

55364-0

55364-0

81393-1

No. 55364-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT L. VANCE,

Appellant.

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2007 APR 25 PM 4:51

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

APPELLANT'S SECOND SUPPLEMENTAL BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. SUPPLEMENTAL STATEMENT OF THE CASE..... 1

B. SUPPLEMENTAL ARGUMENT..... 4

THE EXCEPTIONAL SENTENCE MUST BE REVERSED AND
REMANDED FOR IMPOSITION OF A SENTENCE WITHIN
THE STANDARD RANGE 4

1. The exceptional sentence violated Vance’s Sixth and
Fourteenth Amendment rights 5

2. The error in imposing the exceptional sentence was not
harmless 9

 a. Harmless error analysis is impossible where it involves
 an inquiry that cannot take place under state law..... 10

 b. The error in imposing punishment for the greater offense
 cannot be harmless where the State failed to charge the
 aggravating factor in the information 12

 i. The exceptional sentence aggravating factor was an
 element of a greater criminal offense..... 13

 ii. As a matter of state law, the State must include every
 element of the offense in the information 18

 iii. Vance must be resentenced within the standard
 range..... 21

 c. The state constitutional right to a jury trial does not permit
 harmless error review based on the failure to submit an
 element of a crime to the jury 22

 d. The error in failing to submit the element to the jury is not
 harmless under the facts of this case 25

3. The State may not seek to obtain a second conviction on the aggravating factor on remand	26
a. There is no state statute that would authorize the court to convene a jury on remand	26
b. The Double Jeopardy Clause prevents retrial on the aggravating factor.....	28
c. Retrial on the greater offense is precluded by the mandatory joinder rule.....	29
4. The exceptional sentence must be reversed and remanded for imposition of a sentence within the standard range.....	30
C. <u>CONCLUSION</u>	31

TABLE OF AUTHORITIES

Constitutional Provisions

Const. art. 1, § 21	22, 23, 25
Const. art. 1, § 22	29
U.S. Const. amend. 14	29
U.S. Const. amend. 6	9, 13, 17, 22, 24, 25

Washington Supreme Court Cases

<u>Geschwind v. Flanagan</u> , 121 Wn.2d 833, 854 P.2d 1061 (1993) ..	24
<u>In re Pers. Restraint of VanDelft</u> , 158 Wn.2d 731, 147 P.3d 573 (2006).....	3, 5, 6, 7, 8, 32
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	29
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1970).....	29
<u>McClaine v. Territory of Washington</u> , 1 Wash. 345, 25 P. 453 (1890).....	25
<u>Pasco v. Mace</u> , 98 Wn.2d 87, 653 P.2d 618 (1982)	22, 23
<u>State v. Cardenas</u> , 129 Wn.2d 1, 914 P.2d 57 (1996).....	21
<u>State v. Cosner</u> , 85 Wn.2d 45, 530 P.2d 317 (1975).....	19
<u>State v. Cubias</u> , 155 Wn.2d 549, 120 P.3d 929 (2005)	7
<u>State v. Dallas</u> , 126 Wn.2d 324, 892 P.2d 1082 (1995)	31
<u>State v. Frazier</u> , 81 Wn.2d 628, 503 P.2d 1073 (1972)	19, 20
<u>State v. Goodman</u> , 150 Wn.2d 774, 83 P.3d 410 (2004).....	20, 21

<u>State v. Gore</u> , 143 Wn.2d 288, 21 P.3d 262 (2001)	16
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980)	29
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986)	23
<u>State v. Hughes</u> , 154 Wn.2d 118, 110 P.3d 192 (2005).....	6, 7, 8, 9, 11, 26, 28, 32
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	18
<u>State v. Lane</u> , 40 Wn.2d 734, 246 P.2d 474 (1952)	24
<u>State v. Nass</u> , 76 Wn.2d 368, 456 P.2d 347 (1969)	19
<u>State v. Nordby</u> , 106 Wn.2d 514, 723 P.2d 117 (1986).....	21
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	23
<u>State v. Schaaf</u> , 109 Wn.2d 1, 743 P.2d 240 (1987)	23, 24
<u>State v. Smith</u> , 150 Wn.2d 135, 75 P.2d 934 (2003)	23, 24
<u>State v. Souza</u> , 60 Wn. App. 534, 805 P.2d 237 (1991).....	30
<u>State v. Stegall</u> , 124 Wn.2d 719, 881 P.2d 979 (1994)	22, 23
<u>State v. Strasburg</u> , 60 Wash. 106, 110 P. 1020 (1910)	22, 24
<u>State v. Theroff</u> , 95 Wn.2d 385, 622 P.2d 1240 (1980)	20, 21

United States Supreme Court Cases

<u>Blockburger v. United States</u> , 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).....	30
<u>Brown v. Ohio</u> , 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).....	26, 31
<u>Burks v. United States</u> , 437 U.S. 1, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978).....	30

<u>Duncan v. Louisiana</u> , 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).....	17
<u>Hudson v. Louisiana</u> , 450 U.S. 40, 67 L. Ed. 2d 30, 101 S. Ct. 970 (1981).....	30
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	17
<u>Jones v. United States</u> , 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).....	13
<u>Neder v. United States</u> , 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).....	16, 26
<u>Washington v. Recuenco</u> , __ U.S. __, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).....	3, 9, 10, 13, 16

Statutes

Former RCW 9.41.025	20
Former RCW 9.94A.535(2)(i) (2003)	5
Former RCW 9.95.040	20
Laws of 2005, ch. 68	27
RCW 9.94A.030	8
RCW 9.94A.535	1, 2, 5, 7, 8
RCW 9.94A.589	5, 6, 7

Rules

CrR 4.3.....	31
CrR 4.3.1.....	31

A. SUPPLEMENTAL STATEMENT OF THE CASE

In July 2003, Robert Vance was found guilty by a jury of three counts of first degree child molestation, two counts of second degree child molestation, and three counts of communication with a minor for immoral purposes. CP 19. At his initial sentencing, the court found Vance was a persistent offender and sentenced him to life without the possibility of early release. CP 56. On appeal, this Court reversed the persistent offender sentence and remanded for resentencing. 122 Wn. App. 1040, 2004 Wash. App. LEXIS 1710 (No 53127-1, July 26, 2004).

Vance was resentenced on October 29, 2004. The sentencing court found that, based on Vance's two prior felony convictions and multiple current offenses, his offender score was a "27." CP 20-21, 33. The standard sentence range was 149-198 months. CP 21. The court imposed an exceptional sentence of 198 months on each of the three first degree child molestation counts, to run consecutively to each other and concurrently with the other counts, for a total of 594 months confinement. RP 16-17; CP 24, 33.

In imposing the exceptional sentence, the court relied upon the aggravating factor set forth in former RCW 9.94A.535(2)(i)

(2003). RP 15-16; CP 21, 32-33. In its findings of fact and conclusions of law, the court found,

The defendant's [offender] score, along with the presumption for concurrent sentences in the Sentencing Reform Act, would result in the defendant receiving no actual sanction for many of the current offenses if he were to receive a standard range sentence in this cause. As a result, a standard range sentence would result in the defendant receiving a number of 'free crimes' as explained in State v. Stephens, 116 Wn.2d 238 (1991). Therefore, the Court finds an exceptional sentence above the standard range is justified pursuant to the operation of the multiple offense policy of RCW 9.94A.535(2)(i) because the presumptive standard range sentence would be clearly too lenient in light of the purposes of the Sentencing Reform Act.

CP 33.¹

At no point prior to or during trial did the State seek to amend the information to include the above allegation. Moreover, Vance disputed the contention that a standard-range sentence would be clearly too lenient and did not waive his right to have a jury determine the fact. See, e.g., 10/29/04RP 11-13 (objecting to exceptional sentence).

Vance again appealed, arguing his exceptional sentence violated his Sixth and Fourteenth Amendment rights as set forth in

¹ A copy of the sentencing court's findings of fact and conclusions of law is attached as Appendix A.

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 1531, 159 L.Ed.2d 403 (2004). This Court disagreed, holding that Blakely does not apply to an exceptional sentence imposed as consecutive sentences, so long as the sentence on each individual count is within the standard range. State v. Vance, 2006 Wash. App. LEXIS 88 (No. 55364-0-I, Jan. 23, 2006).

Vance filed a petition for review in the Washington Supreme Court. On March 7, 2007, the Supreme Court granted the petition and remanded to this Court for reconsideration in light of In re Pers. Restraint of VanDelft, 158 Wn.2d 731, 147 P.3d 573 (2006).²

On March 29, 2007, Commissioner Mary Neel issued an order requiring the parties to file supplemental briefs addressing the impact of VanDelft, 158 Wn.2d 731; Washington v. Recuenco, ___ U.S. ___, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006); and State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007).³

² A copy of the Supreme Court's order is attached as Appendix B.

³ A copy of Commissioner Neel's order is attached as Appendix C.

B. SUPPLEMENTAL ARGUMENT

THE EXCEPTIONAL SENTENCE MUST BE REVERSED
AND REMANDED FOR IMPOSITION OF A SENTENCE
WITHIN THE STANDARD RANGE

Vance's exceptional sentence violated his constitutional rights to a jury trial and to due process of law as set forth in Blakely. The Constitution required a jury, rather than the judge, find the aggravating factor beyond a reasonable doubt. As set forth below, this error in imposing the exceptional sentence cannot be harmless, because: (1) harmless error analysis would involve an inquiry that cannot take place under state law; (2) the State failed to charge the aggravating factor in the information; (3) the state constitutional right to a jury trial does not permit harmless error review based on the failure to submit an element of a crime to the jury; and (4) the error was not harmless under the facts of the case. Moreover, the State may not attempt to obtain a second conviction on the aggravating factor on remand because: (1) there is no statute authorizing a procedure by which the aggravating factor could be submitted to a jury; (2) permitting the State to retry Vance for the greater offense would violate double jeopardy; and (3) the rule of mandatory joinder precludes retrial on the greater offense. In sum,

Vance's exceptional sentence must be reversed and remanded for imposition of a sentence within the standard range.

1. The exceptional sentence violated Vance's Sixth and Fourteenth Amendment rights. The Supreme Court's decision in VanDelft requires this Court conclude Vance received an exceptional sentence that violated his constitutional rights to a jury trial and to due process of law.

At the time Vance was resentenced in October 2004, the statute provided the court could impose an exceptional sentence above the standard range if the court found by a preponderance of the evidence that "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter." Former RCW 9.94A.535(2)(i) (2003). Relying upon that statutory aggravating factor, the sentencing court in this case found that, as a result of the multiple offense policy of the SRA, a sentence within the standard range would be "clearly too lenient in light of the purposes of the [SRA]." CP 33.

In State v. Hughes, the Washington Supreme Court ruled "[t]he conclusion that allowing a current offense to go unpunished is clearly too lenient is a factual determination that *cannot* be made by

the trial court following Blakely.” 154 Wn.2d 118, 140, 110 P.3d 192 (2005). Accordingly, the Hughes court made clear that a sentencing court may not impose an exceptional sentence based upon a judicial finding of this aggravating factor.

In VanDelft, as in this case, the sentencing court imposed an exceptional sentence in the form of consecutive sentences based on its finding that concurrent sentencing would “fail to hold [VanDelft] accountable for all of the crimes for which he was convicted.” Id. at 739-40. The Supreme Court reiterated its holding in Hughes that this “clearly too lenient” aggravating factor must be found by a jury and not by a judge under Blakely. 158 Wn.2d at 743. The issue in VanDelft was whether an exceptional sentence imposed in the form of consecutive sentences, where each individual sentence was within the standard range, was subject to the Blakely rule.

The VanDelft court answered that question in the affirmative. The court noted that RCW 9.94A.589 requires a sentence for two or more current offenses, which are not serious violent offenses arising from separate and distinct criminal conduct, be served concurrently. Id. at 738. Consecutive sentences for crimes that are not serious violent offenses may be imposed only if the court

imposes an exceptional sentence pursuant to the procedures set forth in RCW 9.94A.535. Id. at 738-39 (citing RCW 9.94A.589(1)(a)). RCW 9.94A.535, in turn, affirms that a departure from the presumption of concurrent sentences for nonserious felonies is an exceptional sentence. Id. at 739.

Because the crime at issue in VanDelft was not a serious violent offense, the Supreme Court concluded the consecutive sentence amounted to an exceptional sentence that was subject to the Blakely rule. Id. at 742-43. Moreover, because the exceptional sentence rested on a judge's, rather than a jury's, finding that a standard range sentence would be clearly too lenient, the sentence violated both Blakely and Hughes. Id. at 743.

The VanDelft court distinguished its holding in State v. Cubias, which allowed the trial court to impose consecutive sentences without a jury finding when the offenses were serious violent felonies. Id. at 740-43 (citing State v. Cubias, 155 Wn.2d 549, 120 P.3d 929 (2005)). The VanDelft court reasoned Blakely did not apply to the Cubias scenario, because RCW 9.94A.589(1)(b) created a presumption that consecutive sentences would be imposed when the charges arise from separate and distinct criminal conduct. 158 Wn.2d at 740-41. In contrast, RCW

9.94A.589(1)(a) “presumes sentences will be served concurrently and the presumption can be overcome only by a finding of an aggravating factor under RCW 9.94A.535.” Id. at 741. Accordingly, a Blakely violation occurs when an exceptional sentence is imposed under RCW 9.94A.589(1)(a) and RCW 9.94A.535, because “[t]he trial judge’s findings operate[] to elevate the punishment for a nonserious violent offense to the realm of punishment for serious violent offenses based on facts not reflected in the jury’s verdict.” Id. at 742.

VanDelft is indistinguishable from Vance’s case. Here, the sentencing court ordered the sentences for each of the three first degree child molestation counts to run consecutively to each other and concurrently with the other counts. But first degree child molestation is not a serious violent offense as defined by RCW 9.94A.030(41). Thus, the consecutive sentences amounted to an exceptional sentence. VanDelft, 158 Wn.2d at 742-43. Moreover, because the exceptional sentence rested on a judge’s, rather than a jury’s, finding that a standard range sentence would be clearly too lenient, the sentence violated both Blakely and Hughes. Id. at 743.

The VanDelft court reversed the exceptional sentence and remanded for resentencing within the standard range, that is, for

imposition of a sentence that was concurrent with the other counts.

Id. That is the remedy that must be applied in Vance's case.

2. The error in imposing the exceptional sentence was not harmless. In Hughes, the Supreme Court held that Blakely violations cannot be harmless error. 154 Wn.2d 118. Although the United States held in Washington v. Recuenco, ___ U.S. ___, 126 S.Ct. 2546, 2553, 165 L.Ed.2d 466 (2006), that "failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error," but could be harmless under the Sixth Amendment, Recuenco did not determine state law. Instead, Recuenco left open the question of whether harmless error analysis is possible for a Blakely error based on state law considerations.

For the reasons set forth below, this Court should conclude, as a matter of state law, that harmless error analysis is improper where the Legislature did not authorize a procedure that permitted submitting the allegation to a jury utilizing a beyond a reasonable doubt standard, and where the State did not charge the aggravating factor in the information. Even if this Court were to find that state law permits harmless error analysis, the error was not harmless beyond a reasonable doubt under the facts of this case.

a. Harmless error analysis is impossible where it involves an inquiry that cannot take place under state law. Recuenco's holding is narrow: Failing to submit a sentencing factor to a jury, which is no different from failing to submit any other element to the jury, is not structural error. Stated conversely, some Blakely errors can be harmless as a matter of federal constitutional law.

What Recuenco did not, and could not, reach is whether such an error is or can ever be harmless based on state law. Recuenco, 126 S.Ct. at 2551 (“Thus, we need not resolve this open question of Washington law.”); Id. at 2551 n.1 (“Respondent’s argument that, as a matter of *state* law, the [Blakely] error was not harmless remains open to him on remand.”). As a matter of state law, this Court cannot apply the harmless-error doctrine in this case, as doing so would be to allow the State to obtain a result it could not have obtained in the first instance.

The harmless error question posed in Recuenco -- whether, if properly instructed, a jury would have found the requisite element(s) beyond a reasonable doubt -- cannot be answered in this case. That is because at the time of Vance’s trial, no procedure existed that would have allowed a jury to make the

requisite finding. Not only was no instruction, interrogatory, or special verdict form submitted to the jury on the aggravating factor, doing so would have violated state law.

In Hughes, the Supreme Court held that because state statute designates that a judge must decide the existence of aggravating factors using a preponderance standard, a court cannot direct a jury on remand to find those same facts using a reasonable doubt standard. 154 Wn.2d at 151-52. The authority to create a procedure to empanel a jury to consider aggravating factors resides wholly with the Legislature. Id. Thus, courts do not have authority to create such a procedure, as doing so would usurp the power of the Legislature. Id.

In State v. Pillatos, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007), the court reaffirmed its holding in Hughes that “trial courts do not have inherent authority to empanel sentencing juries.” Moreover, the Pillatos court concluded the logic that precludes a trial court from submitting aggravating factors to a jury on remand for re-sentencing, also precludes the court from doing so in the first instance. Id. at 469-70.

Hughes and Pillatos make plain that because state statute designates that a judge must decide the existence of aggravating

factors using a preponderance standard, a court cannot direct a jury to find those same facts using a reasonable doubt standard.

Thus, it necessarily follows that the question of harmless error does not arise here because there simply was no procedure under which an aggravating factor could have been constitutionally submitted to the jury for its determination beyond a reasonable doubt. This Court cannot utilize harmless error review to sustain a judgment that the State could not have constitutionally obtained in the first place. Even though an Apprendi/Blakely⁴ error may be harmless under other circumstances, it cannot be harmless here.

b. The error in imposing punishment for the greater offense cannot be harmless where the State failed to charge the aggravating factor in the information. Just as charging second-degree murder cannot result in a conviction for first-degree murder, charging first-degree child molestation cannot result in a conviction for the greater offense of first-degree child molestation with a presumptive sentence that is clearly too lenient. At no point did the State file an information charging Vance with committing first-

⁴ 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).

degree child molestation with a presumptive sentence that was clearly too lenient.

The holdings of Apprendi and Blakely that sentencing facts must be treated as elements, coupled with long-standing state law regarding the requisites of charging documents, results in the conclusion that the failure to include an aggravating factor in an information means the State cannot seek the accompanying enhanced punishment. In fact, the fundamental point of Recuenco, Blakely, and Apprendi is that courts may not sentence defendants for uncharged transgressions for which juries have not found them guilty.⁵

i. The exceptional sentence aggravating factor was an element of a greater criminal offense. Vance was sentenced as if he were convicted of the crime of first-degree child molestation with a presumptive sentence that was clearly too lenient. First-degree child molestation involving a presumptive sentence that is clearly too lenient is a substantively distinct offense

⁵ The Court in Apprendi specifically cited to Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), which noted that “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” Id. at 243 n.6. The

and carries a greater maximum sentence than simple first-degree child molestation. Any argument that the “clearly too lenient” factor was not an element of a greater crime must be rejected.

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

In Apprendi, the United States Supreme Court held that any fact, other than the fact of a prior conviction, increasing the penalty beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The Apprendi Court began its analysis by noting that “[a]ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.” Id. at 478. Noting that many jurisdictions had recently attempted to re-characterize traditional “elements” as “sentencing factors” and thereby removed the traditional

Apprendi Court then held that: “The Fourteenth Amendment commands the same answer in this case involving a state statute.” Id. at 243.

accompanying protections, the Court held that “constitutional limits exist to States’ authority to define away facts necessary to constitute a criminal offense.” Id. at 486. The Apprendi Court further observed:

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

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

Blakely reinforced Apprendi by holding that, under Washington’s sentencing scheme, the top of the standard-range guideline represents the maximum sentence authorized by a jury verdict. As Blakely emphasized, our state statutes authorized a higher-than-standard sentence on the basis of a factual finding *only if* the fact in question comprised a new element which was not an element of the crime of conviction. 542 U.S. at 301-02, 306-07. A judge applying the SRA could not even consider, much less impose, an exceptional sentence unless he or she found facts “other than those which are used in computing the standard range

sentence for the offense.” Id. at 299 (quoting State v. Gore, 143 Wn.2d 288, 315-16, 21 P.3d 262 (2001)). The additional facts that support an increased sentence are no different in kind from facts that establish a sentence range in the first place.

The Supreme Court’s decision in Recuenco reinforces that no distinction exists between aggravating factors justifying an increased sentence and elements of a crime.⁶ In fact, the core holding of Recuenco is premised on the equivalency of these two types of facts. Id. at 2553 (“Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error.”). The following passage makes the point clear:

The State and the United States urge that this case is indistinguishable from Neder.⁷ We agree. Our decision in Apprendi makes clear that “[a]ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.” Accordingly, we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved

⁶ In Recuenco, the error at issue was not a full Blakely error because the State alleged the sentence enhancement in the charging instrument and the issue was actually litigated at trial. See 126 S.Ct. at 2549. Thus, the court did not directly address whether a Blakely violation, like the one here, in which the defendant had no notice “from the face of the felony indictment” that he faced the possibility of enhanced punishment, Apprendi, 530 U.S. at 478, could be deemed harmless. See Recuenco, 126 S.Ct. at 2552 n.3; id. at 2554 (Stevens, J., dissenting).

⁷ Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

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.

126 S.Ct. at 2552 (internal citations omitted).

Because the Sixth Amendment jury trial right extends to any fact that increases the length of a sentence beyond the statutory maximum, and because the Supreme Court described such a fact as the functional equivalent of an offense element, the perceived distinctions between guilt and sentencing determinations no longer exist.⁸ Under Apprendi and Blakely, a jury determination of a

⁸ These findings reside at the core of the criminal justice system's truth-seeking function. Thus, Apprendi and Blakely stand next to decisions such as Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) and In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), which first recognized and incorporated the right to a jury trial and proof beyond a reasonable doubt in state criminal trials. Without Apprendi's and Blakely's prohibitions against "circumvent[ing] [those protections] merely by 'redefin[ing] the elements that constitute different crimes,'" Apprendi, 530 U.S. at 485 (quoting Mullaney v. Wilbur, 421 U.S. 684, 698, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975)), those rights would not have much genuine force. A state, for example, could set up a system under which a judge "could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it -- or of making an illegal lane change while fleeing the death scene." Blakely, 542 U.S. at 306. Indeed, "when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction" between convictions for a greater and a lesser crime "may be of

sentencing enhancement factor is part and parcel of a jury trial.

When, therefore, a court finds such a fact by a preponderance of evidence during a sentencing proceeding, it effectively finds the defendant guilty of a new and greater crime.

ii. As a matter of state law, the State must include every element of the offense in the information. Once it is understood that the aggravating factors underlying an exceptional sentence constitute elements of a crime, it directly follows, as a matter of state law, that those elements must be stated in an information. It is well established in 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.” Id.

While pre-Blakely Washington courts did not view “exceptional sentences” as involving an increased maximum punishment (and, hence, did not apply the essential elements rule to exceptional sentence aggravators), in other situations where

greater importance than the difference between guilt or innocence for many [minor] crimes.” Mullaney, 421 U.S. at 698.

proof of a fact increased the maximum punishment, Washington courts consistently adhered to the rule that those facts must be alleged in the information.

Where a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, due process requires that the issue of whether that factor is present, must be presented to the jury upon proper allegations and a verdict thereon rendered before the court can impose the harsher penalty.

State v. Nass, 76 Wn.2d 368, 370, 456 P.2d 347 (1969). “[I]n order to justify the imposition of the higher sentence, it is necessary that the matter of aggravation relied upon as calling for such sentence be charged in the indictment or complaint.” State v. Frazier, 81 Wn.2d 628, 633, 503 P.2d 1073 (1972) (citation omitted).

For example, state law has consistently required the charging of a weapon or firearm “enhancement” in an information. In Frazier, the Washington Supreme Court held that the State’s intention to charge such an “enhancement” must be set forth in the information. Id. In State v. Cosner, 85 Wn.2d 45, 50-51, 530 P.2d 317 (1975), the court stated:

The appellate courts of this state have held that when the State seeks to rely upon either RCW 9.41.025 or

RCW 9.95.040,^[9] or both, due process of law requires that the information contain specific allegations to that effect, thus putting the accused person upon notice that enhanced consequences will flow with a conviction.

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

The Supreme Court's post-Apprendi case law is in accord. In State v. Goodman, 150 Wn.2d 774, 785-86, 83 P.3d 410 (2004), the court held the identity of the controlled substance delivered is

⁹ Former RCW 9.41.025 and RCW 9.95.040 contained firearm and deadly weapon enhancements that preceded similar enhancements under the SRA.

an element of the crime that must be alleged in the information where the type of drug determines 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.” *Id.* at 785 (citation omitted; emphasis in original).¹⁰

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

iii. Vance must be resentenced within the standard range. The remedy for the State’s failure to charge Vance with the aggravating factor is to remand this case for re-sentencing within the standard range. The court’s holding in Theroff was explicit: “Because the prosecutor here did not follow the rule, he

¹⁰ The facts necessary to support an exceptional sentence must be different and apart from the facts that are necessarily considered in the underlying crimes. See State v. Nordby, 106 Wn.2d 514, 518, 723 P.2d 117 (1986); State v. Cardenas, 129 Wn.2d 1, 7, 914 P.2d 57 (1996) (seriousness of injuries cannot support exceptional sentence where serious injury is element of crime). Therefore, simply charging the “basic” crime does not result in alleging facts to support an aggravating circumstance.

may not now ask the court to impose the rigors of our enhanced penalty statutes upon the defendant.” Id. at 393. The same rule applies here.

c. The state constitutional right to a jury trial does not permit harmless error review based on the failure to submit an element of a crime to the jury. Article 1, section 21 prohibits Washington courts from finding the error in judicial fact-finding on aggravating factors to be considered harmless. Article 1, section 21 provides that “[t]he right to trial by jury shall remain inviolate.” In construing this state constitutional right, the Supreme Court held that it preserves the right to jury trial as it existed at common law in the Washington Territory at the time of its adoption. Pasco v. Mace, 98 Wn.2d 87, 96, 653 P.2d 618 (1982). The jury trial right to be held “inviolable” is more extensive than its federal counterpart in the Sixth Amendment, and no legislative act may impair that right. Id. at 99; accord State v. Strasburg, 60 Wash. 106, 116, 110 P. 1020 (1910) (statute that prohibited defendant from presenting insanity defense held to violate article 1, section 21 because “the question of insanity . . . is and always has been a question of fact for the jury to determine”); State v. Stegall, 124 Wn.2d 719, 724 & n.1, 881 P.2d 979 (1994) (unlike Sixth Amendment right to jury

which may be satisfied with juries as small as six persons, the article 1, section 21 right to jury guarantees the right to 12-person jury).

Employing the six Gunwall¹¹ criteria leads to the same conclusion. The textual language of the state and federal constitutional provisions are different (factors #1 and #2). Indeed, the Supreme Court has already recognized that article 1, section 21 has no federal counterpart at all. State v. Schaaf, 109 Wn.2d 1, 13-14, 743 P.2d 240 (1987). State constitutional and common-law history, and pre-existing state law (factors #3 and #4) also show that broader protection has been given to the right to jury trial than under the federal constitution. Pasco v. Mace, *supra*; State v. Stegall, *supra*.

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

¹¹ State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

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

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

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

60 Wash. at 116 (emphasis added).

That which the Legislature is forbidden to do is also forbidden to the judiciary. “The right to a jury trial may not be impaired by either legislative or judicial action.” Geschwind v. Flanagan, 121 Wn.2d 833, 840, 854 P.2d 1061 (1993); accord State v. Lane, 40 Wn.2d 734, 736, 246 P.2d 474 (1952). If the Legislature cannot cut back on the right to jury trial by legislative

action, neither can the judicial branch limit the right by adopting a doctrine of harmless error.

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

d. The error in failing to submit the element to the jury is not harmless under the facts of this case. When an element of an offense is omitted from jury instructions, the error can be deemed harmless only if the element is supported by

uncontroverted evidence. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder, 527 U.S. at 18). The question is whether the reviewing court can conclude, beyond a reasonable doubt, that the jury would have found the State had proved the element beyond a reasonable doubt had it been properly instructed. Id.

In this case, the error in failing to submit the element to the jury is not harmless. The State presented *no* evidence to the jury to support a finding that a standard-range sentence would be clearly too lenient. The State presented no evidence of what the standard range sentence would be. Thus, this Court cannot conclude beyond a reasonable doubt that, had the jury been instructed on the element, it would have found the State had proved the allegation beyond a reasonable doubt.

3. The State may not seek to obtain a second conviction on the aggravating factor on remand.

a. There is no statute that would authorize the court to convene a jury on remand. In Hughes, the Supreme Court held that because state statute designates that a judge must decide the existence of aggravating factors using a preponderance standard, a court cannot direct a jury on remand to find those same facts using

a reasonable doubt standard. 154 Wn.2d at 151-52. Hughes dictates that the State not be given an opportunity to prove the aggravating factor to a jury on remand in this case, as there is no statutory procedure that would allow the trial court to convene a jury for that purpose.

In 2005, the Legislature amended the SRA to explicitly give juries the responsibility to find facts that might justify an exceptional sentence, but that legislation does not apply to Vance's case. See Pillatos, 159 Wn.2d at 465 (citing Laws of 2005, ch. 68). The express purpose of the 2005 amendment was to bring the SRA into accord with the Blakely decision. Id. at 468. The act added a new procedure for juries to find facts justifying exceptional sentences:

(1) 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.

(2) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

Id. (quoting Laws of 2005, ch. 68, § 4(1), (2)).

The Pillatos court concluded the act applies only to cases where trials had not begun or guilty pleas accepted at the time the act was signed into law by the governor on April 15, 2005. Id. at 465, 480. For trials that began before the law was signed into law, the procedures set forth in the statute do not apply. Id. at 465. Reaffirming its earlier holding in Hughes, the Pillatos court concluded that where the act does not apply, trial courts lack the power to empanel a sentencing jury. Id. at 465. Thus, because the defendants Pillatos and Butters each pleaded guilty before the new law was signed into effect, the law did not apply to them. Id. at 480-81. The Supreme Court held the State may not seek an exceptional sentence for those defendants on remand. Id.

Because Vance was tried before the new legislation took effect, under Pillatos, it does not apply to him. Vance's trial occurred in July 2003, two years before the new legislation was signed into law. Thus, there is no statutory procedure that would allow the State to seek an exceptional sentence on remand.

b. The Double Jeopardy Clause prevents retrial on the greater offense. In this case, the State presented *no* evidence to the jury to support the allegation that a standard-range sentence would be clearly too lenient. Thus, there is insufficient evidence to

sustain a jury verdict on the greater offense and double jeopardy principles preclude the State from retrying Vance for that offense. In addition, because the State has already obtained a conviction for the lesser offense, double jeopardy principles preclude the State from attempting to obtain a conviction on the greater offense. For these reasons, the State may not attempt to prove the aggravating factor to a jury on remand.

Due process requires a defendant in a criminal case not be convicted absent proof beyond a reasonable doubt of every element of the charged crime. U.S. Const. amend. 14; Const. art. 1, § 22; Jackson v. Virginia, 443 U.S. 307, 311, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1970); In re Winship, 397 U.S. 358, 365-66, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). In reviewing the sufficiency of the evidence on appeal, the critical inquiry is whether the evidence before the jury could reasonably support a finding of guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson, 443 U.S. at 318). The court determines if, looking at the evidence in the light most favorable to the State, a rational trier of fact could have found every element of the crime beyond a reasonable doubt. Id.

In this case, the jury heard *no* evidence that a standard range sentence would be clearly too lenient. The State presented no evidence regarding what the standard range sentence would be. Thus, the evidence is insufficient to sustain a jury finding of guilt on that element.

Where there is insufficient evidence of every element of the crime, a person may not be retried for the offense without violating the constitutional prohibition against double jeopardy. Hudson v. Louisiana, 450 U.S. 40, 67 L. Ed. 2d 30, 101 S. Ct. 970 (1981); Burks v. United States, 437 U.S. 1, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978); State v. Souza, 60 Wn. App. 534, 538, 805 P.2d 237 (1991). Thus, Vance may not be retried for the greater offense of first-degree child molestation with a standard range sentence that is clearly too lenient.

Moreover, double jeopardy bars the State from seeking a conviction on the greater offense, as it has already obtained a conviction on the lesser offense. Double jeopardy bars subsequent prosecutions for a single act. Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Double jeopardy also bars successive prosecutions for greater and lesser-included

offenses. Brown v. Ohio, 432 U.S. 161, 169-70, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). Vance was tried and convicted only of the lesser offense of first-degree child molestation *simpliciter*. Thus, allowing the State to prosecute and convict him of a greater crime at his 2004 resentencing violated double jeopardy. For the same reasons, allowing the State another opportunity to prosecute and convict him of this greater crime would be another double jeopardy violation.

c. Retrial on the greater offense is precluded by the mandatory joinder rule. As argued above, where the State fails to include an element of an offense in the information, the State is precluded from seeking punishment for that offense.

CrR 4.3.1(b)(3) requires *all* related offenses be joined for trial. “CrR 4.3(c) was intended as a limit on the prosecutor. As such, it does not differentiate based upon the prosecutor’s intent. Whether the prosecutor intends to harass or is simply negligent in charging the wrong crime, CrR 4.3(c) applies to require a dismissal of the second prosecution.” State v. Dallas, 126 Wn.2d 324, 332, 892 P.2d 1082 (1995). Thus, under the plain language of the rule, *after trial* the State is precluded from amending an information to charge *any* related offense. Even if this Court finds that the “ends

of justice” exception applies, that exception cannot be read to permit the State now to file more serious charges.

4. The exceptional sentence must be reversed and remanded for imposition of a sentence within the standard range. In this case, the sentencing court followed the same sentencing procedure condemned in Blakely, Hughes, and VanDelft. The sentencing court found Vance had an offender score of 27. The court further found by a preponderance of the evidence that, based on the offender score and the presumption of concurrent sentences, a standard range sentence would be “clearly too lenient in light of the purposes of the [SRA].” CP 33. The court imposed an exceptional sentence in the form of consecutive sentences for the three convictions of first degree child molestation.

As set forth above, the Blakely error is not harmless. Moreover, the State may not seek to obtain a conviction on the greater offense on remand. Thus, the exceptional sentence must be reversed and the case remanded for resentencing within the standard range.

C. CONCLUSION

For the reasons set forth above, Vance's exceptional sentence must be reversed and remanded for imposition of a sentence within the standard range.

Respectfully submitted this 25th day of April 2007.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project 91052
Attorneys for Appellant

APPENDIX A

FILED

04 NOV -9 PM 3:32

PAM L. DANIELS
COUNTY CLERK
SNOHOMISH CO. WASH.

SUPERIOR COURT OF WASHINGTON
COUNTY OF SNOHOMISH

STATE OF WASHINGTON,)
Plaintiff) No. 02-1-02090-3
)
v.) FINDINGS OF FACT AND
) CONCLUSIONS OF LAW FOR
VANCE, ROBERT L.,) AN EXCEPTIONAL SENTENCE
Defendant) (APPENDIX 2.4)
_____)

An exceptional sentence on Counts I, III and VII above the standard range should be imposed based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

- A. The Court finds that the defendant has the following prior felony convictions:
First Degree Statutory Rape in 1988, and Indecent Liberties in 1988.
- B. The jury in this case found that the defendant was guilty beyond a reasonable doubt of the following current offenses: Count I First Degree Child Molestation, Count III First Degree Child Molestation, Count IV Second Degree Child Molestation, Count V Felony Communication with a Minor for Immoral Purposes, Count VII First Degree Child Molestation, Count IX Felony Communication with a Minor for Immoral Purposes, Count X Second Degree Child Molestation, Count XI Felony Communication with a Minor for Immoral Purposes.

AA
93

CONCLUSIONS OF LAW

The Court finds that the defendant's two prior felony sex offense convictions, combined with his eight current felony sex offense convictions, gives him an offender score of 27 under the scoring rules of the Sentencing Reform Act. The sentencing range grid for these crimes under the Sentencing Reform Act ends at an offender score of 9. The defendant's score, along with the presumption for concurrent sentences in the Sentencing Reform Act, would result in the defendant receiving no actual sanction for many of the current offenses if he were to receive a standard range sentence in this cause. As a result, a standard range sentence would result in the defendant receiving a number of "free crimes" as explained in State v. Stephens, 116 Wn. 2d 238 (1991). Therefore, the Court finds an exceptional sentence above the standard range is justified pursuant to the operation of the multiple offense policy of RCW 9.94A.535(2)(i) because the presumptive standard range sentence would be clearly too lenient in light of the purposes of the Sentencing Reform Act. Accordingly, the Court orders that the sentences in Counts I, III and VII run consecutively to each other and all other counts.

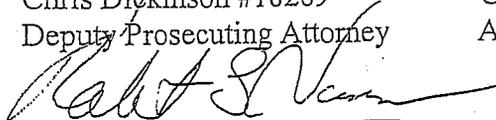
SIGNED in open court this 4 day of Nov, 2004.


Judge Larry E. McKeeman

Copy received:


Chris Dickinson #18269
Deputy Prosecuting Attorney


Caroline Mann #17790
Attorney for the Defendant


Defendant Robert L. Vance

APPENDIX B

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT L. VANCE,

Petitioner.

NO. 78425-6

ORDER

C/A No. 55364-0-I Washington Appellate Project

RECEIVED

MAR - 8 2007

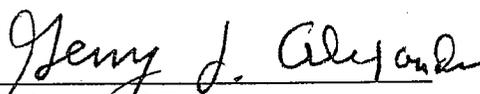
Department II of the Court, composed of Chief Justice Alexander and Justices Madsen, Bridge, Owens and J. M. Johnson (Justice Sanders sat for Justice Madsen), at its March 6, 2007, Motion Calendar, considered whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is granted and remanded to the Court of Appeals Division One for reconsideration in light of *State v. VanDelft*, 158 Wn.2d 731 (2006).

DATED at Olympia, Washington this 7th day of March, 2007.

For the Court


CHIEF JUSTICE

FILED
SUPERIOR COURT
STATE OF WASHINGTON
2007 MAR -7 A 8:32
bjh

APPENDIX C

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

DIVISION I
One Union Square
600 University Street
(206) 464-7750
TDD: (206) 587-5505

March 29, 2007

Mary Kathleen Webber
Snohomish County Prosecutors Office
MSC 504
3000 Rockefeller Ave
Everett, WA, 98201-4061

Seth Aaron Fine
Attorney at Law
Snohomish Co Pros Ofc
3000 Rockefeller Ave
Everett, WA, 98201-4060

RECEIVED

MAR 29 2007

Washington Appellate Project
Attorney at Law
1511 Third Avenue
Suite 701
Seattle, WA, 98101

Maureen Marie Cyr
Washington Appellate Project
1511 3rd Ave Ste 701
Seattle, WA, 98101-3635

Washington Appellate Project

CASE #: 55364-0-1

State of Washington, Respondent v. Robert L. Vance, Appellant

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on March 29, 2007:

The parties are directed to file supplemental briefs addressing the impact of In re Personal Restraint of VanDelft, 158 Wn.2d 731, 147 P.3d 573 (2006), Washington v. Recuenco, ___ U.S. ___, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), and State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007). Appellant's supplemental brief is due by April 23, 2007, respondent's supplemental brief is due by May 18, 2007, and any reply is due by June 1, 2007. Extensions of time should not be anticipated.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

LAM

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	COA NO. 55364-0-1
Respondent,)	
)	
ROBERT VANCE,)	
)	
Appellant.)	

CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 25TH DAY OF APRIL, 2007, I CAUSED A TRUE AND CORRECT COPY OF THIS **APPELLANT'S SECOND SUPPLEMENTAL BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | | |
|-------------------------------------|------------------------------------------------------------------------------------------------------------|-------------------|-------------------------------------|
| <input checked="" type="checkbox"/> | MARY KATHLEEN WEBBER, DPA
SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER
EVERETT, WA 98201 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| <input checked="" type="checkbox"/> | ROBERT VANCE
931781
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON, THIS 25TH DAY OF APRIL, 2007.

X _____ *grd*

Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 APR 25 PM 4:51