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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

81650-6

Supreme Court No. \_\_\_\_\_  
Court of Appeals No. 25475-5-III

81650-6

FILED

JUL 23 2008

CLERK OF SUPREME COURT  
STATE OF WASHINGTON  
*[Signature]*

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

TROY DEAN STUBBS,

Defendant/Petitioner.

PETITION FOR REVIEW

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**I. IDENTITY OF PETITIONER.**

Petitioner, Troy Dean Stubbs, asks this Court to accept review of the Court of Appeals decision terminating review, designated in Part II of this petition.

**II. COURT OF APPEALS DECISION.**

Petitioner seeks review of the Court of Appeals decision filed May 20, 2008, which affirmed his conviction. A copy of the Court's published opinion is attached as Appendix A. A copy of the Court's Order Denying Motion for Reconsideration, filed June 20, 2008, is attached as Appendix B. This petition for review is timely.

**III. ISSUE PRESENTED FOR REVIEW.**

1. May an aggravating circumstance be used to justify an exceptional sentence, where the aggravating circumstance is inherent in an element of the offense?<sup>1</sup>
2. Does the statute pertaining to the aggravating circumstance violate due process vagueness prohibitions?
3. Is the instruction on the aggravating circumstance unconstitutionally vague?

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<sup>1</sup> This issue and the following two issues were also raised in State v. William Richard Joice, No. 815526, COA No. 57794-8-I, petition for review pending consideration 2/3/09.

4. Should Mr. Stubbs' prior juvenile adjudications be excluded from his criminal history?

#### IV. STATEMENT OF THE CASE.

In the early morning hours of October 4, 2005, for reasons not fully revealed, Ryan Goodwin was stabbed in the neck by a knife, severing his spinal cord and resulting in complete paralysis below the point of the injury. (RP 45-47, 149, 153)<sup>2</sup> Several witnesses testified that Mr. Stubbs was the perpetrator. (RP 135-36, 213, 251, 524)

Prior to trial, defense counsel filed a motion to strike from the Amended Information the aggravating factor that the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense. The crux of the argument was that an exceptional sentence could not be imposed based on the severity of the injuries because it is an element of the charged crime. (CP 36-56; 6/26/06 RP 12-19) The trial court denied the motion, finding "This is a fairly straightforward jury question and I don't have any business taking it away from the jury on a ... pretrial motion." (6/26/06 RP 21-23)

The jury was instructed in pertinent part:

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<sup>2</sup> Reference to the trial transcript will be RP, followed by the page number. Reference to the other two transcripts that were numbered separately will be either 6/26/06 RP or 9/7/06 RP, followed by the page number.

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.

(CP 75)

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)

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 79)

The jury convicted Mr. Stubbs of first degree assault while armed with a deadly weapon (General Verdict and Special Verdict Form "B").

(CP 87, 89) Specifically, the jury found that Mr. Stubbs assaulted Ryan Goodwin with a deadly weapon or by force or by means likely to produce great bodily harm or death, which resulted in the infliction of great bodily harm (Special Verdict Form "A"). (CP 88) The jury also found that the

victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense (Special Verdict Form "C"). (CP 90)

At sentencing, the trial court found that two prior juvenile felonies would count toward Mr. Stubbs' criminal history, resulting in an offender score of six. (9/7/06 RP 51-53) The resulting standard range with the 24-month deadly weapon enhancement was 186-240 months. (CP 111) The Court then imposed an exceptional sentence of 40 years (480 months), based on the jury's special verdict that the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense. (9/7/06 RP 57-58) This appeal followed. (CP 124-25)

**V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.**

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this Court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this Court, the U.S. Supreme Court and the Court of Appeals (RAP 13.4(b)(1) and (2)), and/or involves a significant question of law under the Constitution of the United States and state constitution (RAP 13.4(b)(3)), and/or involves issues of substantial public interest that should be determined by the Supreme Court (RAP 13.4(b)(4)).

**Issue No. 1. The aggravating circumstance, that the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense, is inherent in the "great bodily harm" element of first-degree assault and may not be used to justify an exceptional sentence.<sup>3</sup>**

The Washington Supreme Court has stated that "factors inherent in the crime – inherent in the sense that they were necessarily considered by the Legislature and do not distinguish the defendant's behavior from that inherent in all crimes of that type – may not be relied upon to justify an exceptional sentence." State v. Ferguson, 142 Wn.2d 631, 647-48, 16 P.3d 1271 (2001) (citing State v. Chadderton, 119 Wn.2d 390, 396, 832 P.2d 481 (1992)). Stated differently, "an enhanced sentence may not be based on those factors the Legislature necessarily considered in setting the sentence range for the *type* of offense." Chadderton, 119 Wn.2d at 395 (emphasis in original).

Appellate courts have repeatedly stricken exceptional sentences where the alleged "aggravating circumstance" inhered in the jury verdict for the underlying offense. State v. Dunaway, 109 Wn.2d 207, 218-19, 743 P.2d 1237 (1987) (planning is inherent in the premeditation element

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<sup>3</sup> Assignments of Error 1-4, 7.

of first degree murder, thus may not be used to justify an exceptional sentence for the crime of first degree murder); State v. Gore, 143 Wn.2d 288, 320, 21 P.3d 362 (2001) (same) (*rev'd on other grounds*, State v. Hughes, 154 Wn.2d 118, 132, 110 P.3d 192 (2005)); State v. Baker, 40 Wn.App. 845, 848-49, 700 P.2d 1198 (1985) (planning inherent in verdict for attempted first-degree escape); Ferguson, 142 Wn.2d at 648 (“deliberate cruelty” finding inhered in jury’s verdict for assault by intentionally exposing the human immunodeficiency virus (HIV) to another person with intent to inflict bodily harm); State v. Armstrong, 106 Wn.2d 547, 551, 723 P.2d 1111 (1986) (burns inflicted on the 10-month-old victim by defendant’s throwing boiling coffee on the child and plunging the child’s foot in the coffee were injuries accounted for in the offense of second degree assault and could not justify an exceptional sentence); State v. Nordby, 106 Wn.2d 514, 519, 723 P.2d 1117 (1986) (seriousness of bodily injuries could not justify exceptional sentence for vehicular assault because injuries were considered by the Legislature in setting the standard range for the offense); *accord*, State v. Cardenas, 129 Wn.2d 1, 6-7, 914 P.2d 57 (1996).

The rationale underlying these cases is that by defining an offense and assigning a certain seriousness level and sentence range to that

offense, the Legislature necessarily took into consideration the potential for variances in conduct. “[T]he idea of a range, rather than a fixed term . . ., is to allow the judge some flexibility in tailoring the sentence to the person and crime before him; the court may impose any sentence within the range that it deems appropriate.” Baker, 40 Wn.App. at 848.

The aggravating circumstance herein was contemplated by the Legislature in setting the standard ranges for first degree assault. The offense contains the element of great bodily harm, defined as "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." RCW 9A.04.110(4)(c). After reviewing the definitions for the lesser degrees of bodily injury set forth in RCW 9A.04.110(4)(a)—“bodily injury” and (b)—“substantial bodily harm”, it is clear that the “great bodily harm” element of first degree assault encompasses either the intent or actual infliction of the most severe bodily injury short of death. Therefore, Mr. Goodwin’s injuries, while severe, are evidently the type of injuries envisioned by the Legislature in setting the standard range. Consequently, the severity of injuries suffered cannot justify an exceptional sentence. *See*

Cardenas, 129 Wn.2d at 6-7, 914 P.2d 57. The judgment should be vacated and the case remanded for resentencing within the standard range.

**Issue No. 2. The statute pertaining to the aggravating circumstance violates due process vagueness prohibitions.<sup>4</sup>**

The Fourteenth Amendment's due process vagueness doctrine has a twofold purpose: (1) to provide the public with adequate notice of what conduct is proscribed and (2) to protect the public from arbitrary or ad hoc enforcement. City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000); State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001). A law violates due process vagueness prohibitions if either requirement is satisfied. Spokane v. Douglass, 115 Wn.2d 171, 177, 795 P.2d 693 (1990) (internal citation omitted). The party challenging the prohibition has the burden of overcoming the presumption of constitutionality. Id.

“A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Laws which impart an uncommon degree of subjectivity to the jury's consideration of a fact are subject to invalidation

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<sup>4</sup> Assignments of Error 5 and 7.

on due process vagueness grounds. As the Supreme Court has stated, a criminal statute that “leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case,” violates due process. Giacco v. Pennsylvania, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).

Here the instruction on the aggravating circumstance violated due process vagueness prohibitions because the requirement that the jury find Mr. Goodwin’s injuries “substantially exceeded” those necessary to establish the elements of the offense is so subjective that it has no standard. The trial court could possibly have made the instruction less subjective by according the aggravating circumstance a narrowing construction. The Court’s failure to do so doomed the instruction to such a degree of constitutional infirmity that reversal is now the only remedy.

**Issue No. 3. The instruction on the aggravating circumstance was unconstitutionally vague.<sup>5</sup>**

Prior to Blakely<sup>6</sup>, based on the faulty premise that they involved matters of judicial sentencing discretion, due process vagueness challenges to aggravating circumstances were generally deemed “theoretically and analytically unsound” and thus not given serious consideration or rejected

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<sup>5</sup> Assignments of Error 6 and 7.

<sup>6</sup> Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

out of hand by the appellate courts of this state. *See e.g. State v. Jacobsen*, 92 Wn.App. 958, 966, 965 P.2d 1140 (1998); *State v. Owens*, 95 Wn.App. 619, 628-29, 976 P.2d 656 (1999).

Because there is no constitutional right to sentencing guidelines--or, more generally, to a less discretionary application of sentences than that permitted prior to the Guidelines--the limitations the Guidelines place on a judge's discretion cannot violate a defendant's right to due process by reason of being vague. It therefore follows that the Guidelines cannot be unconstitutionally vague as applied to [the defendant] in this case. Even vague guidelines cabin discretion more than no guidelines at all. What a defendant may call arbitrary and capricious, the legislature may call discretionary, and the Constitution permits legislatures to lodge a considerable amount of discretion with judges in devising sentences.

*Jacobsen*, 92 Wn.App. at 966 (quoting *United States v. Wivell*, 893 F.2d 156, 159 (8th Cir. 1990)).

It was also assumed that because judges would factor their own awareness of the "typical" case into their assessment of whether an aggravating circumstance had been established, the subjectivity of certain aggravating circumstances would be minimized, further reducing the likelihood of a due process violation. *Nordby*, 106 Wn.2d at 518-19. Given the now-irrefutable proposition after *Blakely* that aggravating circumstances, as facts which increase punishment, operate as elements of

a higher offense which must be found by a jury beyond a reasonable doubt, the due process vagueness inquiry must apply.

In the death penalty context, the Supreme Court has held a challenged provision is unconstitutionally vague in violation of the Eighth Amendment if it “fails to adequately inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972).” Maynard v. Cartwright, 486 U.S. 356, 361, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). A vague sentencing factor creates “an unacceptable risk of randomness,” Tuilaepa v. California, 512 U.S. 967, 974, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994), and for this reason the “channeling and limiting of the sentencer’s discretion. . . is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.” Cartwright, 486 U.S. at 362 (citations omitted).

The Court explained the rationale for its holding in Cartwright thusly:

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.’

Cartwright, 486 U.S. at 364.

Here, by comparison, reasonable minds will differ on the quantum of evidence needed for injuries to “substantially exceed” what is necessary to establish the elements of first-degree assault. For example, some jurors may imagine that “great bodily harm” affecting more than one bodily part or organ will “substantially exceed” the level of bodily harm necessary to establish the elements of first-degree assault, while others may believe the requisite degree of injury is much greater. It is on these grounds that the trial court should have defined the aggravating circumstance or provided a limiting instruction to save it from constitutional infirmity.

**Issue No. 4. Since Mr. Stubbs’ prior juvenile adjudications do not come within the prior conviction exception to the Appendi rule because he was not afforded the right to a jury trial in those convictions, they cannot be included in his criminal history.<sup>7</sup>**

In State v. Weber, 159 Wn.2d 252, 149 P.3d 646 (2006), our Supreme Court held that that prior juvenile adjudications fall under the “prior conviction” exception in Appendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and are not facts that a jury must find under Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531,

159 L.Ed.2d 403 (2004). Weber, 159 Wn.2d at 255, 149 P.3d 646.

However, the majority's holding is inconsistent with the United States Supreme Court's reasons for excluding prior convictions from the rule, and with statutes and case law from this state. Weber, 159 Wn.2d at 280, 149 P.3d 646 (Madsen, J. dissenting).

In Jones v. United States, 526 U.S. 227, 143 L.Ed.2d 311, 119 S.Ct. 1215 (1999), a case preceding Apprendi, the U.S. Supreme Court said that "unlike virtually any other consideration used to enlarge the possible penalty for an offense, ... a prior conviction must itself have been established through procedures satisfying *the fair notice, reasonable doubt, and jury trial guarantees*." Jones, 526 U.S. at 249, 119 S.Ct. 1215 (emphasis added). Thus, the prior conviction exception to the rule stated in Apprendi is premised on there having been specific constitutional safeguards underlying a prior conviction used to increase the punishment for a subsequent offense. Weber, 159 Wn.2d at 282, 149 P.3d 646 (Madsen, J. dissenting). Therefore, in order to fall within the prior conviction exception to the rule in Apprendi, a juvenile adjudication must have had the same constitutional safeguards in place as in Jones, in

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<sup>7</sup> Assignment of Error 8.

particular the right to trial by jury and proof beyond a reasonable doubt.

Id.

Other courts have reached this conclusion after carefully examining the Supreme Court's cases. In United States v. Tighe, 266 F.3d 1187, 1194 (9th Cir.2001), the Ninth Circuit read Jones and Apprendi to mean that "the 'prior conviction' exception to Apprendi's general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt." If juvenile adjudications lack these due process guaranties, the court reasoned, they do not fall within the exception. Id. at 1194. Further, the Ninth Circuit said that insofar as the government argued that the exception should be extended to include nonjury juvenile adjudications, the "Apprendi Court's serious reservations about the reasoning of Almendarez-Torres<sup>8</sup> counsel[ed] against any extension[s]." Id.; *see* Apprendi, 530 U.S. at 487, 489-90, 120 S.Ct. 2348 (noting that it was arguable that Almendarez-Torres was wrongly decided). Other courts have also held that juvenile adjudications do not fall within the prior conviction exception. State v. Harris, 339 Or. 157, 118 P.3d 236 (2005); State v. Brown, 03-2788 (La. 7/6/04), 879 So.2d 1276.

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<sup>8</sup> Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998)

Finally, most commentators addressing this issue argue forcefully that a juvenile adjudication does not fall within the "prior conviction" exception to the Apprendi rule. Weber, 159 Wn.2d at 286, 149 P.3d 646 (Madsen, J. dissenting). One says, in summary, that "[s]ince the juvenile system of justice was founded on the principle of rehabilitation, and continues to embrace the 'rehabilitative ideal' in modern times, there are significant constitutional differences in the degree of procedural due process and fundamental fairness involved in adult convictions and juvenile adjudications" and because "juvenile adjudications [are] subject to less stringent procedural standards than adult criminal proceedings," the Apprendi rule "must be limited to prior convictions that were themselves obtained through proceedings affording individual defendants the same procedural safeguards they would be entitled to in the adult criminal justice system." Stephen F. Donahoe, Note, *The Problem With Forgiving (But Not Entirely Forgetting) the Crimes of Our Nation's Youth: Exploring the Third Circuit's Unconstitutional Use of Nonjury Juvenile Adjudications in Armed Career Criminal Sentencing*, 66 U. PITT. L.REV. 887, 907 (Summer 2005); see also Kimberly L. Johnson, Note & Comment, *Should Juvenile Adjudications Count as Convictions for Apprendi Purposes?*, 20 GA. ST. U.L.REV. 791 (Spring 2004) (juvenile

adjudications do not come within the prior conviction exception to the Apprendi rule; the juvenile system is different from the criminal justice system in that juvenile adjudications have a rehabilitative purpose and juveniles do not have the same rights as adults in the criminal justice system, in particular the right to trial by jury).

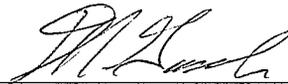
In fact, it is because of the fundamental difference between the juvenile justice system and the criminal system that the United States Supreme Court and this state's appellate courts have held that there is no right to a jury trial in the juvenile justice system. Weber, 159 Wn.2d at 284, 149 P.3d 646 (Madsen, J. dissenting) (citations omitted). In contrast, the criminal justice system is primarily punitive. Monroe v. Soliz, 132 Wn.2d 414, 420, 939 P.2d 205 (1997).

Herein, Mr. Stubbs' prior juvenile adjudications do not come within the prior conviction exception to the Apprendi rule because he was not afforded the right to a jury trial in those convictions. Therefore, his prior juvenile convictions cannot be included in his criminal history.

**VI. CONCLUSION.**

For the reasons stated herein, Defendant/Petitioner, Troy Dean Stubbs, respectfully asks this Court to grant the petition for review and reverse the decision of the Court of Appeals.

Respectfully submitted July 18, 2008,



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David N. Gasch  
Attorney for Petitioner  
WSBA #18270

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

**STATE OF WASHINGTON,**

**No. 25475-5-III**

**Respondent,**

**Division Three**

**v.**

**TROY DEAN STUBBS,**

**PUBLISHED OPINION**

**Appellant.**

Brown, J. — Troy Dean Stubbs appeals his exceptional sentence for his first degree assault conviction, contending the trial court erred in considering the severity of the victim's injuries as an aggravating factor under RCW 9.94A.535(3)(y) and instructional vagueness. We disagree. Pro se, Mr. Stubbs expresses various concerns that we either reject or cannot address. Accordingly, we affirm.

**FACTS**

Early on October 4, 2005, Mr. Stubbs, for unclear reasons, stabbed Ryan Goodwin once in the back of the neck with a knife. Mr. Goodwin's spinal cord was severed, resulting in partial paralysis of his arms and chest and complete paralysis

from the waist down. Mr. Goodwin is permanently confined to a wheelchair. Trial testimony showed Mr. Stubbs was partying with friends near Mr. Goodwin's home. The group was drinking and using methamphetamine. Around 2 a.m., Holly Stigall, Mr. Goodwin's girl friend, left the party to join Mr. Goodwin. About an hour later, several people from the party arrived at the Stigall/Goodwin home to get the couple to join them. Eventually, just Mr. Goodwin, Mr. Stubbs, and another male remained.

Mr. Stubbs and Mr. Goodwin began to argue. To divert Mr. Goodwin's attention, Mr. Stubbs told him a huge spider was behind him. When Mr. Goodwin turned to look for the spider, Mr. Stubbs stabbed Mr. Goodwin in the back of the neck. Mr. Goodwin dropped the burner he was holding, which caused a small fire. Mr. Stubbs ignored his pleas for help and ran away, forcing Mr. Goodwin to put the fire out with his bare arms. Mr. Goodwin was left with the knife embedded in his neck and unable to move his legs. He managed to reach a cell phone at arm's length to call for help. He was taken to a hospital by ambulance.

The State charged Mr. Stubbs with first degree assault while armed with a deadly weapon other than a firearm. Later, the State added the allegation that the "victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of Assault in the First Degree as charged as such an exceptional sentence outside the standard range is justified pursuant to RCW 9.94A.535(y)." Clerk's Papers (CP) at 12.

Before trial, the State successfully moved to submit this aggravating factor to the jury over Mr. Stubbs' objection that Mr. Goodwin's injuries did not exceed the level of bodily harm necessary to satisfy the elements of first degree assault.

At trial, Dr. Vivian Moise, a specialist in spinal cord injuries, described Mr. Goodwin's injuries. She testified that the stabbing severed Mr. Goodwin's spinal cord in half. This resulted in about 50 percent loss of strength in his left arm and roughly two-thirds loss of strength in his right hand. Mr. Goodwin's diaphragm still worked, but his rib cage muscles, which assist with breathing, were permanently paralyzed, increasing his risk of pneumonia. His bladder and intestines were paralyzed. She also explained that paralysis causes other medical problems, including higher risks of stroke, seizure, death, and a shortened life expectancy. The jury convicted Mr. Stubbs of first degree assault while armed with a deadly weapon and found the victim's injuries substantially exceeded the level of harm necessary to satisfy the offense elements.

At sentencing, the State asked the court to impose a life sentence based on the severity of Mr. Goodwin's injuries. Mr. Stubbs argued he should not receive a sentence exceeding the standard range for second degree murder, which was 199 to 299 months. The trial court sentenced Mr. Stubbs to 480 months. The standard range was 186 to 240 months. The court justified the sentence based on the severity of Mr. Goodwin's injuries, characterizing his condition as a "fate worse than death." Report of Proceedings (Sept. 17, 2006) at 55. Mr. Stubbs appealed.

ANALYSIS

A. Exceptional Sentencing

The issue is whether the trial court erred by considering the severity of Mr. Goodwin's injuries as the basis for Mr. Stubbs' exceptional sentence. Mr. Stubbs contends Mr. Goodwin's injuries inhere in first degree assault and cannot justify an exceptional sentence. The State responds that the definition of great bodily harm in the first degree assault statute does not account for the severity of Mr. Goodwin's injuries.

A court may depart from a standard range sentence if the offense involves substantial and compelling circumstances. *State v. Hammond*, 121 Wn.2d 787, 794, 854 P.2d 637 (1993). We apply the clearly erroneous standard to review the imposition of an exceptional sentence. *State v. Nordby*, 106 Wn.2d 514, 517-18, 723 P.2d 1117 (1986). A reason for imposing an exceptional sentence is clearly erroneous if it is not supported by substantial evidence. *State v. Jeannotte*, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997). We determine whether, as a matter of law, "factually supported aggravating factors justify an exceptional sentence." *State v. Russell*, 69 Wn. App. 237, 250, 848 P.2d 743 (1993). Our review of the legal sufficiency of the sentence is therefore, de novo. *State v. Smith*, 124 Wn. App. 417, 435, 102 P.3d 158 (2004), *aff'd*, 159 Wn.2d 778, 154 P.3d 873 (2007).

The trial court justified the 480-month sentence based on the severity of Mr.

Goodwin's injuries, finding they were substantially more severe than required under the first degree assault statute. Generally, the seriousness of a victim's injuries is a valid aggravating factor as long as the injuries are "significantly more serious than what is typically involved in the crime." *State v. Warren*, 63 Wn. App. 477, 479, 820 P.2d 65 (1991). But the seriousness of the victim's injuries cannot support an exceptional sentence if the factor was considered by the legislature in defining the crime itself. *State v. Bourgeois*, 72 Wn. App. 650, 661-62, 866 P.2d 43 (1994).

Mr. Stubbs stabbed Mr. Goodwin in the back of his neck with a knife, causing severe paralysis. Mr. Goodwin dropped the burner he was holding, starting a fire. Mr. Stubbs callously ignored Mr. Goodwin's pleas for help and ran away, forcing Mr. Goodwin to put the fire out with his bare arms, causing further injury. Dr. Vivian Moise testified about Mr. Goodwin's loss of strength and paralyzed rib cage muscles, bladder, and intestines. Dr. Moise predicted an increased risk of pneumonia, stroke, seizure, and death and gave Mr. Goodwin a 17-year shortened life expectancy.

The jury found that Mr. Goodwin's injuries substantially exceeded the level of bodily harm necessary to satisfy the first degree assault elements, considering the great bodily harm definition. The sentencing court properly exercised its discretion in acting on the special verdict finding when ordering this exceptional sentence. The jury could well find that Mr. Stubbs did not just threaten Mr. Goodwin's death or cause significant serious permanent loss or impairment to the functioning of his bodily parts or

organs. Mr. Stubbs actually caused the risks noted by Dr. Moise, and shortened Mr. Goodwin's life expectancy by 17 years.

Given the evidence, the jury could find Mr. Goodwin did not present as a typical fixed and stable victim of first degree assault because Mr. Goodwin remains in jeopardy of death in a manner exceeding great bodily harm, and has been forced to live in a suspended, tortured state between life and death, during his shortened life expectancy.

Next Mr. Stubbs contends RCW 9.94A.535(3)(y) and the aggravating circumstance instruction violate due process vagueness prohibitions. Mr. Stubbs first argues RCW 9.94A.535(3)(y) gives excessive subjectivity to a jury's factual determinations.

Generally, the void for vagueness doctrine does not apply to a sentencing scheme. *State v. Baldwin*, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003). The void for vagueness doctrine applies to laws that involve conduct, not sentencing directives. Further, a statute is not impermissibly vague merely because some facts could exist where all its possible applications cannot be anticipated. *State v. Worrell*, 111 Wn.2d 537, 541, 761 P.2d 56 (1988). Mr. Stubbs' challenge fails to reference the facts of his case. Even so, the statute is not vague because it appraises the individuals that inflicting serious bodily injury upon another would subject them to a higher sentence.

Mr. Stubbs next argues the jury instruction was unconstitutionally vague. A jury instruction is not unconstitutionally vague if it has a commonsense meaning that juries

could understand. *Tuilaepa v. California*, 512 U.S. 967, 976 (1994); *State v. Elmore*, 139 Wn.2d 250, 289-90, 985 P.2d 289 (1999). Here, the term “substantially exceeds” is not vague because it denotes ascertainable standards for an exceptional sentence and is used in relationship to the definition for great bodily harm, which provides the jury with a standard for comparison. Accordingly, there is no constitutional vagueness violation.

#### B. Juvenile Adjudications

The next issue is whether the trial court erred in including Mr. Stubbs’ juvenile adjudications in calculating his offender score. Mr. Stubbs contends his juvenile adjudications do not carry the same procedural safeguards as adult convictions, and should not fall under the prior conviction exception in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).<sup>1</sup> However, his supporting arguments have been considered and rejected by our Supreme Court. See *State v. Weber*, 159 Wn.2d 252, 255, 149 P.3d 646 (2006), *cert. denied*, 127 S. Ct. 2986, 168 L. Ed. 2d 714 (2007). After reviewing cases from numerous states, the *Weber* court concluded that

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<sup>1</sup> In excluding prior convictions as facts a jury must find in order to enhance a defendant’s sentence, the *Apprendi* court reasoned: “[T]he certainty that procedural safeguards attached to any ‘fact’ of prior conviction, . . . mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a ‘fact’ increasing punishment beyond the maximum statutory range.” *Apprendi*, 530 U.S. at 488.

juvenile adjudications fall under the prior adjudication exception. *Weber*, 159 Wn.2d at 262. Mr. Stubbs' argument therefore fails. The trial court did not err in including his juvenile offenses in calculating his offender score.

C. Statement of Additional Grounds for Review

Pro se, Mr. Stubbs voices various concerns. He broadly asserts the jury panel was improperly selected and defense counsel was ineffective for failing to exclude certain jurors. He claims several jurors were biased, the State improperly obtained evidence, and witnesses had credibility problems.

Mr. Stubbs suggests we review inconsistent, incredible, perjured witnesses' statements, but credibility determinations are for the finder of fact, not a review court. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Mr. Stubbs fails to elaborate on his other concerns, cite any authority, or reference the relevant parts of the record as required under RAP 10.3(a)(5) and (6). Passing treatment of an issue or lack of reasoned argument is insufficient to allow for our meaningful review. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); RAP 10.3(a)(5). Thus, we are not able to address his remaining concerns.

Affirmed.

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Brown, J.

I CONCUR:

No. 25475-5-III  
State v. Stubbs

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Kulik, A.C.J.

No. 25475-5-III

Schultheis, C.J. (dissenting) — I respectfully dissent. Particularly severe injuries may be used to enhance a defendant's sentence only if they are greater than those contemplated by the legislature in establishing the standard range sentence. *State v. Nordby*, 106 Wn.2d 514, 723 P.2d 1117 (1986). While Ryan Goodwin's injuries are unquestionably severe, they inhere in the crime of first degree assault and therefore cannot justify an exceptional sentence. I would therefore remand for a sentence within the standard range.

A conviction for first degree assault requires proof that the defendant caused "great bodily harm." RCW 9A.36.011. The majority holds that the sentencing court properly exercised its discretion in accepting the jury's finding that Mr. Goodwin did not present as a typical victim of first degree assault and finds Mr. Goodwin's injuries exceeded the statutory definition of "great bodily harm" due to his shortened life expectancy and the difficulties of his daily life.

The majority ignores statutory language that defines "great bodily harm" as

“bodily injury which creates a probability of death.” RCW 9A.04.110(4)(c). This language is crucial in evaluating the type of injury envisioned by the legislature in setting the standard range for first degree assault. Troy Dean Stubbs argues that this definition “encompasses either the intent or actual infliction of the most severe bodily injury short of death.” Br. of Appellant at 9. I agree and conclude that Mr. Goodwin’s injuries fall squarely within the statutory definition. In fact, even the majority characterizes Mr. Goodwin’s injuries as creating a probability of death.

*State v. Bourgeois*, 72 Wn. App. 650, 866 P.2d 43 (1994) is instructive here. In that case, the juvenile defendant was convicted of two counts of first degree assault after shooting two people. One of the victims suffered the loss and functioning of multiple organs: his spleen was removed, and a portion of his pancreas and colon were removed, requiring a colostomy. *Id.* at 652. The juvenile court imposed a manifest injustice disposition upward, finding the victim’s injuries were more severe than contemplated by the first degree assault statute and “capable of causing death.” *Id.* at 662 (quoting trial court).

In reversing the disposition, Division One of this court concluded that the injuries in question “unambiguously” fell within the legislature’s definition of first degree assault. *Id.* Similarly, Mr. Goodwin’s injuries fit the statutory definition. The majority finds that his paralysis and shortened life expectancy justify an exceptional sentence, but it is just

this “probability of death” that places Mr. Goodwin’s injuries squarely within the scope of the statutory definition. RCW 9A.04.110(4)(c).

In reaching this conclusion, I am mindful of the lack of gratuitous violence in *Bourgeois*, 72 Wn. App. at 663. In reversing the manifest injustice disposition, the court compared its facts to those in *State v. George*, 67 Wn. App. 217, 220, 834 P.2d 664 (1992), *overruled on other grounds by State v. Ritchie*, 126 Wn.2d 388, 894 P.2d 1308 (1995), where the defendants hit an elderly woman in the face three times, held her down for 15 minutes, robbed and raped her, and then beat her in the head multiple times with the stock of a rifle, using so much force the rifle broke. The woman’s skull was fractured and she was left with permanent brain damage and in a semivegetative state. *George*, 67 Wn. App. at 220.

The court affirmed the exceptional sentence for first degree assault, finding the woman’s injuries were more serious than the typical first degree assault. *Id.* at 223. Significantly, in reaching this conclusion, the court noted the multiple acts and the “deliberate and gratuitous violence” that caused the victim’s injuries. *Id.* at 223 n.3.

This case lacks the drawn out, gratuitous violence present in *George*. The injuries here were the result of a single, impulsive act. And though severe, they fall within the range of injuries contemplated by the first degree assault statute. Not all first degree assaults will result in injuries as serious as Mr. Goodwin’s. But that is not the test. We

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evaluate whether the legislature contemplated such injuries in setting the standard range sentence. The standard range for first degree assault encompasses a wide range of injuries, including those short of death. RCW 9A.04.110(4)(c). Because Mr. Goodwin's injuries fall within this statutory range, the sentencing court erred in considering the severity of the injuries to support the exceptional sentence. Therefore, I respectfully dissent.

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Schultheis, C.J.

FILED

JUN 20 2008

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

**COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III**

STATE OF WASHINGTON,	)	
	)	No. 25475-5-III
Respondent,	)	
	)	
v.	)	
	)	ORDER DENYING MOTION
TROY DEAN STUBBS,	)	FOR RECONSIDERATION
	)	
Appellant.	)	
	)	

THE COURT has considered appellant's motion for reconsideration of this Court's opinion under date of May 20, 2008, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, appellant's motion for reconsideration is hereby denied.

DATED: June 20, 2008

BY A MAJORITY:



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**JOHN A. SCHULTHEIS**  
**CHIEF JUDGE**