

NO. 80643-8

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STATE OF WASHINGTON

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SUPREME COURT OF THE  
STATE OF WASHINGTON

BY RONALD R. CARPENTER

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STATE OF WASHINGTON, RESPONDENT

v.

COVELL PAUL THOMAS, APPELLANT

Petition for Review from  
Court of Appeals

No. 34339-8

**SUPPLEMENTAL BRIEF OF RESPONDENT**

GERALD A. HORNE  
Prosecuting Attorney

By  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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A. ISSUES PERTAINING TO THE GRANT OF REVIEW.

1. Should this court reject defendant's contention that a person cannot be held accountable for aggravated murder unless the jury determines that he: 1) intended to kill; or 2) committed the actual killing, when it is unsupported by any authority and contradicted by longstanding authority?
2. Should this court reject defendant's contention that the proceedings on remand violated double jeopardy when double jeopardy protections do not apply to non-capital sentencing proceedings?
3. When the procedures employed on remand did not conflict with any legislative enactment and when there is authority by virtue of a statute, court rule, and decisional law to devise procedures to carry out tasks assigned to it, did the trial court act within its authority in allowing defendant to be retried on aggravating circumstances when this Court had authorized retrial on aggravating circumstances?
4. Has defendant failed to show an abuse of discretion in the trial court's denial of his *Batson* challenge as well as any error in the decision below affirming the trial court?

B. STATEMENT OF THE CASE.

This appeal marks the second time this case has been before this court.

The Pierce County Prosecutor's Office charged, COVELL PAUL THOMAS (defendant), with one count of premeditated murder in the first degree plus aggravating circumstances ("aggravated murder in the first degree"), residential burglary, and unlawful possession of a firearm in the first degree. CP 1 -4. The State alleged four aggravating factors. CP 1-4. The matter proceeded to trial; defendant was convicted as charged and the

jury returned a verdict for death. *State v. Thomas*, 150 Wn.2d 821, 830, 83 P.3d 970 (2003). Because of an erroneous accomplice liability instruction this Court vacated the death sentence and the jury's finding of aggravated circumstances, but found the instructional error was harmless as to defendant's convictions for premeditated first degree murder, residential burglary, and firearm possession. *Id.* at 876. This Court remanded the case "for either a new trial on the aggravating factors or resentencing in accordance with [the] opinion." *Id.*; CP 5-77.

On remand the State opted to retry defendant on the aggravating factors, but not to seek the death penalty. The retrial of the aggravating circumstances occurred before the Honorable Sergio Armijo, the same judge that had presided of the original trial. RP 47-48.

There was considerable debate over the content of the instructions to the jury. CP 95-97, 98-119, 137-150, 151-166; RP 2-26, 78-109, 123-151, 1528-1596. Ultimately, the court decided adopt the State's proposal, which was to inform the jury that defendant had been found guilty of premeditated murder in the first degree but to instruct the jury that it was not to "consider the finding of guilt of premeditated murder in the first degree as proof of the aggravating circumstances." RP 62, CP 178-201. The jury was not instructed on or informed of the existence of defendant's convictions for burglary or unlawful possession of a firearm. *Id.*

After hearing the evidence, the jury found the existence of four aggravating circumstances. CP 202. The trial court sentenced defendant

to the mandatory sentence of life without the possibility of parole. CP 205-214. Defendant filed a timely notice of appeal from entry of this judgment. CP 215. The Court of Appeals affirmed the judgment in an unpublished opinion that issued on August 21, 2007. Defendant obtained discretionary review in this court.

For a summary of the evidence presented at the remand hearing, the court is referred to the State's response brief filed below. Respondent's brief at pp. 5-20.

C. ARGUMENT.

1. ALL PARTICIPANTS IN A PREMEDITATED MURDER ARE EQUALLY LIABLE FOR THE SUBSTANTIVE CRIME REGARDLESS OF THE DEGREE OF THEIR PARTICIPATION AND ALL MAY BE HELD ACCOUNTABLE FOR AGGRAVATED MURDER.

A person is legally accountable for the conduct of another person if he is an accomplice to that person in the commission of the crime. *State v. McDonald*, 138 Wn.2d 680, 690, 981 P.2d 443 (1999)(quoting *State v. Davis*, 101 Wn.2d 654, 657, 682 P.2d 883 (1984)); *see also* RCW 9A.08.020. A person is an accomplice to another in the commission of a crime if he or she solicits, commands, encourages, or requests the other person to commit the crime; or if he or she aids or agrees to aid such other person in planning or committing the crime. RCW 9A.08.020(3). An accomplice "need not participate in or have specific knowledge of every element of the crime nor share the same mental state as the principal." *State v. Berube*, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003); *State v.*

*Sweet*, 138 Wn.2d 466, 479, 980 P.2d 1223 (1999). Rather, general knowledge of “the crime” is sufficient, *State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2001); the accomplice need only intend to facilitate the commission of the crime by providing assistance through his presence or act. *Id.* at 502.

The Washington Supreme Court has held repeatedly that a defendant charged with murder in the first degree may be lawfully convicted upon principles of accomplice liability. E.g., *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004); *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2001); *State v. Cronin*, 142 Wn.2d 568, 581-582, 14 P.3d 752 (2001); *State v. Rice*, 120 Wn.2d 549, 844 P.2d 416 (1993); *State v. Hoffman*, 116 Wn.2d 51, 103-104, 804 P.2d 577 (1991); *State v. Guloy*, 104 Wn.2d 412, 413, 705 P.2d 1182 (1985). In all of these cases, the court either explicitly stated that a defendant may be convicted of murder in the first degree as an accomplice; or the court affirmed a conviction for a defendant convicted of murder in the first degree as an accomplice. Thus, it is beyond dispute that in Washington, a person, via accomplice liability, may be properly convicted of the crime of premeditated murder even though the person may not have personally engaged in any premeditation. A person so convicted is not any less guilty of premeditated murder than the person who engaged in the premeditation.

[W]e have made clear the emptiness of any distinction between principal and accomplice liability:

The legislature has said that anyone who participates in the commission of a crime is guilty of the crime and should be charged as a principal, regardless of the degree or nature of his participation. Whether he holds the gun, holds the victim, keeps a lookout, stands by ready to help the assailant, or aids in some other way, he is a participant.

*State v. McDonald*, 138 Wn.2d 680, 981 P.2d 443 (1999), quoting *State v. Carothers*, 84 Wn.2d 256, 264, 525 P.2d 731 (1974).

Applying these principles, when a crime is committed by several participants, every single participant is liable for the nature of the resulting crime and the harm inflicted upon the victim of that crime regardless of which participant is directly responsible because there is no distinction between their culpability under RCW 9A.08.020 for the substantive crime. Notably, in *Roberts*, this Court acknowledged that a person who is an accomplice to premeditated murder in the first degree may be executed in some circumstances. *State v. Roberts*, 142 Wn.2d 471, 502, 14 P.3d 713 (2001).

Permeating many of the arguments raised in the petition for review is an underlying premise that defendant cannot be properly convicted of aggravated murder unless a jury finds that he, and not his accomplice, intended to commit murder or did the actual killing. *See* Petition at pp. 4-10; *see also* Brief of Appellant at pp. 20, 23-24, 27, 29-31, 34, 36. The only authority cited to support this position is a portion of this Court's opinion in the prior appeal. *See* Petition for Review at pp 3-4. The portion of the opinion cited is from the opinion's conclusion summarizing the Court's earlier determination that *Apprendi/Blakely* error was not

subject to harmless error analysis, so while the Court could find the faulty accomplice liability instruction harmless as to the substantive offense under *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), it could not find the instructional error harmless as to the sentencing factors. *Thomas*, 150 Wn.2d at 844-850, 876. The Court's determination that *Apprendi/Blakely* error was not subject to harmless error analysis proved to be erroneous. *State v. Recuenco*, 154 Wn.2d 156, 162, 110 P.3d 188 (2005)(Recuenco I), *reversed*, *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 2553, 165 L. Ed. 2d 466 (2006)(Recuenco II)(*Apprendi/Blakely* error subject to harmless error analysis). This means that the only support defendant has for his contention is a statement by this court based upon an erroneous understanding of the law.

The question of premeditation is an element of the substantive crime of murder in the first degree under RCW 9A.32.030(1)(a). It is not a component of any of the four aggravating circumstances alleged in petitioner's case. *See* RCW 10.95.020(9), (a)(c); CP 202. Defendant's conviction for premeditated murder in the first degree was affirmed in his first appeal. *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004).

The Court of Appeals correctly held that defendant's liability for the crime of premeditated murder in the first degree may not be reconsidered as that is precluded by the law of the case doctrine. The law

of the case doctrine has been codified in RAP 2.5(3)(c)(2).<sup>1</sup> The doctrine has its roots in the Supreme Court decision in *Greene v. Rothschild*, 68 Wn.2d 1, 414 P.2d 1013 (1966); see also *State v. Worl*, 129 Wn.2d 416, 918 P.2d 905 (1996).

Under the doctrine of “law of the case,” as applied in this jurisdiction, the parties, the trial court, and this court are bound by the holdings of the court on a prior appeal until such time as they are “authoritatively overruled.” . . . Such a holding should be overruled if it lays down or tacitly applies a rule of law which is clearly erroneous, and if to apply the doctrine would work a manifest injustice to one party, whereas no corresponding injustice would result to the other party if the erroneous decision should be set aside.

*Greene*, at 10.

In the prior appeal in this case, this Court determined that defendant’s conviction for premeditated murder should be affirmed because the instructional error was harmless beyond a reasonable doubt with regard to the substantive conviction. The evidence showed that defendant initiated the plan, recruited others to help him execute it, thought about killing Geist beforehand, and was known to Geist and could use their friendship to lure him into a trap. As the court concluded: “[Thomas] was so entrenched as a major participant in the murder that his culpability cannot be lessened *even if* his accomplice pulled the trigger.” *State v. Thomas*, 150 Wn.2d at 846 (brackets in original)(emphasis

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<sup>1</sup> (2) Prior appellate court decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court’s opinion of the law at the time of the later review.

added). Defendant presents no argument that the Supreme Court was applying “a rule of law which is clearly erroneous” in this portion of the decision. Thus, defendant’s guilt on the substantive crime of premeditated murder is not subject to relitigation in this appeal under the law of the case doctrine.

Defendant’s liability for premeditated murder in the first degree is beyond dispute; it is also unaffected by whether he was a major participant who engaged in premeditation or a minor player who knew that he would be facilitating the commission of a premeditated murder but did not engage in premeditation or the actual killing himself. On remand defendant was free to argue his theory of the case; defense counsel argued that the jury should conclude that defendant did not do the killing and therefore, none of the aggravators should be applied to him. RP 1643-1645, 1649-1650. The special verdict given to the jury focused on the defendant and did not allow the finding of an aggravating circumstance on the basis of an accomplice’s acts or otherwise mention an accomplice. CP 202. The jury must have rejected the defense arguments as it found the existence of four aggravating circumstances beyond a reasonable doubt were applicable to defendant. CP 202. With the return of this special verdict, defendant was properly convicted of both components of aggravated murder and subject to imposition of a sentence of life without the possibility of parole. *See State v. Roberts*, 142 Wn.2d at 502.

Defendant's contention that he cannot be punished for aggravated murder absent a jury determination that he intended to commit murder or that he was the actual killer should be rejected as meritless.

2. DOUBLE JEOPARDY PROTECTIONS DO NOT APPLY TO NON-CAPITAL SENTENCING PROCEEDINGS AS SENTENCING FACTORS ARE NOT "OFFENSES."

The protection against double jeopardy is found in the Fifth Amendment to the United States Constitution which states: that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb... ." The corresponding provision in the state constitution is found at Const. Art. 1, § 9, which declares: "no person shall be... twice put in jeopardy for the same offense." Washington courts have long held that the language of the state constitution receives the same interpretation as that which the United States Supreme Court gives to the jeopardy provision of the federal constitution. *State v. Eggleston*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (2008)(Case No. 77756-0 issued July 10, 2008), *State v. James*, 36 Wn.2d 882, 897, 221 P. 2d 482 (1950); *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

The United States and Washington constitutions each provide that a defendant cannot be placed in jeopardy twice for the same offense. *State v. Ahluwalia*, 143 Wn.2d 527, 535-36, 22 P.3d 1254 (2001). Accordingly, double jeopardy under either constitution protects the accused against three possible events: 1) a second prosecution following an acquittal; 2) a second prosecution following a conviction; and 3) imposition of multiple

punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

Historically, double jeopardy principles generally do not apply to sentencing matters, except in capital proceedings. *Eggleston, supra*; *Monge v. California*, 524 U.S. 721, 724, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998). The United States Supreme Court concluded that the double jeopardy clause does not preclude retrial on a sentencing allegation when sentencing a defendant convicted of a non-capital offense “because the determinations at issue do not place a defendant in jeopardy for an ‘offense’.” *Monge*, 524 U.S. at 728. The court characterized its holdings in the death penalty sentencing hearings as “a ‘narrow exception’ to the general rule that double jeopardy principles have no application in the sentencing context.” *Monge*, 524 U.S. at 730.

Recently this Court applied these principles to hold that in a retrial of a defendant on the charge of murder (non-capital), the double jeopardy clause did not preclude resubmitting an aggravating factor<sup>2</sup> to the jury on retrial even though an earlier jury had rejected that aggravating factor.

*Eggleston*, \_\_\_ Wn.2d \_\_\_ (Opinion at pp 6-8).

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<sup>2</sup> At the time that the first jury returned the special verdict rejecting the factor, it was an “aggravating circumstance” that would have elevated a conviction for first degree murder to “aggravated murder in the first degree.” The first jury did not return a verdict on murder in the first degree and should not have answered the special verdict which was relevant only if it had found him guilty of that charge. When the special verdict was submitted to the third jury it was to support the finding of an “aggravating factor” that could be used to support an exceptional sentence on a conviction of murder in the second degree.

Also relevant is the United States Supreme Court's decision in a capital case where the double jeopardy clause offers protection in sentencing matters. *Poland v. Arizona*, 476 U.S. 147, 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986). In *Poland*, two defendants were found guilty of first-degree murder and sentenced to death. 476 U.S. at 149. At the sentencing hearing, the State alleged two aggravating circumstances, but the sentencing court found that only one aggravating circumstance was present. The defendants successfully challenged their convictions and death sentences on appeal; on remand, they were again convicted of first degree murder. The prosecution argued the same two aggravating circumstances as in the first trial, plus an additional aggravating circumstance. *Poland*, 476 U.S. at 149-150. The second sentencing court found all three aggravating circumstances were present and sentenced defendants to death. *Id.*

The matter went to the United States Supreme Court on whether the trial judge's rejection in the first trial of one of the aggravating circumstance was an "acquittal" of that circumstance for double jeopardy purposes; the court answered this question in the negative. *Poland*, 476 U.S. at 155-157. The United States Supreme Court does not view each aggravating circumstance as being a separate penalty or offense when the prosecution is required to prove "murder plus aggravating circumstance(s)." Thus, the finding of any particular aggravating circumstance does not of itself "convict" a defendant, and the failure to

find any particular aggravating circumstance does not “acquit” a defendant. In the death context, it is only when there is a determination on the merits that no aggravating circumstance justifying the death penalty applies to defendant’s crime has there been an “acquittal” that would bar a second death sentence proceeding. Applying these principles to the case before the court shows there was no violation of double jeopardy.

a. This Court Did Not Violate Double Jeopardy By Remanding For Retrial Of The Aggravating Circumstances As It Did Not Require A Retrial On A Substantive Offense.

On more than one occasion, this Court has examined the provisions of RCW 10.95 et seq. and construed the nature of these provisions. It is well settled that the determination of the existence of an aggravating factor under RCW 10.95.020 relates to sentencing and is not an element of the offense. *State v. Irizarry*, 111 Wn.2d 591, 593-94, 763 P.2d 432 (1988); *State v. Kincaid*, 103 Wn.2d 304, 312, 692 P.2d 823 (1985). This Court has held that although commonly referred to as “aggravated first degree murder” or “aggravated murder,” Washington’s criminal code does not contain such a crime in and of itself; the crime is premeditated murder in the first degree, RCW 9A.32.030(1)(a), accompanied by the presence of one or more of the statutory aggravating circumstances listed in RCW 10.95.020. *State v. Roberts*, 142 Wn.2d 471, 501, 14 P.3d 713 (2000); *State v. Irizarry*, 111 Wn.2d 591, 593-94, 763 P.2d 432 (1988); *State v. Kincaid*, 103 Wn.2d 304, 312, 692 P.2d 823 (1985). This Court explained it as follows:

In the statutory framework in which the statutory aggravating circumstances now exist, they are not elements of a crime but are “aggravation of penalty” provisions which provide for an increased penalty where the circumstances of the crime aggravate the gravity of the offense. The crime for which the defendant was tried and convicted in connection with the death of his wife was premeditated murder in the first degree, and the jury was correctly instructed as to the elements of that offense.

*Kincaid*, 103 Wn.2d at 312. Once a jury has found a defendant guilty of premeditated murder in the first degree, and the existence of one or more aggravating circumstances in RCW 10.95.020, the sentencing options are narrowed to two – life without possibility of parole, or death. RCW 10.95.030. Under the above well settled case law, there is only one substantive crime at issue in RCW 10.95 et seq. and that is premeditated murder in the first degree.

After the first appeal, this Court remanded the case “for either a new trial on the aggravating factors or resentencing in accordance with [the] opinion.” CP 5-77; *State v. Thomas*, 150 Wn.2d 821, 876, 83 P.3d 970 (2003). The State opted to seek a jury determination of the aggravating factors but did not seek the death penalty upon remand. Even if the State had been seeking the death penalty on remand, this proceeding would not have violated double jeopardy. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003); *Poland v. Arizona*, *supra*. Because the second proceeding was not a capital proceeding, defendant faces an even more insurmountable barrier to raising a double jeopardy claim. Under *Monge* and *Eggleston*, the double jeopardy clause is not applicable to non-capital sentencing proceedings. Defendant cannot

assert a double jeopardy violation because he was back before the court in a sentencing proceeding for a jury to determine aggravating circumstances in a non-capital case –a situation to which the double jeopardy clause does not apply. Thus, double jeopardy principles did not bar a second jury from determining whether aggravating circumstances existed in a non-capital sentencing proceeding.

b. Washington’s Statutory Scheme For Convicting Persons Of Aggravated Murder Satisfies Sixth Amendment Protections Under *Apprendi* And Its Progeny; There Is No Constitutional Necessity For This Court To Encroach Upon Legislative Functions.

Defendant contends that the *Apprendi* line of case have turned sentencing factors into elements of a crime. He asserts that double jeopardy was violated because he was retried on a greater crime – aggravated murder- while there was a valid final conviction on a lesser crime – premeditated murder- in place. *See* Petition at pp. 12-14; *see also State v. Ervin*, 158 Wn.2d 746, 147 P.3d 567 (2006). This argument ignores controlling case law on the nature of “aggravated murder” in Washington and asks this court to intrude into legislative areas when there is no constitutional reason to do so.

In our system of government “the power of punishment is vested in the legislative, not in the judicial department,” and “[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment.” *United States v. Wiltberger*, 18 U.S. 76, 95, 5 L. Ed. 2d 37, 5 Wheat. 76 (1820); *Patterson v. New York*, 432 U.S. 197, 210, 97 S.Ct. 2319, 53 L.

Ed. 2d 281 (1977). Judicial review of legislative enactments is to ensure legislatures do not authorize procedures or manipulate the definitions of crimes in a way that relieves the prosecution of its constitutional obligations to submit each element or each sentencing factor to the jury, or to prove each element or sentencing factor beyond a reasonable doubt. *Jones v. United States*, 526 U.S. 227, 240-241, 119 S. Ct. 1215, 143 L. Ed. 2d 311(1999); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 435 (2002).

The United States Supreme Court's decisions in *Apprendi*, *Ring*, and *Blakely*, hold that the Sixth Amendment right to a jury requires that any fact, other than the fact of a prior conviction, that is used to increase the sentence imposed beyond that which the legislature authorized upon conviction of the crime must be submitted to the jury and proved beyond a reasonable doubt. *Apprendi* and its progeny make it clear that a legislature cannot sidestep the Sixth Amendment's protections by applying a label of "sentencing factor" to a factual determination as opposed to calling it an "an element" of the crime. This line of cases, however, had no impact on how aggravated murder cases were tried in Washington as the jury had always been responsible for finding beyond a reasonable doubt the aggravating circumstances that would increase the penalty imposed for the conviction for premeditated murder in the first degree. *State v.*

*Bartholomew*, 98 Wn. 2d 173, 189, 654 P.2d 1170 (1982), vacated on other grounds, *Washington v. Bartholomew*, 463 U.S. 1203, 103 S. Ct. 3530, 77 L. Ed. 2d 1383 (1983).

The United States Supreme Court did not indicate in any of the *Apprendi* line of cases that the judicial branch was now assuming the legislative function of defining crimes and determining punishments. Courts act properly by reviewing legislative enactments and procedures to ensure compliance with Sixth Amendment protections. When there is no constitutional deficiency in those enactments or procedures, however, a court would violate the separation of powers doctrine and intrude into a legislative function by re-writing the enactment to change a sentencing factor into an element of a substantive crime or to create a new substantive crime where the legislature did not intend one.

Defendant asks this Court to intrude into areas the constitution delegates to the legislative branch and overrule well-settled law in Washington that the existence of an aggravating factor under RCW 10.95.020 relates to sentencing, and is not an element of the offense. He offers no argument that there is a constitutional need for this intrusion into the legislative realm. A criminal defendant's Sixth Amendment rights to a jury have always been protected under Washington's statutory scheme on aggravated murder. When this Court affirmed defendant's conviction of premeditated murder and remanded "for either a new trial on the aggravating factors or resentencing in accordance with [the] opinion" it

did not violate the double jeopardy clause by remanding defendant for a second prosecution on a substantive crime while there was a valid conviction in place. Rather this court remanded for retrial of aggravation of penalty provisions that would affect the length of the sentence to be imposed on the substantive offense of premeditated murder. Under *Monge* and *Eggleston*, this does not violate double jeopardy.

3. THE TRIAL COURT HAD THE AUTHORITY TO FASHION PROCEDURES TO ALLOW RETRIAL OF THE AGGRAVATING CIRCUMSTANCES.

A court is not without authority to devise procedures to carry out the tasks assigned to it. RCW 2.28.150 provides that:

When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.

In conjunction with this statutory authority, the court rules provide guidance to the superior court on how to instruct a jury regarding special findings or verdicts. First, the criminal rules require the court to provide “a jury” when the defendant has a right to a jury trial. CrR 6.1(a) (“Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court.”). The criminal court rules further allow the court to submit special verdict forms to the jury regarding aggravating circumstances or other necessary factual determinations:

Special Findings. The court may submit to the jury forms for such special findings which may be required or authorized by law. The court shall give such instruction as may be necessary to enable the jury both to make these special findings or verdicts and to render a general verdict.

CrR 6.16(b).

Previous appellate court decisions have required the trial court to submit special findings to the jury in a variety of contexts. *See State v. Roberts*, 142 Wn.2d 471, 509 n.12, 14 P.3d 713 (2000) (death penalty case involving accomplice liability issues, jury should be presented with special interrogatories concerning defendant's level of involvement); *State v. Manuel*, 94 Wn.2d 695, 700, 619 P.2d 977 (1980)(when defendant seeks reimbursement for self-defense, special interrogatories should be submitted to jury). *See also United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004)(post-*Blakely* holding that federal district courts can impanel juries to decide facts concerning sentencing enhancements despite absence of federal sentencing statute explicitly providing for such a procedure).

Moreover, Washington case law recognizes that when a defendant has a constitutional right to a jury, a jury should be impaneled regardless of whether the right to jury has been incorporated into a statute. For example, Washington's habitual offender statute, RCW 9.92.030, was amended in 1909 to delete the requirement that a jury decide the defendant's habitual offender status. Despite this deletion of the statutory authority, trial courts regularly impaneled juries to make such determinations for over seventy years. *See State v. Smith*, 150 Wn.2d

135, 144, 75 P.3d 934 (2003); *State v. Courser*, 199 Wash. 559, 560, 92 P.2d 264 (1939); *State v. Fowler*, 187 Wash. 450, 60 P.2d 83 (1936). In 1940, the Washington Supreme Court held that there was a constitutional right to a jury in habitual offender proceedings. *State v. Furth*, 5 Wn.2d 1, 104 P.2d 925 (1940), *overruled by*, *State v. Smith*, 150 Wn.2d 135, 75 P.3d 934 (2003). Even though the statute was not amended to conform to the holding in *Furth*, Washington courts continued to recognize that it had the power to impanel juries for habitual offender proceedings. *See State v. Smith*, 150 Wn.2d 135, 144, 75 P.3d 934 (2003).

Similarly, the school zone/bus stop sentencing enhancements set forth in RCW 69.50.435 make no specific provision for impaneling a jury to decide whether the facts support the enhancement. Yet there has been no doubt that Washington courts have the authority to instruct the jury and provide special verdict forms concerning the enhancement. *State v. Becker*, 132 Wn.2d 54, 61, 935 P.2d 1321 (1997).

In *Hawkins v. Rhay*, this Court found the improper exclusion of jurors for cause due to their opinions on the death penalty, mandated a new sentencing hearing, but not a new guilt phase. 78 Wn.2d 389, 399, 474 P.2d 557 (1970). The court observed that while there was no statutory framework to order a new trial on only the penalty phase, doing so would satisfy the intent of the legislature. *Id.* at 399-400, citing *State v. Davis*, 6 Wn.2d 696, 108 P.2d 641 (1940); *State v. Todd*, 78 Wn.2d 362, 474 P.2d 542 (1970).

The statutory scheme under RCW 10.95 et seq. is silent as to when the jury should determine the existence of the aggravating circumstances, other than to indicate that this determination occurs prior to the special sentencing proceeding. *See* RCW 10.95.020 and 10.95.050(1). While this Court has indicated that aggravating circumstances should be proved in the guilt phase of the proceedings, this procedure was not statutorily mandated. *See State v. Bartholomew, supra*, 98 Wn. 2d at 189. For the most part the provisions of RCW 10.95 et seq. are only applicable once a criminal defendant has been convicted of premeditated murder and a jury has found the existence of aggravating circumstances.

In the first appeal of this case, this Court ruled that a defendant may face a hearing where the existence of aggravating circumstance is put to a new jury when the premeditated murder conviction is upheld on appeal but the finding of an aggravating circumstance is reversed due to trial error. *State v. Thomas*, 150 Wn.2d 821, 831, 876, 83 P.3d 970 (2004)(affirming Thomas's murder conviction, but reversing the death sentence and remanding "for either a new trial on the aggravating circumstances or for resentencing in accordance with this opinion."). As the decision in *Thomas* indicates, appellate review may create a situation where a determination of aggravating factors, but not of guilt on the substantive crime, is submitted to a jury on remand. Such a procedure does not contradict any portion of RCW 10.95. Rather, it facilitates the

overall statutory scheme by creating a procedure to handle a situation where the statutes are silent.

Essentially, defendant asserts that this Court did not know what it was doing when it remanded for a new trial on the aggravating factors as such a procedure is not authorized. As articulated in the above cited law, there is considerable authority that the court may impanel a jury when it has before it an issue that must be decided by a jury. There is statutory authority in RCW 2.28.150; authority under the court rules-CrR 6.16(b) and the considerable case law noted above. The actions of the court below were consistent with the authority given it under these provisions. Certainly, a trial court should feel empowered to resubmit the aggravating factors to a jury when the Supreme Court has expressly indicated that such a procedure was permissible in its appellate opinion in the same case. 150 Wn.2d at 876.

Defendant relies upon the recent Washington Supreme Court decision in *State v. Hughes*, 154 Wn.2d 118, 126, 110 P.3d 192 (2005). *Hughes* was a consolidated appeal of three defendants who each received exceptional sentences based on aggravating factors proved to the court, not a jury. While their cases were on appeal, the United States Supreme Court issued the decision in *Blakely* and each of the defendants' sentences had to be vacated. The *Hughes* court concluded that a jury could not be impaneled on remand to find aggravating factors warranting an enhanced sentence because the SRA did not provide for such a mechanism; the court

opted not to create a procedure out of “whole cloth.” *Id.* at 151-152. The court in *Hughes* held that the proper remedy in this circumstance is vacation of the sentence and remand for imposition of a standard range sentence. *Id.* at 126, 154.

Defendant argues that under *Hughes*, the trial court exceeded its authority by impaneling a jury to consider whether aggravating factors existed for aggravated murder. The defendant reads more into *Hughes* than is warranted. *Hughes* is not the absolute prohibition on judicially implied procedures for imposing sentence enhancements that defendant claims. In *Hughes*, this Court considered the statutory procedure for imposition of exceptional sentences. The Legislature had not failed to provide a procedure; it had instead specifically provided that a judge, not a jury, must find the facts to impose such a sentence. *Hughes*, 154 Wn.2d at 148-49, 151. When it declared the Legislature’s specified procedure unconstitutional because a jury must instead find those facts, the Court was unwilling to create a procedure completely opposite from that created by the Legislature. *Hughes*, 154 Wn.2d at 150, 151-52.

Here, defendant’s situation is different. He does not claim that the Legislature created a system inconsistent with that used by the trial court in his case. Washington law has always required a jury to find the existence of aggravating circumstance for aggravated murder. The procedures used on remand do not conflict with this longstanding practice. Even under *Hughes*, courts were allowed to “imply a necessary

procedure” when “a statute merely is silent or ambiguous.” *Hughes*, 154 Wn.2d at 151.

Defendant also contends that nothing in RCW 10.95 et. seq. provides for the procedure employed by the trial court on remand. This is not surprising. Except for RCW 10.94.040 which sets forth the procedure for filing a notice of special sentencing proceeding, the provisions of RCW 10.95 et. seq. discuss the procedures to be employed after a criminal defendant has been found guilty of both components of “aggravated murder” – premeditated murder in the first degree and one or more aggravating circumstances. Once the Supreme Court vacated the finding of aggravating circumstances on direct appeal and remanded it to the trial court, defendant’s case was not yet under the provisions of RCW 10.95 pertaining to special sentencing procedures.

This Court held that the State could retry defendant on the aggravating circumstances; the trial court employed proper procedures to carry out this directive. The trial court did not act without authority.

4. THE COURT IS REFERRED TO THE BRIEF FILED BELOW FOR LAW AND ARGUMENT PERTAINING TO THE DENIAL OF THE DEFENSE BATSON CHALLENGE AND THE ARGUMENT THAT THE INSTRUCTIONS CREATED A MANDATORY PRESUMPTION OF GUILT.

Due to limitations on the length of a supplemental brief, the State refers the court to the brief filed below for law and argument regarding whether the instruction created a mandatory presumption of guilt and whether defendant’s *Batson* challenge was properly denied. Respondent’s

brief filed below at pp. 51-57, 65-73. With regard to the *Batson* issue, since that brief was filed, this court addressed whether the removal of the sole remaining venire person from a constitutionally cognizable group is sufficient to establish a prima facie case of discrimination. *State v. Hicks*, 163 Wn.2d 477, 181 P.3d 831 (2008). This court held that trial courts “*may*, in their discretion, recognize a prima facie case in such instances[,]” but that they are not required to do so. *Hicks*, 163 Wn.2d at 490 (emphasis in original).

As defendant has failed to demonstrate any error in the Court of Appeals decision below with regard to these two issues, the decisions below should be affirmed.

D. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the decision of the Court of Appeals.

DATED: July 18, 2008.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney



KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/18/08  
Date Signature