he did not know he had. State v. Harris, ___ Wn.2d ___, 99 P.3d 902, 908-09 (2004).

Furthermore, the defendant's "real facts" stipulation under RCW 9.94A.530 does not constitute a knowing and intelligent waiver of his Blakely constitutional rights. On its face, the real facts stipulation merely waives the defendant's statutory right to a bench hearing on disputed sentencing facts, in which Mr. Robinson would have a right to demand proof of those facts to the judge as fact-finder, by a preponderance of the evidence. RCW 9.94A.530(2).[3]

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[3]RCW 9.94A.530(2) provides that the defendant has a right to a bench hearing in which the judge will determine sentencing facts by a preponderance of the evidence.

> In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgement includes not objecting to information stated in

Plainly, this does not satisfy a showing of a valid waiver of the right to jury proof of exceptional sentence facts beyond a reasonable doubt. "The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation." Boykin, 395 U.S. at 242. Prior to Blakely, Washington courts did not question the constitutionality of a "real facts" stipulation because the facts used to support imposition of an exceptional sentence were not viewed to be elements of the crime under Apprendi. In Blakely's aftermath, however, courts have considered and correctly rejected waiver arguments based "real facts"-type stipulations that would drastically expand constitutional waiver jurisprudence. See e.g., State v. Whitley, ___ N.W.2d ___, 2004 WL 1613250 (No. A03-725, Mn. App. 2004) (record did not clearly support determination that appellant understood he had the right to have jury decide whether factors permitting sentence enhancement were proved beyond a reasonable doubt); U.S. v.

> the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence. Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided for in RCW 9.94A.535(2)(d), (e), (g), and (h).

RCW 9.94A.530(2).

Terrell, 2004 U.S. Dist LEXIS 13781 n. 3 (D. Neb. July 22, 2004) ("a defendant [may] waive the right to a jury trial and to consent to factfinding by the court, [but such] judicial factfinding must still satisfy the standard of 'proof beyond a reasonable doubt.' Simply put, the standard of proof is not the defendant's to waive; it is a burden placed on the government, without which a conviction cannot be obtained").

When the defendant's "real facts" sentencing stipulation under RCW 9.94A.530 is assessed in light of the plain language of the stipulation and the statute, and in light of the substantial weight of constitutional jurisprudence, see Boykin; Apprendi; Terrell; Harris, supra, Mr. Robinson could not by executing this stipulation somehow waive his jury trial right to proof of the aggravating factors beyond a reasonable doubt, and thus no valid Blakely waiver occurred.

4. There was no contractual expectation that an exceptional sentence would be imposed, the defendant fully performed his obligations under the plea agreement, and there is no attempt by the defendant to avoid performance of part of his obligations under the agreement, nor is there any frustration of purpose of the plea agreement by virtue of Mr.

Robinson's exercise of his reserved right to appeal an illegal sentence. Mr. Robinson is not seeking to withdraw his plea of guilty to the three counts of vehicular assault. Mr. Robinson's appeal of the legality of his exceptional sentences is brought under his half of the parties' joint reservation of the right to appeal an exceptional sentence as clearly set out in the plea statement. His appeal of his illegal sentence has nothing to do with, and no affect upon, his underlying plea. As he will argue, his argument that the sentence was illegal is not an attempt to partially renege on his plea contract by avoiding or retracting his promise to waive his RCW 9.94A.530 statutory right to demand a bench hearing in which sentencing facts would be determined by the judge under a "preponderance of the evidence" standard. The defendant gave his performance under that promise and as a consequence the State's burden of prosecuting a bench hearing on disputed sentencing facts, under the preponderance standard, was thereby avoided. The stipulation given by the defendant is fully operative, and it is not "diminished" in its value to the State. A criminal defendant's real facts stipulation waiving his RCW 9.94A.530 rights may properly be used by the State to urge imposition of a sentence at the high end of the standard range. However, the RCW

9.94A.530 stipulation never was, never purported to be, and is not now a waiver of Mr. Robinson's Blakely right to jury proof, beyond a reasonable doubt, of facts used to impose a sentence above the standard range.

The State contended in its response to Mr. Robinson's original motion to modify that (1) Mr. Robinson is seeking to be "unilaterally excused" from his real facts stipulation under the plea agreement and that (2) Mr. Robinson is seeking to "partially rescind an integrated contract." Response to Motion to Modify, December 8, 2004, at p. 6.

Both of these contentions are spurious and completely without merit. Mr. Robinson, by pleading guilty, of course waived his right to appeal the entry of judgments of guilty on the offenses of vehicular assault to which he plead guilty. CP 7-30 (statement of defendant, at p. 2). This is not and cannot be disputed.

However, the plea agreement did not contractually grant any promise, or any contractual expectation, of an exceptional sentence to the State of Washington. Indeed, the plea of guilty acknowledged that the "judge does not have to follow anyone's recommendation as to sentence." (Emphasis added.) CP 7-30 (statement of defendant, at p. 5); see RCW 9.94A.432 ([t]he

sentencing judge is not bound by any recommendations contained in an allowed plea agreement"). In addition, the defendant further stated in his plea statement that

> If the judge goes outside the standard range, either I or the State can appeal that sentence.

(Emphasis added.) CP 7-30 (statement of defendant, at p. 5). The plea contract did not promise or guarantee to any party any particular sentence.

In support of its contention that Mr. Robinson is improperly trying to only partially perform his obligations under an integrated contract, the State offered a supplemental statement of authorities following its motion in opposition to the original motion to modify, in which the State cited State v. Hagar, ___ Wn. App. ___, 105 P.3d 65 (COA no. 52809-2, Division One, filed January 24, 2005).

In Hagar, the Court expressly assumed without deciding that a real facts stipulation pursuant to RCW 9.94A.530 does not constitute a valid waiver of the defendant's Blakely/Sixth Amendment right to a jury determination of sentencing facts. Hagar, ___ Wn. App. at ___, 105 P.3d at 67 and n. 6 (citing State v. Harris, ___ Wn.2d at ___, 99 P.3d at 908-09). The Court, however, then ruled that even if the stipulation was not a valid

waiver of the defendant's Sixth Amendment rights, the stipulation was "integral" to the plea agreement as a whole, such that it was an indivisible part of the bargain, meaning that the stipulation was so central a part of the package of benefits negotiated by the State that the defendant could not attempt to divide the stipulation from the rest of the agreement by challenging it alone, rather than challenging the whole plea agreement. Hagar, ___ Wn. App. at ___, 105 P.3d at 67. Thus, if the defendant was not seeking to withdraw his plea or willing to concede that the entire guilty plea was invalid, he therefore had to forego any 'challenge' to the real facts stipulation. Hagar, ___ Wn. App. at ___, 105 P.3d at 67-68.

Of course, the State received the stipulation that it bargained for, and the stipulation had, and has, the same express legal affect it has always had under RCW 9.94A.530, and no one is trying to take the stipulation away from the State or retract the stipulation. For the Hagar Court, however, the defendant's obligation to 'not challenge' the real facts stipulation meant that the defendant had to give the State something more than the benefit of the bargained-for real facts stipulation. Instead, the Hagar Court's conclusion that the stipulation was "integral" to the plea contract meant that the defendant had to give the State the benefit of not just what the

State bargained for, but also what the State hoped and risked ("[the] judge does not have to follow anyone's recommendation as to sentence') that the bargained-for stipulation would (or would not) later ultimately gain them -- i.e., a valid exceptional sentence. (Emphasis added.) CP 7-30 (statement of defendant, at p. 5).

The State's arguments in echo of Hagar must be rejected and to the extent that the Hagar decision supports the State's contentions the decision should be repudiated.

First, under the caselaw cited by the Hagar Court, and under the unchallenged plea documentation in the present case, the real facts stipulation was not "integral" to the plea agreement because there was overwhelming evidence of the opposite intent in the agreement. That is to say, the stipulation was not integral to the contract under the reasoning that it promised a guaranteed result of an exceptional sentence. There was no such promise, guarantee, or reasonable expectation of that result by any party shown in the manifest language of the plea. The Hagar Court stated,

> We start with the observation that Hagar's stipulation to facts was an integral part of a plea agreement that he has not shown to be divisible. Both parties to the agreement received benefits as a part of a package that they negotiated and then presented to the court. Given the stipulation's integral role in the plea agreement, the stipulation and resulting sentence

> cannot be challenged apart from the agreement itself. See State v. Turley, 149 Wn.2d 395, 400-02, 69 P.3d 338 (2003) (plea agreements are contracts and "will be treated as indivisible, absent objective evidence of a contrary intent in the agreement."); United States v. Fotiades-Alexander, 331 F. Supp.2d 350, 354 (E.D.Penn.2004) ("defendant's argument about whether she voluntarily and intelligently 'waived' her Blakely rights relates to the validity of her guilty plea rather than to the court's reliance on the facts admitted by the defendant").

(Footnote omitted and case citations in footnote added.) (Emphasis added.) State v. Hagar, ___ Wn. App. at ___, 105 P.3d at 67 and n. 6.[4]

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[4]The Turley case does not support the Hagar Court's conclusion that a defendant must show the the real facts stipulation was "divisible" from the plea agreement in order to challenge the manifest illegality of his exceptional sentence under Blakely. In Turley, the defendant pleaded guilty to two criminal counts, was affirmatively misadvised of a direct consequence of one of those counts, and sought to set aside his entire guilty plea. Turley, 149 Wn.2d at 396-98. The trial court denied Turley's motion and instead permitted him only to withdraw his plea to the crime about which he had been misadvised. Turley, at 397. The Court of Appeals affirmed and the Supreme Court granted Turley's pro se petition for review. Turley, at 398. In its decision, the Supreme Court expressly stated that it decided only the narrow issue presented by the facts below:

> The sole issue we decide today is whether a trial court may grant or deny a motion to withdraw a plea agreement as to each count separately when the defendant pleaded guilty to multiple counts entered the same day in one agreement. This is an issue of first impression. We answer the question in the negative.

Turley, 149 Wn.2d at 398. The Court's holding similarly reflects the Court's intent to announce a narrow rule:

> We hold that a trial court must treat a plea agreement as indivisible when pleas to multiple counts or charges were made at the same time, described in one document, and accepted in a single proceeding. Absent objective indications to the contrary in the agreement itself, we will not look behind the agreement to attempt to determine divisibility. . . When the defendant can show manifest

In the present case, every objective indication in the record shows that the understanding of the parties was that the State would recommend a certain sentence, but that the sentencing court, pursuant to law, did not have to follow the State's, or anyone's, recommendation, and that the defendant or the State

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> injustice as to one count or charge in an indivisible agreement, the defendant may move to withdraw the plea agreement or have specific performance of the agreement.

Turley, at 400. Turley, therefore, does not support the Hagar Court's conclusion that a defendant in the circumstances of the present case must show the real facts stipulation was "divisible" in order to challenge his illegal sentence.

The case of United States v. Fotiades-Alexander, although not supportive of the proposition for which the Hagar Court cited it, is illuminative of Blakely principles and the issue of waiver. That case involves a defendant who admitted to all the facts necessary for her exceptional sentence when those same facts were presented as part of the factual basis for the plea at her plea hearing, in which she admitted guilt and waived her right to demand proof of the government's criminal charge to a jury beyond a reasonable doubt. Fotiades-Alexander, 331 F.Supp.2d at 352-53. It was in this context that the United States District Court ruled that the defendant's argument that she did not knowingly waive her "Blakely rights" was really only an argument that she did not validly plead guilty at the plea hearing:

> This argument conflates any infirmity which may have attached to her plea if not intelligently and knowingly made with the issue of what facts the court may rely upon to increase the defendant's offense level. To put it another way, the defendant's argument about whether she voluntarily and intelligently "waived" her Blakely rights relates to the validity of her guilty plea rather than to the court's reliance on the facts admitted by the defendant to increase her offense level.

Fotiades-Alexander, at 354. Because Fotiades-Alexander was not arguing n appeal that her guilty plea was invalid, her argument that she did not validly waive her Blakely rights was nothing more than a reformulation of an argument that she was not even making in the first place. Fotiades-Alexander, at 354. The Fotiades-Alexander case does not stand for the proposition that a defendant can only challenge the Blakely adequacy of a real facts stipulation if she also challenges the entire plea agreement.

would be able to appeal an exceptional sentence. The defendant's statement on plea of guilty acknowledged that the "judge does not have to follow anyone's recommendation as to sentence." CP 7-30 (statement of defendant, at p. 5); see RCW 9.94A.432 ([t]he sentencing judge is not bound by any recommendations contained in an allowed plea agreement"). In addition, the defendant further stated in his plea statement that

> If the judge goes outside the standard range, either I or the State can appeal that sentence.

CP 7-30 (statement of defendant, at p. 5). Nobody ever guaranteed the State that an exceptional sentence would be secured, or that if secured it would go unchallenged on appeal under all applicable law. The State never negotiated for a promise that the real facts stipulation would gain the State an unassailable exceptional sentence, and no party purported to grant such a promise. The real facts stipulation in no way constituted such a promise as shown by these objective indications of the parties' intent, and the State's "hope" or even its firm belief that the sentencing court would not reject the State's sentencing recommendation, which occurrence or non-occurrence was expressly within the parties' objectively assumed risks, was not a

contractual "expectation." This Court cannot enforce the subjective hopes of one disappointed party to a contract where the manifested, objective intent of the parties showed there was no promise or condition that such hopes would be realized. When determining the intent of the parties to a contract, the Washington courts do not concern themselves with unexpressed subjective intent, only objective manifestations of intent. State v. Turley, 149 Wn.2d at 400 (citing Wilson Court Ltd. Partnership v. Tony Maroni's, Inc., 134 Wn.2d 692, 699, 952 P.2d 590 (1998)).

However, if the State's argument is that the real facts stipulation was somehow a promise that the stipulation would result in an exceptional sentence, for like reasons that promise was divisible from the plea contract's primary purpose of securing pleas of guilty to the crimes, because any such promise was expressly limited by language establishing that any exceptional sentence was appealable separate and apart from the plea agreement securing the guilty plea to the three counts of vehicular assault. As the trial court correctly advised Mr. Robinson at the plea hearing on March 19, 2003:

> THE COURT: And you will have an opportunity, if the Court sentences you above the standard range, whether it's the State's

> recommendation of their own sentence above the standard range, you will have the right to appeal the sentence only, but that will not take away the fact that you have already pled guilty to this crime. Do you understand that?
>
> THE DEFENDANT: Yes.

(Emphasis added.) 3/19/03 at 7.

Second, and more importantly, it is simply immaterial whether the real facts stipulation was an "integral" part of the plea agreement. There is no need to determine if the real facts stipulation is an integral, divisible, or indivisible part of the plea agreement, because Mr. Robinson fully performed his promise under the real facts stipulation and he is not seeking to divide it from the plea agreement or to unilaterally excuse himself from any obligation under that promise or under the agreement as a whole.

Mr. Robinson offered the detriment of the real facts stipulation and the State received the benefit of that stipulation. RCW 9.94A.530(2) provides:

> In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgment includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence. Facts that establish

> the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided for in RCW 9.94A.535(2)(d), (e), (g), and (h).

(Emphasis added.) RCW 9.94A.530(2). Thus, the form of the detriment the defendant gave, and the benefit the State received, was that the State was relieved from the following burden:

> Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence.

RCW 9.94A.530(2). Just as he gave the State the benefit of securing guilty verdicts without a trial when he plead guilty, by stipulating to real facts under RCW 9.94A.530 Mr. Robinson relieved the State of having to prove alleged sentencing facts in a bench hearing by a preponderance of the evidence.

Mr. Robinson does not challenge the real facts stipulation on appeal. His appellate argument that the sentence was illegal is made under his express reservation of the right to appeal an exceptional sentence. Thus his argument that the stipulation to real facts cannot support an exceptional sentence under Blakely is not an attempt to partially renege on his plea contract by avoiding or retracting the promise to waive his RCW 9.94A.530 statutory

right to demand a bench hearing in which sentencing facts would be determined by the judge under a "preponderance of the evidence" standard. The defendant gave that promise and the State has received his performance under that promise. However, the stipulation is not a waiver of his Blakely right to jury proof of facts used to impose a sentence above the standard range, beyond a reasonable doubt.

The State feels aggrieved, because the United States Supreme Court decided Blakely v. Washington, ___ U.S. ___. Under that controlling authority, the RCW 9.94A.530 real facts stipulation waiving the right to a bench hearing on the sentencing facts does not also suffice as a waiver of the defendant's Sixth Amendment right to demand jury proof of aggravating facts.

If the Court deems it proper to apply contract principles to the plea agreement, see, e.g., State v. Sledge, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997); State v. Wheeler, 95 Wn.2d 799, 803, 631 P.2d 376 (1981), there is no "frustration of purpose" in the fact that the State may not now also secure an exceptional sentence to that plea, imposed from the bench, because the State expressly recognized the sentencing court could do what it wished with regard to sentence, and the State assumed a risk that the court

would reject its recommendation and also assumed the risk the defendant's reserved right to appeal an exceptional sentence could be successful. Application of the contracts doctrine of frustration is a question of law. Washington State Hop Producers, Inc. Liquidation Trust v. Goschie Farms, Inc., 112 Wn.2d 694, 704, 773 P.2d 70 (1989). The Washington Courts apply the doctrine as it is stated in Restatement (Second) of Contracts § 265 (1979). Hop Producers, 112 Wn.2d at 700, 773 P.2d 70. This section, entitled "Discharge by Supervening Frustration," states:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

Restatement (Second) of Contracts § 265 (1979). Comment a to this section gives a detailed explanation of how the rule should be applied. It states, in part:

> The rule stated in this Section sets out the requirements for the discharge of that party's duty. First, the purpose that is frustrated must have been a principal purpose of that party in making the contract. It is not enough that he had in mind some specific object without which he would not have made the contract. The object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense.

> Second, the frustration must be substantial. It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss. The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract. Third, the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made[.]

(Emphasis added.) Restatement (Second) of Contracts § 265 (1979), Comment a (as cited in Felt v. McCarthy, 130 Wn.2d 203, 208, 922 P.2d 90 (1996)).

Here, the State had an object in mind that the real facts stipulation would enable the State to secure an exceptional sentence imposed by the judge after finding aggravating facts by a preponderance of the evidence. It might be argued that the State would not have accepted a guilty plea to the offenses charged absent Mr. Robinson's agreement to real facts. One wonders what additional charges the State could possibly have filed if the defendant had refused to plead guilty to the three counts of vehicular assault, which did not involve the death of any victim and thus could not have been charged as vehicular homicide. But in any event, under the foregoing law, it is not enough to make out frustration of purpose to simply assert that the State subjectively had in mind some specific object -- the hope that the judge would

follow the recommended imposition of an exceptional sentence -- without which it would not have entered into the plea contract. Restatement (Second) of Contracts § 265. The parties negotiated a plea agreement that specifically indicated the actual sentence the court could impose was up to the court, and acknowledged the sentence could not be 'agreed' by the parties so as to bind the court. The statement on plea of guilty noted that the "judge does not have to follow anyone's recommendation as to sentence." (Emphasis added.) CP 7-30 (statement of defendant, at p. 5); RCW 9.94A.432 ([t]he sentencing judge is not bound by any recommendations contained in an allowed plea agreement"). The parties recognized that either party had a right to appeal a sentence outside the standard range. CP 7-30 (statement of defendant, at p. 5). These provisions of the plea indicate without ambiguity that both parties understood that the actual end result at sentencing was out of the parties' control.

Both parties assumed the risk that the sentencing court might ignore the State's recommendation of a 90 month exceptional sentence, and impose a sentence above or below the State's recommendation, or indeed a sentence above, or below, the standard range. Consequently, it cannot be said that the

Blakely decision and the defendant's valid constitutional argument that the real facts stipulation is not a Blakely waiver, represents an occurrence amounting to "frustration . . . so severe that it is not fairly to be regarded as within the risks that he assumed under the contract." (Emphasis added.) Restatement (Second) of Contracts § 265.

The State contends that the defendant's appeal under Blakely is the frustration of an indivisible purpose of the plea agreement and that this requires him to agree to voiding of the entire plea agreement in order to challenge his plainly illegal sentence. This is akin to the customer of a furniture store complaining that he must be given his money back because the coffee table he purchased did not fit through his front door. But the customer in this analogy assumed this risk, absent a showing of some negotiated promise by the store owner that the table would fit through the buyer's door.

Here, both parties to the plea agreement recognized that the "judge does not have to follow anyone's recommendation as to sentence." CP 7-30 (statement of defendant, at p. 5). The defendant in this case could not, of course, successfully move to withdraw his guilty plea on ground that the trial court imposed an

exceptional sentence. Likewise, the State in this case could not complain to the Court of Appeals that the plea was voided if the trial court had refused to impose an exceptional sentence. And if the court had imposed a sentence below the standard range, the State could and probably would have simply exercised the right to appeal that sentence that it reserved to itself. CP 7-30 (statement of defendant, at p. 5) ("either I or the State can appeal that sentence"). Nor could the State have voided the plea if the Court of Appeals had accepted Mr. Robinson's pre-Blakely original appellate argument that the facts did not support the aggravating factors and that the factors did not justify an exceptional sentence. In neither situation could the State plausibly argue that it failed to gain a negotiated benefit of its plea bargain. The State harbored its own unilateral hope that the Court would and could use the real facts stipulation to impose an exceptional sentence from the bench, and relied on its own calculation that the Supreme Court would not apply the clear and straightforward principles of Apprendi to Washington's manifestly unconstitutional exceptional sentence procedures. But Blakely is merely a straightforward application of the very simple Apprendi principle: if a given fact equals more punishment imposed, the defendant has a right to demand jury

proof of that fact beyond a reasonable doubt. The State miscalculated the ultimate later value of the plea bargain it negotiated and presumably it will not do so in future cases, but instead will demand knowing waivers of the right to jury proof of aggravating factors. However, having failed to do so in this case, it cannot seek and this Court should not grant judicial fiat allowing the State to avoid the consequences of their miscalculation and impose a sentence that all parties agree is illegal under Blakely.

The sentencing court used the real facts stipulation to find aggravating factors in support of an exceptional sentence, from the bench, by a preponderance of the evidence. That procedure is illegal and unconstitutional under Blakely v. Washington, ___ U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Exercising the right to appeal an exceptional sentence, which right he expressly reserved under the plea statement, Mr. Robinson has argued that his sentence was, a fortiori, imposed in an unconstitutional manner. He cites in support of that argument the United States Supreme Court case of Blakely v. Washington. Under this controlling authority, the sentence was illegal and must be reversed.

5. The Blakely error is not subject to harmless error analysis. The Blakely error was not harmless. Apprendi/Blakely

errors are not subject to harmless error analysis because such errors are structural. State v. Fero, ___ Wn. App. ___, 104 P.3d 49 (2005). As stated in Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), harmless error cannot be applied to structural errors, which are subject to automatic reversal. Neder, 527 U.S. at 8. Thus this Court should vacate the defendant's sentence consistent with Blakely.

6. On remand for resentencing, the sentencing court may impose only standard range sentences. Mr. Robinson's unconstitutional sentences must be vacated and his case remanded for the imposition of standard range sentences. This Court may not remand for a "sentencing jury" because the SRA contains no such constitutional procedure and a new trial on the elements of aggravated vehicular assault would violate Mr. Robinson's constitutional right to be free from double jeopardy.

(1). If the SRA is interpreted to permit the imposition of an exceptional sentence based upon factors found by the court by a preponderance of the evidence, RCW 9.94A.535 and RCW 9.94A.530(2) are unconstitutional. Washington's exceptional sentence statutes do not comply with the Sixth Amendment. Blakely, 124 S.Ct. at 2538. The SRA permits a judge to impose a

sentence above the standard range based upon facts that are not found by a jury and are not proven beyond a reasonable doubt. RCW 9.94A.530(2); RCW 9.94A.535. RCW 9.94A.535 permits the court to impose a sentence outside the standard range if the court finds "substantial and compelling reasons" to do so and provides an illustrative, non-exclusive list of "aggravating circumstance." By permitting sentences over the standard range based upon "aggravating circumstances" found by a judge, RCW 9.94A.535 is unconstitutional. Blakely, 124 S.Ct. at 2538 (petitioner's sentence unconstitutional). RCW 9.94A.530(2) addresses the sentencing hearing, and provides that when the defendant disputes a fact at sentencing, "the facts shall be deemed proved at the hearing by a preponderance of the evidence." This portion of the statute is unconstitutional in its application to exceptional sentences. The exceptional sentence provisions of RCW 9.94A.535 combined with RCW 9.94A.530(2) thus create an unconstitutional sentencing scheme.

The Kansas Supreme Court declared its exceptional sentence provisions unconstitutional based upon Apprendi, one of the foundations of the Blakely opinion. State v. Gould, 271 Kan. 394, 23 P.3d 801, 814 (2001). At the time, Kansas's determinate

sentencing scheme was remarkably similar to the SRA. See Gould, 23 P.3d at 811-12. The court was permitted to impose an exceptional sentence above the standard range based upon factual findings. Gould, 23 P.3d at 811-12 (citing K.S.A. 2000 supp. 21-4716). The burden of proof was preponderance of the evidence. Gould, 23 P.3d at 812 (citing State v. Spain, 263 Kan. 708, 713, 953 P.2d 1004 (1998)).

In Gould, the defendant had been convicted by a jury of three counts of child abuse and her standard sentence range was 31-32-34 months. Gould, 23 P.3d at 806. The court imposed an upward departure of 136 months because (1) the defendant knew or should have known the victims were particularly vulnerable due to age, infirmity, or reduced physical capacity, (2) the defendant's acts were excessively brutal, and (3) the defendant had a fiduciary relationship with the victims. Id. The State argued that the sentence need not be reversed because there was no dispute that Gould was the mother of the victims or that two of the victims were only 21 days old, supporting two statutory aggravating factors. Id. at 814. The Kansas Court, however, declined to apply principles of harmless error because the sentencing scheme was unconstitutional on its face. "Gould's sentence was imposed

pursuant to an unconstitutional scheme and cannot stand." Id. Accord State v. Santos-Garza, 276 Kan. 27, 72 P.3d 560 (2003) (sentence vacated where defendant stipulated jury would have found aggravating factors beyond a reasonable doubt). Kansas therefore remanded an exceptional sentence for the imposition of a standard range sentence even where the defendant agreed to the upward departure. State v. Cullen, 275 Kan. 56, 60 P.3d 933 (2003). Similarly, here, Mr. Robinson's sentences were imposed pursuant to an unconstitutional scheme, and they cannot stand.

(2). This Court may not remand for a jury trial on "aggravating facts." The superior court's authority to impose a sentence is controlled by statute, in this case the SRA. RCW 9.94A.505(1); State v. Freitag, 127 Wn.2d 141, 144-45, 896 P.2d 1254, 905 P.2d 355 (1995); State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986); State v. Bryan, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980) ("Determination of crimes and punishment has traditionally been a legislative prerogative, subject to only very limited review in the courts"). Accord, City of Spokane v. Marquette, 146 Wn.2d 124, 129, 43 P.3d 502 (2002) (no inherent judicial authority to suspend or defer sentence); Personal Restraint of Sappenfield, 138 Wn.2d

588, 591, 980 P2d 1271 (1999) (authority to impose restitution purely statutory). In the absence of statutory authority authorizing jury determinations of aggravated elements, remand for a new evidentiary hearing or jury trial is inappropriate. See State v. Ford, 137 Wn.2d 472, 484, 973 P.2d 452 (1999) (upholding procedurally defective sentencing hearings would send wrong message to trial courts, defendants, and the public), citing American Bar Association, Standards for Criminal Justice: Sentencing std. 18-5.17, at 206 (3d ed. 1994); State v. Kessler, 73 P.3d 761, 772 (Kan. 2003).

To remand Mr. Robinson's case for a jury determination of whether aggravating circumstances exist would effectively amend the SRA. "Courts do not amend statutes by judicial construction, nor rewrite statutes to avoid difficulties in construing and applying them." Millay v. Cam, 135 Wn.2d 193, 203, 955 P.2d 791 (1998), quoting Salts v. Estes, 133 Wn.2d 160, 170, 943 P.2d 275 (1997) and Applied Industrial Materials Corp. v. Melton, 74 Wn. App. 73, 79, 872 P.2d 87 (1994). Washington courts have "exhibited a long history of restraint in compensating for legislative omissions." State v. Taylor, 97 Wn.2d 724, 728, 649 P.2d 633 (1982). Courts thus do not add to or subtract from the language of statute "unless

imperatively required to make it . . . rational." State v. Edwards, 104 Wn.2d 63, 68, 701 P.2d 508 (1985), quoting Taylor, 97 Wn.2d at 728. This Court should not rewrite the SRA to add a sentencing jury never contemplated by the Legislature. See State v. Groom, 133 Wn.2d 679, 689, 947 P.2d 240 (1997) ("We also note that however much members of this court may think that a statute should be rewritten, it is imperative that we not rewrite statutes to express what we think the law should be. We simply have no such authority.").

These principles of statutory interpretation were applied to Washington's criminal sentencing procedures in State v. Frampton, 95 Wn.2d 469, 479, 627 P.2d 922 (1981) and State v. Martin, 94 Wn.2d 1, 614 P2.d 164 (1980). At the time, Washington's death penalty statute provided that a defendant who pled guilty to first degree murder could not be put to death, but a defendant who exercised his constitutional right to a trial faced the death penalty. The Washington Supreme Court found this statutory system violated due process as it chilled a defendant's rights to plead not guilty and have a jury trial. Frampton, 95 Wn.2d at 479. The State suggested the court adopt an alternative procedure which would permit the State to convene a jury in any capital proceeding,

although the statutes did not permit the State to force the defendant to trial. The Court found it had no independent authority to create a new sentencing procedure, and directed the State to seek relief from the Legislature. Id. at 479.

Mr. Robinson is aware that this Court recently held the sentencing court has "inherent power to supplement the exceptional sentence statutes" and "empanel a jury under CrR 6.16 to determine the facts upon which the court may based an exceptional sentence" on remand, in Harris, 99 P.3d at 911-12. Washington courts, however, may only invoke the court's "inherent authority" when no alternative procedure exists to accomplish the statutory goal. State v. Masangkay, 121 Wn. App. 904, 914, 91 P.2d 140 (2004). A determinate sentencing procedure remains in place in Washington after Blakely. The SRA reserved exceptional sentences for that small minority of cases where a sentence within the standard range would be unjust; exceptional sentences have constituted only a small percentage of Washington sentences. State v.. Breedlove, 138 Wn.2d 298, 307 n.3, 979 P.2d 417 (1999) (in 1996, only 2.3% of sentences above the standard range). The Harris Court's decision to improvise a new jury sentencing system was not necessary for Washington to have a constitutional

sentencing scheme.

In addition, an overriding goal of the SRA is to provide sentencing uniformity by creating standard sentence ranges based upon the seriousness of the offense and the offender's criminal history. RCW 9.94A.101(1), (2), (3). Relying exclusively upon the SRA's constitutional standard range sentencing scheme is more in line with that goal than adding a jury sentencing system never contemplated by the Legislature.

Furthermore, the Harris Court was not addressing an exceptional sentence based only upon the agreement of the parties. Harris, 99 P.3d at 906. In Mr. Robinson's case, a jury would be asked to determine if there the agreed exceptional sentence was consistent with the purposes of the SRA. This is a legal decision juries are ill-equipped to make.

(3). Remand for a "sentencing jury" would violate Mr. Robinson's constitutional right to be free from double jeopardy. The double jeopardy clause of the United States Constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. 5. The Fifth Amendment's double jeopardy protection is applicable to the States through the Fourteenth Amendment. Benton v. Maryland, 395 U.S.

784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). The double jeopardy clause protects against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). The double jeopardy clause was designed to prevent the government, with all its resources and power, from repeatedly attempting to convict an individual for an offense, thereby subjecting him to embarrassment, expense, and anxiety. State v. Roybal, 82 Wn.2d 577, 579, 512 P.2d 718 (1973), citing Green v. United States, 355 U.S. 184, 190, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

Double jeopardy protections thus begin when there has been an event, such as an acquittal or a conviction, that terminates original jeopardy. Richardson v. United States, 468 U.S. 317, 325, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984). When an individual like Mr. Robinson pleads guilty, jeopardy attaches when the court accepts the guilty plea. United States v. Patterson, 381 F.3d 859, 864 (9th Cir. 2004).

To determine if separate prosecutions violate double jeopardy, the courts utilize the Blockburger, or "same elements" test. United States v. Dixon, 509 U.S. 688, 697, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993).

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932); United States v. Dixon, 509 U.S. at 696. Two offenses are the same offense for purposes of a double jeopardy analysis when one offense is necessarily included within the other and, in the prosecution for the greater offense, the defendant could have been convicted of the lesser. Roybal, 82 Wn.2d at 582.

Thus, conviction or acquittal on a lesser included offense bars the government from prosecuting the defendant for the greater offense. Green, 355 U.S. at 190-91. The court found double jeopardy prohibited a second prosecution for stealing an automobile when the defendant has already been convicted of joyriding in Brown v. Ohio, 432 U.S. 161, 169-70, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). And this Court upheld the dismissal of a

negligent homicide prosecution because the defendant had previously been convicted with driving while intoxicated and failure to use due care. State v. Culp, 30 Wn. App. 879, 639 P.2d 766 (1982).

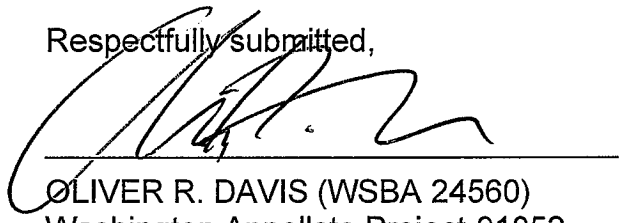
Notwithstanding double jeopardy prohibitions, this Court has remanded cases for jury determinations of aggravating circumstances after finding exceptional sentences violated the Sixth Amendment. State v. Maestas, ___ Wn. App. ___, 101 P.3d 426, 428-30 (2004); Harris, 99 P.3d at 912. The logic of these cases, however, is incorrect because it is based upon the assumption that aggravating factors are not elements of a greater offense. Id. Such reasoning is in direct conflict with Blakely and other United States Supreme Court cases that hold that any fact that increases the maximum sentence to which a defendant is exposed is an element of an aggravated offense that must be found by a jury beyond a reasonable doubt. Blakely, 124 S.Ct. at 2539; Sattazahn v. Pennsylvania, 537 U.S. 101, 111-12, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003) (lead opinion of Scalia, J.); Ring, 536 U.S. at 609; Apprendi, 530 U.S. at 494 n.19.

D. CONCLUSION

For the reasons stated, Mr. Robinson submits this Court must reverse his exceptional sentences and remand for resentencing to standard range sentences.

DATED this 17 day of March, 2005.

Respectfully submitted,



OLIVER R. DAVIS (WSBA 24560)
Washington Appellate Project-91052
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 52447-0-I
	)	
WILLIAM ROBINSON,	)	
	)	
APPELLANT.	)	

DECLARATION OF SERVICE

I, BECKY CROWLEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 17TH DAY OF MARCH, 2005, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF MTION TO MOTIFY** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KING COUNTY PROSECUTOR'S OFFICE
APPELLATE DIVISION
KING COUNTY COURTHOUSE, W-554
516 THIRD AVENUE
SEATTLE, WA 98104

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF MARCH, 2005.

x Becky Crowley

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2005 MAR 17 PM 4:31