

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

TROY DEAN STUBBS,

Petitioner.

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WASHINGTON ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS AMICUS CURIAE BRIEF

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**TABLE OF CONTENTS**

Table of Authorities ..... ii

I. INTEREST OF AMICUS CURIAE ..... 1

II. INTRODUCTION ..... 1

III. STATEMENT OF THE CASE..... 2

IV. ARGUMENT ..... 3

    1. Stubbs’ Argument That the Severity of the Victim’s Injuries Inheres in the Elements of the Crime of Assault in the First Degree and Cannot Support an Exceptional Sentence is Supported by Settled Precedent Pre-*Blakely* and Legislative Intent..... 3

    2. Facts Justifying an Exceptional Sentence Must be Truly Extraordinary ..... 7

    3. The Court Must Determine Impact of Jury Instructions ..... 8

    4. The Evidence Did Not Support an Exceptional Sentence on the Ground of Excessive Bodily Harm ..... 9

    5. Verdict Form C Suffers from Vagueness Defects ..... 14

V. CONCLUSION..... 19

Proof of Service

## TABLE OF AUTHORITIES

### FEDERAL CASES

|   |        |
|---|--------|
| <i>Blakely v. Washington</i> , 542 U.S. 296 (2004).....   | 8      |
| <i>Coates v. Cincinnati</i> , 402 U.S. 611 (1971).....  | 15     |
| <i>Furman v. Georgia</i> , 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d<br>346 (1972).....        | 17     |
| <i>Godfrey v. Georgia</i> , 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d<br>398 (1980).....      | 18     |
| <i>Maynard v. Cartwright</i> , 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed.<br>2d 372 (1988).....  | 18     |
| <i>Papachristou v. Jacksonville</i> , 405 U.S. 156 (1972).....                                  | 14     |
| <i>Stringer v. Black</i> , 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d<br>367 (1992).....      | 17     |
| <i>Tuilaepa v. California</i> , 512 U.S. 967, 114 S. Ct. 2630, 129 L. Ed.<br>2d 750 (1994)..... | 17, 18 |

### STATE CASES

|   |        |
|---|--------|
| <i>Bellevue v. Lorang</i> , 140 Wn.2d 19 (2000).....                | 14, 15 |
| <i>City of Seattle v. Douglas</i> , 115 Wn.2d 171 (1990).....       | 14     |
| <i>City of Sumner v. Walsh</i> , 148 Wn.2d 490 (2003).....          | 15     |
| <i>Mays v. State</i> , 116 Wn.App. 864 (2003).....                  | 15     |
| <i>Spokane v. Neff</i> , 152 Wn.2d 85 (2004).....                   | 15     |
| <i>State v. Bartlett</i> , 128 Wn.2d 323 (1995).....                | 7      |
| <i>State v. Bourgeois</i> , 72 Wn.App. 650, 850 P.2d 43 (1994)..... | 5      |

|  |    |
|--|----|
| <i>State v. Cardenas</i> , 129 Wn.2d 1, 914 P.2d 57 (1996).....  | 5  |
| <i>State v. Chadderton</i> , 119 Wn.2d 390, 832 P.2d 481 (1992).....   | 5  |
| <i>State v. Cowen</i> , 87 Wn.App. 45 (1997) .....   | 8  |
| <i>State v. Dennis</i> , 45 Wn.App. 893 (1986).....  | 8  |
| <i>State v. Ferguson</i> , 142 Wn.2d 631, 15 P.3d 1271 (2001).....   | 4  |
| <i>State v. Gardner</i> , 328 N.W.2d 159 (Minn. 1983).....   | 5  |
| <i>State v. George</i> , 67 Wn.App. 217, 834 P.2d 664 (1992), <i>review denied</i> , 120 Wn.2d 1023 (1993) ..... | 5  |
| <i>State v. Kier</i> , 164 Wn.2d 798, 194 P.3d 212 (2008).....   | 7  |
| <i>State v. Monschke</i> , 133 Wn.App. 313 (2006) .....  | 18 |
| <i>State v. Nordby</i> , 106 Wn.2d 514, 723 P.2d 1117 (1986).....  | 5  |
| <i>State v. Pillatos</i> , 159 Wn.2d 459, 150 P.3d 1130 (2007).....  | 7  |
| <i>State v. Sansone</i> , 127 Wn.App. 630 (2005).....  | 15 |
| <i>State v. Stubbs</i> , 144 Wn.App. 644, 184 P.3d 660 (2008).....   | 6  |
| <i>State v. Williams</i> , 144 Wn.2d 197 (2002).....   | 15 |
| <i>Sumner v. Walsh</i> , 148 Wn.2d 490 (2003).....   | 15 |

**FEDERAL STATUTES**

|                              |    |
|------------------------------|----|
| U.S. Const., Amend. 14 ..... | 14 |
|------------------------------|----|

**STATE STATUTES**

|                       |      |
|-----------------------|------|
| RCW 9.94A.535(3)..... | 6, 7 |
| RCW 9.94A.535(y)..... | 9    |

|                        |    |
|------------------------|----|
| RCW 9.94A.535 .....    | 16 |
| RCW 9.94A.535(i).....  | 16 |
| RCW 9.94A.535(c) ..... | 16 |
| RCW 9.94A.535(t).....  | 16 |
| RCW 9.94A.535(x).....  | 16 |
| RCW 9A.44.110(c).....  | 9  |

**I. INTEREST OF AMICUS CURIAE**

The Washington Association of Criminal Defense Lawyers (“WACDL”) is a nonprofit association of over 1,100 attorneys, law students, and other professionals practicing criminal defense law in Washington State. As stated in its bylaws, WACDL’s objectives include “to protect and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, and to resist all efforts made to curtail such rights.” WACDL has filed numerous amicus briefs in the Washington appellate courts.

**II. INTRODUCTION**

Petitioner Troy Dean Stubbs was convicted of assault in the first degree with a deadly weapon. Stubbs received an exceptional sentence of twice the high end of the standard range based on a jury finding that the “victim’s injuries substantially exceed[ed] the level necessary to satisfy the elements of the offense.” In this Court, Stubbs argues that serious injuries were contemplated by the Legislature in setting the standard range for assault in the first degree and thus could not support an exceptional sentence. He also argues this statutory aggravating circumstance violates due process vagueness prohibitions.

*Amicus curiae* first explains why Stubbs’ arguments are consistent with the Legislature’s intent in codifying statutory and non-statutory

aggravating factors post-*Blakely*. *Amicus* expands upon Stubbs' reference to Eighth Amendment jurisprudence for purposes of evaluating vagueness challenges to aggravators that authorize an increase in the sentence that may be imposed. *Amicus* explains how, due to the inherent difficulty in transposing facts previously determined by judges based upon their experience and discretion for resolution by juries, other statutory aggravating circumstances may be susceptible of judicial invalidation on vagueness grounds.

Last, *amicus* attempts to articulate a framework that sets forth 'best practices' so that future exceptional sentencing proceedings achieve the twin goals of the Sentencing Reform Act of 1981 (SRA) of accountability and uniformity in sentencing statewide.

### **III. STATEMENT OF THE CASE**

*Amicus* adopts the statement of the case in the Supplemental Brief of Petitioner.

#### IV. ARGUMENT

1. Stubbs' Argument That the Severity of the Victim's Injuries Inheres in the Elements of the Crime of Assault in the First Degree and Cannot Support an Exceptional Sentence is Supported by Settled Precedent Pre-Blakely and Legislative Intent.

In enacting the SRA, the Washington Legislature was guided and informed by the models utilized in other states that had similarly tried to reform their sentencing system to structure, but not eliminate, judicial discretion in sentencing. David Boerner, Sentencing in Washington, §2.2(c)(2) at 2-23 (1985). The SRA replaced the previous parole and sentencing guidelines with guidelines that (1) created presumptive standard ranges and (2) authorized departures based upon a judicial determination that substantial and compelling reasons justified the departure. *Id.*, see also David Boerner and Roxanne Lieb, Sentencing Reform in the Other Washington, 28 Crime & Just. 71, 87-88 (2001).

Boerner and Lieb remark,

The original legislation [structuring the imposition of exceptional sentences] defined “exceptional sentences” as warranted when the “imposition of a sentence within the standard range would impose an excessive punishment on the defendant or would pose an unacceptable threat to community safety” (Laws of 1981, chap. 137, sec. 2[2]). As the commission worked to implement the reform, members studied Minnesota's experience and were impressed with that state's emerging case law interpreting its exceptional sentence provision. The commission

decided that Minnesota's appellate decisions would reinforce Washington's reform and assist in creating a "common law of sentencing," one of the stated legislative intents.

Id.

A persistently troublesome issue in presumptive sentencing is whether the same information used to compute the standard range may also justify a departure from that range. According to Boerner, the Sentencing Guidelines Commission (SGC) and the Legislature adopted the principle that

while factors which truly distinguish the crime from others of the same statutory category may justify an exception, those which are inherent in that class of crimes and do not distinguish the defendant's behavior from that inherent in all crimes of that classification may not.

Boerner, §9.6 at 9-13. Thus, "facts which constitute elements of the crime of conviction may not be used to justify a departure." *Id.*, §9.7 at 9-14.

The severity of the victim's injuries has been a non-statutory aggravating circumstance in Washington since nearly the inception of sentencing under the SRA. Yet, as noted by Stubbs, Br. Pet. at 7-9, this factor cannot support an exceptional sentence where the victim's injuries was an element the jury was required to find to convict on the underlying crime. *State v. Ferguson*, 142 Wn.2d 631, 647-48, 15 P.3d 1271 (2001) (cruelty could not support exceptional sentence for crime of exposing

another person to HIV with intent to do bodily harm); *State v. Cardenas*, 129 Wn.2d 1, 6-7, 914 P.2d 57 (1996) (“serious bodily injury” element of vehicular assault precluded exceptional sentence based on severe injuries); *State v. Chadderton*, 119 Wn.2d 390, 396, 832 P.2d 481 (1992) (“planning” could not justify exceptional sentence for first-degree premeditated murder); *State v. Nordby*, 106 Wn.2d 514, 519, 723 P.2d 1117 (1986) (severe injuries could not justify exceptional sentence for vehicular assault); *see also, e.g. State v. Gardner*, 328 N.W.2d 159, 162 (Minn. 1983) (where personal injuries were relied upon by jury to convict of first-degree criminal sexual conduct, those injuries could not be used again as a basis for a durational departure).

To the extent severe injuries have been upheld as a basis for departing from the standard range for assault in the first degree, the crime must be shown to be atypical by virtue of “the deliberate and gratuitous violence of the assault.” *State v. Bourgeois*, 72 Wn.App. 650, 663, 850 P.2d 43 (1994) (quoting *State v. George*, 67 Wn.App. 217, 222, 834 P.2d 664 (1992), *review denied*, 120 Wn.2d 1023 (1993)). In *George*, for example, the defendants brutally beat a 77-year-old woman with their fists and the stock of a rifle multiple times, leaving her in a semi-vegetative state). 67 Wn.App. at 220.

However, as noted by dissenting Judge Schultheis in the instant case, the facts in *Stubbs* “lack[] the drawn out, gratuitous violence present in *George*.” *State v. Stubbs*, 144 Wn.App. 644, 654, 184 P.3d 660 (2008).

*Amici* Washington Association of Prosecuting Attorneys may claim that the differences between the statutory language of RCW 9.94A.535(3)(y) and the pre-*Blakely* non-statutory aggravator are indicative of the Legislature’s intent to create a new category of exceptional sentences. Such a claim would be without merit.

In conforming exceptional sentencing procedures to comply with *Blakely*, the Legislature expressly declared its intent to create a new criminal procedure only, and to this end, to codify existing statutory and non-statutory aggravating circumstances without alteration or modification. Laws of 2005, Ch. 68 § 1. The Legislature stated in relevant part:

The legislature intends to conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in [*Blakely*]. . . The Legislature intends to create a new criminal procedure for imposing greater punishment than the standard range or conditions and to codify existing common law aggravating factors, **without expanding or restricting existing statutory or common law aggravating circumstances.** (Emphasis added.)

Laws of 2005, Ch. 68 § 1.

In accord with RCW 9.94A.535(3)(y), this Court has found that because the amendments to the SRA were procedural and not substantive, the newly-codified statutory aggravating factors did not violate the *ex post facto* clauses of the state or federal constitution. *State v. Pillatos*, 159 Wn.2d 459, 476-77, 150 P.3d 1130 (2007).

Thus any difference in verbiage stems from the efforts of the legislation's drafters to codify what previously had existed only at common law, and does not signal a legislative desire to change or expand the common law aggravating circumstance. Indeed, the statement of legislative intent indicates that the Legislature acquiesced in this Court's application of the primary principle that factors inherent in the underlying crime cannot support an exceptional sentence. *See State v. Kier*, 164 Wn.2d 798, 805, 194 P.3d 212 (2008) (presumption of legislative acquiescence in prior judicial interpretation arises where Legislature amends statute without changing relevant portions).

2. **Facts Justifying an Exceptional Sentence Must be Truly Extraordinary**

In order to justify an exceptional sentence, the facts or circumstances must be extraordinary in order to justify a departure from the standard range. *State v. Bartlett*, 128 Wn.2d 323, 333 (1995). Courts have held that facts justifying an exceptional sentence must be such that

they would distinguish it from other crimes in the same statutory category. *State v. Dennis*, 45 Wn.App. 893, 895-896 (1986) (exceptional sentence justified on ground of deliberate cruelty because a gang rape occurred which was not “typical” under statutory scheme).

Even before *Blakely v. Washington*, 542 U.S. 296 (2004), when trial judges, rather than juries, were given the discretion to impose exceptional sentences, it was nevertheless difficult for the courts to ascertain what was typical of a particular crime:

Difficulties can arise in determining **what** facts are typical of a particular type of crime. In making this determination, it is not proper to compare the current crime with crimes described in published appellate decisions. This skews the inquiries: Most minor crimes are resolved by plea bargaining, at the trial court level, or in unpublished opinions. Rather, trial courts may rely on their own experience of day-to-day offenses.

Fine & Ende, Criminal Law, 13B Wash. Prac. § 3802, p. 373.

### **3. The Court Must Determine Impact of Jury Instructions**

Verdict Form C and instructions as to the elements of first degree assault would have been impossible for a jury to fairly follow.<sup>1</sup>

Initially, it is necessary for a reviewing court to determine what effect of the words or terms in jury instructions will have on a juror. *State v. Cowen*, 87 Wn.App. 45, 52 (1997). Verdict Form C and related

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<sup>1</sup> The pertinent instructions provided to the jury are reproduced in Appendix A to this brief.

instructions literally required the jury to first determine the minimum level of bodily harm which would satisfy the statutory requirements of the element “great bodily harm” as used in the first degree assault definition, and then determine if the harm or injury in the instant case “substantially exceed[ed]” that level. Even assuming an exceptional sentence could have been imposed for this aggravating circumstance, it is simply unworkable for a jury to have to undertake this analysis without additional instructions or evidence.

4. **The Evidence Did Not Support an Exceptional Sentence on the Ground of Excessive Bodily Harm**<sup>2</sup>

The jury first had to determine the minimum amount of force necessary to satisfy the requirement of great bodily harm so as to establish a base line from which to decide whether the victim’s injuries were substantially “excessive.” The court’s definitional instruction on assault in the first degree, taken verbatim from RCW 9A.44.110(c), told the jury that the element of great bodily harm could be proven in three different ways: (1) a bodily injury that created the “probability of death;” or, (2) bodily injury “which causes significant serious permanent disfigurement;” or, (3)

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<sup>2</sup> The provision utilized by the court in the instant case, RCW 9.94A.535(y) can be best described as excessive bodily harm. This was not a statutory element in prior iterations of this statute, but instead developed by prior case law.

bodily injury “that causes a significant permanent loss or impairment of the function of any bodily part or organ.”

Analyzing these separately, the evidence clearly established that the injury inflicted on the victim created a probability of death, certainly at the time it was inflicted and also in terms of the shortening of the victim’s life expectancy. These being the circumstances, what evidence was there in this particular case, or could there ever be in any case, that “substantially exceed[ed]” that standard?

Said another way, the only injury that could “substantially exceed” the standard of “probability of death” is death itself. If death had occurred in this case, Stubbs would have been charged with second degree murder.<sup>3</sup> The standard SRA range for second degree murder is 123 to 220 months, approximately half the length of the exceptional sentence imposed in this case. It is doubtful an exceptional sentence could ever be imposed based on a finding of excessive harm under the probability of death prong of first degree assault because such a finding is a logical impossibility.

The second prong of the great bodily harm instruction, which relates to a significant serious permanent disfigurement, does not seem to be relevant in this case, since there was no evidence of disfigurement.

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<sup>3</sup> The State did not charge Stubbs with attempted first degree murder, a concession that the State lacked evidence of a premeditated intent to kill. Had the injury resulted in

Yet, in spite of this, the jury nevertheless was instructed on this prong. Certainly, the jury could have been confused and used this as the minimum standard from which to judge Stubbs' actions. If that were the case, the jury could have erroneously decided that the level of bodily harm necessary to establish a significant serious permanent disfigurement might mean, for example, a scar, broken teeth, a scald burn, or a facial or other bodily disfigurement, and thereby concluded that the injury in this case substantially exceeded this level. This would have provided a very low threshold for the jury. It would also have been an erroneous interpretation of the aggravating circumstance.

The third prong is a requirement that the bodily injury caused a significant permanent loss or impairment of the function of any bodily part or organ. This could be minimally satisfied by someone losing a finger, a toe, an appendage, or an organ that may not be crucial or important for good health, such as a spleen, a kidney (where the second kidney is functioning) or the appendix.<sup>4</sup>

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death, it is likely that the State would have charged Stubbs with felony murder predicated on assault.

<sup>4</sup> The term "Organ" also needs definition. A common dictionary definition is: "**Organs:** **Organs** are the next level of organization in the **body**. An **organ** is a structure that contains at least two different types of tissue functioning together for a common purpose. There are many different **organs** in the **body**: the liver, kidneys, heart, even your skin is an **organ**." *See:* "Basic Anatomy - Tissues and Organs" <http://web.jjay.cuny.edu/~acarpi/NSC/14-anatomy.htm>. Human organs include one's brain, voice box, lungs, heart, spleen, kidneys, large and small intestines, skin, bladder, appendix, genitals, pancreas, gall bladder, stomach, and liver. *See:* EBC Home, Science

That being the case, the jury was told that anything substantially exceeding this minimum level would support an exceptional sentence. In the context of the confusing and inapplicable standards set forth in the definition of great bodily harm, this created a grave potential for an erroneous result.

Importantly, the SRA gives every ranked crime a standard range. These standard ranges get broader as the crime becomes more serious and the defendant has more criminal history. In this case, the standard range for the crime of first degree assault, given Stubbs' criminal history, was 186 to 240 months in prison, which is a spread of 4-½ years imprisonment. It was certainly contemplated by the Legislature in formulating the SRA that judges should be given discretion to decide the appropriate sentence within the standard range, recognizing there would always be a differentiation between the facts supporting a conviction in every case, some being much more serious than others.

It was therefore erroneous to tell the jury that the starting point for their deliberations was the minimum level of harm that would satisfy the definition of great bodily harm. Certainly, the Legislature intended that even though crimes might substantially exceed the minimum level necessary to establish the elements of that crime they should still be

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and Nature, Human Body and Mind at:

sentenced within the standard range. Otherwise, a standard “range” has no purpose.

However, the jury was not instructed on the SRA sentencing guidelines or informed that a judge has discretion to impose a sentence at the high end of the standard range, which in a case such as this, is a very substantial difference in the sentence. Not having this information, it would be very easy for a jury to confuse the term “exceed” with “substantially exceed” and return a special verdict without sufficient evidence. Moreover, without further instruction as to the meaning of the word “substantially” it is unrealistic to expect a jury to be able to discern between what exceeds the minimum level of injury and that which substantially exceeds it.

The jury was simply not equipped with sufficient information to decide whether the evidence merely exceeded, or substantially exceeded, the bare minimum to justify an exceptional sentence. Likewise, the jury was not instructed on what is the “typical” assault in the first degree case. Unlike a judge, who has experience in dealing with cases and can review case law, a lay juror is thrust into deciding what is the “typical” first degree assault case as opposed to a “truly exceptional” one without context.

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[www.ebc.co.uk/science/humanbody/body/factfiles/organs\\_anatomy.shtml](http://www.ebc.co.uk/science/humanbody/body/factfiles/organs_anatomy.shtml).

In this regard, upon determining guilt of the underlying crime, the jury should have been given additional evidence in a bifurcated proceeding. Such additional evidence could have been expert testimony as to the level of injury in “typical” first degree assault cases, with and without exceptional sentences. Another possible expert could have been someone from the Sentencing Guidelines Commission who has analyzed data regarding levels of harm present in various first degree assault cases.

Verdict Form C lacks sufficient precision because there is no way to ascertain the meaning of the phrase, “substantially exceed the level of bodily harm necessary to satisfy the elements of the offense.”

**5. Verdict Form C Suffers from Vagueness Defects**

An individual’s right to due process, secured by the U.S. Const., Amend. 14, and Const., Art. 1, § 3, includes the fundamental notions of fair notice and equal application of the laws. The “void for vagueness” doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited, and in a manner that does not encourage arbitrary or discriminatory enforcement. *Papachristou v. Jacksonville*, 405 U.S. 156 (1972); *Bellevue v. Lorang*, 140 Wn.2d 19, 30 (2000).

A criminal statute must provide fair notice to avoid “arbitrary, erratic and discriminatory enforcement.” *City of Seattle v. Douglas*, 115

Wn.2d 171, 180 (1990). Applying this principle, courts have not hesitated to invalidate statutes which failed to satisfy due process. *See e.g. Coates v. Cincinnati*, 402 U.S. 611 (1971) (ordinance making it crime to congregate in a manner that was “annoying” to others vague); *Mays v. State*, 116 Wn.App. 864 (2003) (civil commitment statute which contained element of “need for more sustained treatment” void for vagueness); *Sumner v. Walsh*, 148 Wn.2d 490 (2003) (use of terms “linger” and “stay” in juvenile curfew law were void for vagueness); *State v. Williams*, 144 Wn.2d 197 (2002) (statute criminalizing threats to “mental health” of another void for vagueness); *Bellevue v. Lorang*, 140 Wn.2d 19 (2000) (telephone threat ordinance, providing defense for caller if purpose was legitimate communication, void for vagueness); *City of Sumner v. Walsh*, 148 Wn.2d 490 (2003) (statute making it unlawful for a parent to permit a juvenile to remain in a public place during curfew hours, unless the minor was on an errand, void for vagueness, since the word errand was vague); *Spokane v. Neff*, 152 Wn.2d 85 (2004) (city anti-prostitution ordinance was void for vagueness because it did not define the term “known prostitute,” which was one of the elements of the offense); *State v. Sansone*, 127 Wn.App. 630, 639 (2005) (the term “pornography,” as used in a community placement order, was unconstitutionally vague in violation of the Due Process Clause).

The aggravating circumstance sought by the State in Special Verdict C violates Due Process, as there is no possible way an accused person could understand what conduct is proscribed, or a juror could ascertain under an objective standard what facts he or she must find. In contrast, several aggravators contained within RCW 9.94A.535 allow a jury to objectively apply the aggravating circumstance based on objective criteria. For instance, RCW 9.94A.535(i) allows for a departure from the standard range where the offense resulted in the pregnancy of a child victim of rape. Assuming the State offered evidence confirming a pregnancy in such an instance, the existence of this aggravating circumstance would be irrefutable. This is true also for RCW 9.94A.535(c) (current offense was violent and defendant knew the victim was pregnant); RCW 9.94A.535(t) (offense committed shortly after being released from prison); RCW 9.94A.535(x) (offense committed against a public official). But Verdict Form C provides neither objective criteria nor guidance to assist the jury in determining under what circumstances the injuries substantially exceed the level of bodily harm necessary to establish First Degree Assault.

Stubbs analogizes his case to cases where similarly vague aggravating circumstances have been struck as violative of the Eighth Amendment's prohibition on cruel and unusual punishment. Br. Pet. at

15-19. The analogy is apt. The Fourteenth Amendment's requirement that criminal statutes give notice of what conduct will invite heightened punishment and supply standards that do not invite arbitrary and subjective application by juries and judges parallels and overlaps with the Eighth Amendment concern that decisions to inflict the ultimate punishment (death) are not based on an arbitrary and capricious sentencing process.

In *Tuilaepa v. California*, 512 U.S. 967, 974-75, 114 S.Ct. 2630, 129 L.Ed.2d 750, the Court explained:

In our decisions holding a death sentence unconstitutional because of a vague sentencing factor, the State had presented a specific proposition that the sentencer had to find true or false (e.g., whether the crime was especially heinous, atrocious, or cruel). We have held, under certain sentencing schemes, that a vague propositional factor used in the sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentencing process prohibited by *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) See *Stringer v. Black*, 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992). These concerns are mitigated when a factor does not require a yes or no answer to a specific questions, but only points the sentencer to a subject matter.

*Tuilaepa* requires that in order for a special circumstance for application of the death penalty to be constitutional: "First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a sub-class of defendants convicted of murder.

Second, the aggravating circumstance may not be unconstitutionally vague.” *Tuilaepa v. California*, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) (internal citations omitted).

Where aggravating circumstances in a death penalty case are overbroad, they have been stricken. The Court succinctly described these concerns in *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), criticizing the lack of guidance given to the jury in an Oklahoma death penalty case:

First, the language of the Oklahoma aggravating circumstance at issue—“especially heinous, atrocious, or cruel”—gave no more guidance than the “outrageously or wantonly vile, horrible or inhuman” language that the jury returned in its verdict in *Godfrey* [446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)]. The State’s contention that the addition of the word “especially” somehow guides the jury’s discretion, even if the term “heinous” does not, is untenable. To say that something is “especially heinous” merely suggests that the individual jurors should determine that the murder is more than just “heinous,” whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is “especially heinous.” *Godfrey, supra*, at 428-429, 100 S.Ct. at 1764-1765. Likewise, in *Godfrey* the addition of “outrageously or wantonly” to the term “vile” did not limit the overbreadth of the aggravating factor.

*Maynard v. Cartwright*, 486 U.S. 356, at 364.

While *Tuilaepa* and *Cartwright* were death penalty cases applying the Eighth Amendment, their analysis is equally applicable to the Fourteenth Amendment’s vagueness doctrine. *State v. Monschke*, 133

Wn.App 313, 332 n. 2 (2006) rev. den. 159 Wn.2d 1010 (2007). An individual facing a sentence outside that prescribed by the sentencing guidelines which may result in decades of additional imprisonment should not be afforded less process just because their punishment is perceived as less severe than the death penalty. Such individuals are still subject to incarceration, possibly for the duration of their life. Just as jurors' discretion was not sufficiently limited by the language disapproved in *Maynard v. Cartwright*, this Court should conclude that the language in Verdict Form C lacked sufficient objective criteria to ensure uniform application and fair notice.

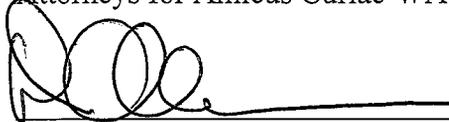
V. **CONCLUSION**

This Court should conclude that the Legislature contemplated the injuries suffered here in setting the standard range for first-degree assault. Even assuming for the sake of argument that the aggravating circumstance could be applied, to merely define excessive injury as the trial court did in

Verdict Form C was insufficient and, without additional evidence as to excessive injuries, constituted reversible error.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of September, 2009.

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**PROOF OF SERVICE**

David Allen swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 25<sup>th</sup> day of September, 2009, I sent by United States Mail, postage prepaid, one true copy of this document directed to:

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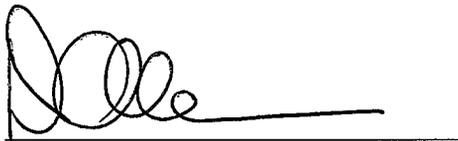
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DATED at Seattle, Washington this 25<sup>th</sup> day of September, 2009.



David Allen  
Attorney for Amicus Curiae WACDL

# APPENDIX A

## APPENDIX A

### **To Convict Instruction:**

To convict the defendant of the crime of assault in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 4<sup>th</sup> day of October, 2005, the defendant assaulted Ryan Goodwin;
- (2) That the defendant acted with intent to inflict great bodily harm;
- (3) That the assault
  - (a) was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death; or
  - (b) resulted in the infliction of great bodily harm...

CP 76.

### **Definitional Instructions:**

A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another with a deadly weapon or by any force or means likely to produce great bodily harm or death.

Great bodily harm means bodily injury that creates a probability of death or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

CP 75, 79.

### **Special Verdict Form C:**

Did the victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense?

CP 90.