

Supreme Court No. 80496-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,  
v.  
TERRANCE TERRIEL POWELL,  
Appellant.

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

The Honorable Ronald Culpepper, Judge

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*Petitioner*  
OPENING BRIEF OF APPELLANT

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RITA J. GRIFFITH  
JOHN C. CAIN  
ERIK L. BAUER  
Attorneys for Appellant

RITA J. GRIFFITH, PLLC  
4616 25th Avenue NE, #453  
Seattle, WA 98105  
(206) 547-1742

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**A. ISSUES ON REVIEW**

1. Is RCW 9.94A.537 an unambiguous statute which, by its plain term, authorizes a judge to impanel a jury to consider aggravating circumstances on remand after reversal of an exceptional sentence only if notice of the aggravating circumstances was given prior to trial?

2. Are broad statements of legislative intent insufficient to impeach or alter the plain terms of a statute, and not retroactive to overrule a prior construction of the statute by the courts?

3. Is notice of the aggravating circumstances in the information constitutionally-mandated, under the state and federal constitutions, because they are functionally equivalents of elements of the crime?

4. Would trial on the aggravating circumstance without retrial on the underlying conviction violate the state and federal prohibitions against double jeopardy by trying the defendant for a more serious offense after conviction on the underlying offense?

5. Would trial for murder with aggravating circumstances which were not charged in the information violate the mandatory joinder rule?

**B. STATEMENT OF THE CASE**

In 1998, a jury convicted Mr. Powell of first degree murder under the "extreme indifference" alternative. CP 22-34. The jury did not find

that he acted with premeditation and acquitted him of the aggravated murder with which he was charged. CP 1-9, 16-21, 22-34, 10-15.

On May 25, 2001, the Court of Appeals, in State v. Powell, COA 23819-5-II, reversed his murder conviction. CP 36-63. Mr. Powell was retried and convicted again of first degree murder, in 2002, and given an exceptional sentence. CP 79-97, 99-108. The Court of Appeals reversed his exceptional sentence under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). In re the Personal Restraint of Powell, 34244-8-II, filed June 29, 2006.<sup>1</sup> CP 111-119, 120-121.

On remand for resentencing, the state served a "Notice to Defense of Aggravating Circumstances Upon Which State Intends to Seek Exceptional Sentence." CP 122-123.

This Court granted discretionary review of the trial court's ruling that "it has authority to impanel a jury to determine the existence of aggravating circumstances that may be considered in imposing an exceptional sentence." CP 127.

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<sup>1</sup> In granting his petition, the Court of Appeals noted that Mr. Powell's Petition for Review was denied on November 3, 2004, so that his direct appeal was not final at the time Blakely was decided. CP 109-110.

C. ARGUMENT

1. UNDER RCW 9.94A.537, UNLESS THE DEFENDANT WAS SERVED WITH NOTICE PRIOR TO TRIAL, A TRIAL COURT DOES NOT HAVE AUTHORITY TO IMPANEL A JURY TO CONSIDER AGGRAVATING CIRCUMSTANCES AFTER REVERSAL OF AN EXCEPTIONAL SENTENCE IMPOSED BY A JUDGE.

RCW 9.94A.537 is an unambiguous statute. By its plain terms, RCW 9.94A.537 sets out the circumstances under which a trial court can impanel a jury to consider aggravating circumstances after a judicially-imposed exceptional sentence is reversed under Blakely v. Washington.

RCW 9.94A.537(2), a new section added in 2007, authorizes the trial court to impanel a jury to consider aggravating factors which were relied on by a judge in imposing a previous exceptional sentence if those aggravating factors are listed in RCW 9.94A.535(3). RCW 9.94A.537(1), which limits consideration of aggravating factors to instances in which the defendant was given notice of the aggravating factors "prior to trial or entry of the guilty plea," was not altered when the new section (2) was added. Thus, RCW 9.94A.537(1) further limits RCW 9.94A.537(2), to those instances in which notice was given prior to trial or to a plea.

Specifically, RCW 9.94A.537(2), which became effective April 18, 2007, provides that:

In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

The legislature did not, however, amend RCW 9.94A.537(1), which provides that:

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

These provisions are not alternatives; they are the first two of six subsections which are interrelated: (1) sets out the general requirement that the state give notice prior to trial of aggravating factors; (2) enables the court to impanel a jury if a new sentencing hearing is required after reversal of an exceptional sentence imposed by a judge; (3) requires a jury determination of facts supporting an aggravating factor; (4) specifies which facts shall be presented to the jury during trial and which in a separate proceeding; (5) provides for the separate proceeding to follow immediately after trial; and (6) requires that the jury find the facts unanimously and beyond a reasonable doubt. There are no "or"s between the sections and obviously it would not make sense to provide for either a jury determination

(3) or proof beyond a reasonable doubt (4). Both are constitutionally mandated under Blakely. Section (4) was, in fact, amended at the time section (2) was added to provide that specified aggravating circumstances shall be presented "during the trial of the alleged crime, *unless the jury has been impaneled solely for resentencing . . .*" at the same time that section 2 was added. (emphasis added).

Moreover, sections (1) and (2) address different concerns. Section (1) addresses the due process requirement of notice to a defendant of what the state will have to prove in order to convict and punish him. This is no less a concern for a person who did not receive notice before an earlier plea or trial -- particularly where a defendant's exposure to an exceptional sentence is tied to the aggravating factors considered by the court at a prior hearing. Section (2) provides a mechanism for submitting aggravating factors by impaneling a jury where other requirements are met.

The way to harmonize the two provisions is to apply section (2) to any case in which notice of aggravating factors was given prior to the initial trial. The legislature distinguished "trial" and "sentencing hearing." Notice is clearly required before "trial," not just before a new "sentencing hearing."

It is well established that the meaning of plain and unambiguous statutory language must be derived from the wording of the statute itself and is not subject to interpretation. State v. Delgado, 148 Wn.2d 723, 730, 63 P.3d 792 (2003); Koenig v. City of Des Moines, 158 Wn.2d 173, 182, 142 P.3d 162 (2000) (plain language doesn't require construction); In re Swanson, 115 Wn.2d 21, 27, 804 P.2d 1 (1990) (citing Human Rights Comm's v. Cheney Sch. Dist. 30, 97 Wn.2d 118, 121, 641 P.2d 163 (1987)). Further, a statute must be construed as a whole to give effect to all of the language and to harmonize all provisions. City of Seattle v. Fontainilla, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996). Sections (1) and (2) are unambiguous and need not be construed; they can be harmonized by limiting the applicability of (2) to instances in which notice was given under (1),

Harmonizing the provisions, so that section (1) acts as a limitation on section (2), is not contrary to the "intent statement" which accompanied the 2007 amendment which added section (2). Laws of Washington 2007 c 205 section 1. That statement indicates that the legislature was addressing the holding of this Court in State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007), "that the changes made to the sentencing reform act concerning exceptional sentences in chapter 69, Laws of 2005 do not apply

to cases where the trial had already begun or guilty pleas had already been entered prior to the effective date of the act." RCW 9.94A.537(1) is part and parcel of the changes in chapter 68, Laws of 2005, which the legislature in its 2007 statement intended to make applicable to convictions which were already entered through trial or plea. What the legislature intended, as set out in its statement, was to make the 2005 amendments retroactively applicable to cases reversed on appeal and to grant the trial court authority to impanel juries after remand for resentencing. The notice requirement must apply equally with the other provisions, such that those who received notice prior to trial or a plea could face a jury on remand for a new sentencing hearing, but those who did not receive notice could not.

Further, broad statements of intent do not impeach or add to a statute's unambiguous operative language. State v. Delgado, 148 Wn.2d at 727-730 (applying the plain language of the "two strikes" definition in declining to rely on the 2001 legislature's contrary "finding" of intent); State v. Smith, 144 Wn.2d 665, 672, 30 P.3d 1245 (2002) (although a statutory note indicated a "general legislative discontent" with a prior Supreme Court decision, it did not change the plain operative language of the relevant statutes); ACCORD, State v. Alvarez, 74 Wn. App. 250, 258,

872 P.2d 1123 (1994), aff'd, 128 Wn.2d 1, 904 P.2d 754 (1995); In re Detention of R.W., 98 Wn. App. 140, 145, 988 P.2d 1034 (1999).

Finally, even if the statement of intent was intended to be remedial, such a remedial statement would not apply retroactively to overrule a prior construction of the statute by this Court. Pillatos, 159 Wn.2d at 473 (citing Overton v. Econ. Assistance Auth., 96 Wn.2d 552, 558, 637 P.2d 652 (1981), and Johnson v. Morris, 87 Wn.2d 922, 926, 557 P.2d 1299 (1976)).

In Pillatos, this Court interpreted the language of former RCW 9.94A.537, as creating a procedure for a jury to consider aggravating factors in support of an exceptional sentence, but only in cases which had not gone to trial or had a guilty plea entered. Pillatos, 159 Wn.2d at 470. Although the legislature amended the statute after Pillatos, it did not alter the notice requirement of section (1).

The requirements of the plain language of RCW 9.94A.537 are clear and unambiguous: a trial court is authorized to impanel a jury for consideration of aggravating factors on remand after reversal under Blakely as long as the defendant received notice, prior to trial, of the aggravating factors the state would seek to establish. Since Mr. Powell did not receive notice of the aggravating factors the state is now seeking to establish, as

required by RCW 9.94A.537(1), the trial court does not have authority to impanel a jury to consider them.

**2. NOTICE OF AGGRAVATING FACTORS IS NOT ONLY STATUTORILY REQUIRED, IT IS CONSTITUTIONALLY MANDATED.**

Notice of aggravating factors is not only required by RCW 9.94A.537(1), notice is required by the federal and state constitutions.<sup>2</sup>

In Gautt v. Lewis, 489 F.3d 993 (9th Cir. 2007), the Ninth Circuit Court of Appeals held that under the Sixth Amendment, as applied to the states through the due process provisions of the Fourteenth Amendment, the right to be informed of the charges against one applies to sentencing enhancements. The court noted that the Sixth Amendment right to notice protects the most fundamental right of persons accused of crime to adequately prepare a defense. Gautt, 489 F.3d at 1002-1003 (citing Cole v. Arkansas, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 2d 644 (1948), In re Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 92 L. Ed. 2d 682 (1948); and Jackson v. Virginia, 443 U.S. 307, 314, 99 S. Ct. 2781, 61 L. Ed.

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<sup>2</sup> The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation." The Washington Constitution, article 1, section 22 provides that "[i]n criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him, [and] to have a copy thereof."

2d 560 (1979)). This Sixth Amendment right applies to the states through the Fourteenth Amendment. Cole, 333 U.S. at 201.

The Gault Court further held that the adequacy of the notice should be determined by looking at the information. Gault, 489 F.3d at 1003 (citing Cole, at 198, and James v. Borg, 24 F.3d 20, 24 (9th Cir. 1994)). The court held that the information must apprise the accused of the elements with sufficient clarity to let the defendant know what he must be prepared to defend against. Gault, at 1003 (citing Givens v. Housewright, 786 F.2d 1378, 1380 (9th Cir. 1986)). Because the defendant was not apprised in the information of the sentencing enhancement, the information was inadequate to charge him with the enhancement.

The holding in Gault is dictated not only by Cole, In re Oliver and Jackson, but by the holding of the United States Court in Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (200), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), that any fact that increases the punishment for a crime, other than the fact of a prior conviction, cannot be insulated from the protections of the Sixth and Fourteenth Amendments by labeling it a "sentencing enhancement." Instead, that fact constitutes an element of a more serious crime and must be proven to a jury by proof beyond a reasonable doubt,

In Apprendi, the Court /observed:

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

Apprendi, 530 U.S. at 494 n. 19 (original emphasis omitted; emphasis added).

In Blakely the Court reinforced Apprendi by emphasizing that Washington's Sentencing Reform Act (SRA) authorized a higher-than-standard-range sentence on the basis of a factual finding only if the fact in question comprised a new element which was not an element of the crime of conviction. Blakely, 542 U.S. at 301-302, 306-307. The additional facts which support an increased sentence, however, are no different in kind than the facts which establish the standard range and are equivalent to elements of the crime.

After Blakely, in Washington v. Recuenco, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2546, 2553, 165 L. Ed. 2d 466 (2006), the Supreme Court premised

its holding that the failure to submit a sentencing enhancement to a jury could be harmless error on its equivalency to an element of the crime:

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

Recuenco, 126 S. Ct. at 2553.

Because the Sixth Amendment right to a jury trial extends to any fact that can increase the length of a sentence, and because the Supreme Court has held that such a fact is the functional equivalent of an element of the offense, the aggravating factors must be charged in the information prior to trial. Absent this notice, an accused person is not apprised of the charges he will face at trial. Any interpretation of RCW 9.94A.537 which permitted a trial court to impanel a jury and try a defendant on aggravating factors of which he had no notice prior to trial would be unconstitutional. Moreover, the Sixth Amendment requires not only that notice be provided

prior to trial or a guilty plea, it requires that the notice be provided in the information. Cole, *supra*; Gault, *supra*.

**3. UNDER WELL SETTLED STATE LAW, AGGRAVATING FACTORS, AS EQUIVALENT TO ELEMENTS OF THE CRIME AND SIMILAR TO OTHER SENTENCE ENHANCEMENTS, MUST BE STATED IN THE INFORMATION.**

Once it is understood that "elements and sentencing factors must be treated the same for Sixth Amendment purposes," Recuenco, at 2553, it follows directly that under state law those factors must be charged in an information. It is well established in Washington that "[a]ll essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). "This conclusion is based on constitutional law and court rule." Kjorsvik, 117 Wn.2d at 97.

Washington courts have, in fact, consistently held that "[w]here a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, due process requires that the issue of whether the factor is present, must be presented to the jury upon proper allegations and a verdict thereon rendered before the court can impose the harsher penalty." State v. Nass, 76 Wn.2d 368, 456 P.2d 347

(1969). "[I]n order to justify the imposition of the higher sentence, it is necessary that the matter of aggravating relied upon as calling for such sentence be charged in the indictment or complaint." Nass, 76 Wn.2d at 370.

Washington law has consistently required the charging of a weapon or firearm enhancement in the information. State v. Frazier, 81 Wn.2d 628, 503 P.2d 1073 (1972); State v. Cosner, 85 Wn.2d 45, 50-51, 530 P.2d 317 (1975). Notice is not enough. In State v. Theroff, 95 Wn.2d 385, 622 P.2d 1240 (1980), the state sought an enhanced sentence based on the use of a deadly weapon during the crime. The state did not include the deadly weapon allegation in the information, but filed a notice of intent to seek the enhanced sentence. Theroff, at 387. This Court held that the state's failure to charge the facts in the information was fatal, despite the separate notice. "When prosecutors seek enhanced penalties, notice of their intent must be set forth in the information." Theroff, at 392.

More recently, in State v. Goodman, 150 Wn.2d 774, 785-786, 83 P.3d 410 (2004), this Court held that the identity of the controlled substance delivered is an element of the crime which must be alleged in the information where the type of drug determined the length of punishment. Axiomatic in Washington law is the requirement that the

charging document must "*allege facts supporting every element of the offense*" in order to be constitutionally sufficient. Goodman, 150 Wn.2d at 785.

Aggravating factors function in the same manner as the weapon enhancement in Theroff or the identity of the controlled substance in Goodman or the requirement of premeditation which separates first and second degree murder. The facts supporting the aggravating factors must be different from the facts which establish the underlying crime; simply charging the elements of the crime does not give notice of facts to support an aggravating factor. State v. Nordby, 106 Wn.2d 514, 518, 723 P.2d 117 (1986); State v. Cardenas, 129 Wn.2d 1, 7, 914 P.2d 57 (1996). The aggravating factors -- just like weapon enhancements, elements of the crime or the nature of the controlled substance which determines the length of sentence -- must be charged in the information and failure to do so precludes a sentence based on that factor. The remedy for the state's failure to charge Mr. Powell with the aggravating factors it seeks to establish at a sentencing hearing is to remand his case for resentencing within the standard range.

4. IT WOULD VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY TO IMPANEL A JURY TO FIND AGGRAVATING FACTORS TO SUPPORT AN EXCEPTIONAL SENTENCE.

Because the aggravating factors are the same as elements of the crime, it would violate the prohibition against double jeopardy to try Mr. Powell for the more serious offense of first degree murder with aggravating circumstances as long as he remains convicted of first degree murder without aggravating circumstances.

Double jeopardy bars subsequent prosecutions for a single act. Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Double jeopardy also bars successive prosecutions for greater and lesser-included offenses. Brown v. Ohio, 432 U.S. at 161, 169-170, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). Mr. Powell was convicted of first degree murder. It would violate double jeopardy to now allow the state to charge, prosecute and convict him of the greater crime of first degree murder with aggravating circumstances.

In addition, retrial on the greater offense is precluded by the mandatory joinder rule. CrR 4.3(1)(b)(3) requires *all* related offenses to be joined for trial. "CrR 4.3(c) was intended as a limit on the prosecutor. As such, it does not differentiate based upon the prosecutor's intent. Whether the prosecutor intends to harass or simply failed to charge the

more serious offense, CrR 4.3(c) applies to require a dismissal of the second prosecution." State v. Dallas, 126 Wn.2d 324, 332, 892 P.2d 10 (1995). Thus, under the plain language of CrR 4.3, *after trial* the state is precluded from amending an information to charge *any* related offense.

In this case, Mr. Powell was originally charged with "AGGRAVATED MURDER IN THE FIRST DEGREE (MURDER IN THE FIRST DEGREE WITH AGGRAVATING CIRCUMSTANCES), with the alleged aggravating circumstance "that the murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge, contrary to RCW 9A.32.030(1)(a) and 10.95.020(7)." This aggravating circumstances, if found by the jury and if the jury determines the murder to be premeditated, results in a mandatory sentence of life without the possibility of parole. The state did not allege any other aggravating factors. The jury did not find Mr. Powell guilty of premeditated murder and therefore acquitted him of murder in the first degree with aggravating circumstances. He should not be tried for aggravating circumstances the state elected not to charge against him.

Trial on the aggravating factors is barred by double jeopardy provisions of the state and federal constitutions.

**D. CONCLUSION**

Mr. Powell respectfully submits that his case should be remanded for imposition of a sentence within the standard range.

DATED this 17<sup>th</sup> day of December, 2007.

Respectfully submitted,

  
\_\_\_\_\_  
Rita J. Griffith, WSBA 14360  
Attorney for Terrance Powell

CERTIFICATE OF SERVICE

I certify that on the 17<sup>th</sup> day of December, 2007, I caused a true and correct copy of Supplemental Brief of Appellant to be served on the following via prepaid first class mail:

Counsel for the Respondent:  
Kathleen Proctor  
Terry Lane  
Michelle Luna-Green  
P. Grace Kingman  
Office of Prosecuting Attorney  
930 Tacoma Ave. S., Rm. 946  
Tacoma, Washington 98402-2171

Erik L. Bauer  
Attorney at Law  
215 Tacoma Avenue S.  
Tacoma, WA 98402-2523

John Cain  
Attorney at Law  
802 N. 2nd Street  
Tacoma, WA 98403-2929

Terrance Powell  
#2007158022  
Pierce County Jail  
910 Tacoma Avenue S.  
Tacoma, WA 98402

Rita J. Griffith DATE 12/17/07 at Seattle, WA