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STATE OF WASHINGTON

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Supreme Court No. 81650-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TROY DEAN STUBBS,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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ORIGINAL

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A. INTRODUCTION

In Blakely v. Washington,¹ the Supreme Court held that punishment may only follow from facts found by a jury beyond a reasonable doubt, and invalidated Washington's exceptional sentencing scheme, which permitted sentences outside the standard range based on judicial factfinding. This case presents two issues regarding the imposition of exceptional sentences in Washington following Blakely. The first concerns a straightforward application of this Court's longstanding rule – unchanged by Blakely – that facts contemplated by the Legislature in setting the standard range for the charged offense cannot support an exceptional sentence. The second requires this Court to decide whether RCW 9.94A.535(3)(y) fails to provide notice of what conduct is proscribed and encourages arbitrary and ad hoc enforcement, in violation of due process.

Here, applying this statutory aggravator, the jury found the victim's injuries "substantially exceed[ed] the level of bodily harm necessary to satisfy the elements of the offense" of assault in the first degree. Based upon this finding, the court imposed an exceptional sentence.

¹ Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

But although judges are expected to recognize what is truly “exceptional” and what is not, jurors are presumed to follow only the instructions they are given. These instructions must ensure the jurors have not improperly based their verdicts on factors the Legislature considered in setting the standard range for the offense, or on their own arbitrary and subjective definitions of the circumstances they are asked to find. Only if juries are properly instructed can the Court be confident that verdicts on aggravating factors were rendered fairly.

Because the Legislature necessarily contemplated the possibility of severe injuries in setting the standard range for the crime of assault in the first degree, this Court should hold an exceptional sentence may not be imposed on this basis. In the alternative, this Court should hold RCW 9.94A.535(3)(y) presents an unacceptable risk that punishment will be based on arbitrary and subjective standards, in violation of due process.

B. ISSUES PRESENTED FOR REVIEW

1. Whether serious injuries were contemplated by the Legislature in fixing the standard range for assault in the first degree, precluding imposition of an exceptional sentence on this basis.

2. Whether RCW 9.94A.535(3)(y), permitting an exceptional sentence to be imposed where the victim’s injuries “substantially exceed

the level necessary to satisfy the elements of the offense,” violates due process vagueness prohibitions.

3. Whether Special Verdict form C, asking, “Did the victim’s injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense?” violates due process vagueness prohibitions. CP 90.

C. STATEMENT OF THE CASE

Ryan Goodwin was stabbed in the neck by a knife, partially severing his spinal cord and causing paralysis below the point of the injury. RP 45-47, 149, 153.² According to several witnesses, petitioner Troy Dean Stubbs stabbed Goodwin during an argument. RP 135-36, 213, 251, 524.

The State initially charged Stubbs with assault in the first degree with a deadly weapon, but, prior to trial, amended the information to allege the aggravating circumstance that the victim’s injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense. Stubbs moved to strike the aggravating circumstance, but the trial court denied the motion, finding “This is a fairly straightforward jury

² The trial transcript is referenced as “RP,” followed by page number. Reference to two other transcripts is by date, followed by page number.

question and I don't have any business taking it away from the jury on a ... pretrial motion." 6/26/06 RP 21-23.

At trial, the "to convict instruction" provided:

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 4th 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; RCW 9A.36.011.

The jury received the following 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.

The jury was also issued special verdict forms for purposes of a deadly weapon sentencing enhancement and the aggravating circumstance.

Although the court provided a definition of "deadly weapon," special

verdict form C simply asked, “Did the victim’s injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense?” without any pertinent definitional instruction. CP 90.

The jury convicted Stubbs as charged and answered “yes” to both special verdicts. Based on Stubbs’ criminal history, and including the deadly weapon enhancement, Stubbs’ standard range for the first degree assault was 186-240 months.

At sentencing, the State asked the court to impose an exceptional sentence of life imprisonment. Stubbs objected, and requested a standard range sentence.³ The court sentenced Stubbs to serve forty years – 480 months – in prison. 9/17/06 RP 58.

In the court of appeals, Stubbs argued that his exceptional sentence should be invalidated, contending first that the severity of Goodwin’s injuries were contemplated by the Legislature in fixing the standard range for the crime of first-degree assault, and in the alternative that both the statute and jury instruction pertaining to the aggravating circumstance were unconstitutionally vague.

A two-judge majority of the court affirmed the sentence, ruling, “the jury could find Mr. Goodwin did not present as a typical fixed and

³ Stubbs aptly noted that had the injury resulted in Goodwin’s death, he would have been prosecuted for second degree felony murder. The standard range for felony murder in the second degree would have been 199-299 months.

stable victim of first degree assault” because of his paralysis and shortened life expectancy. State v. Stubbs, 144 Wn. App. 644, 650, 184 P.3d 660 (2008). The court also rejected Stubbs’ vagueness challenges. Id. at 650-51.

Dissenting Judge Schultheis disagreed. He wrote,

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 intent or actual infliction of the most severe bodily injury short of death.” ... 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.

Stubbs, 144 Wn. App. at 652-53 (Schultheis, J., dissenting) (citation omitted).

Judge Schultheis concluded,

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 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.

Id. at 654.

This Court has granted Stubbs' petition for review.

D. ARGUMENT

1. THE STANDARD RANGE PRESCRIBED BY THE LEGISLATURE FOR THE CRIME OF ASSAULT IN THE FIRST DEGREE CONTEMPLATES THE INJURIES THAT OCCURRED HERE, SO NO EXCEPTIONAL SENTENCE COULD HAVE BEEN IMPOSED PURSUANT TO RCW 9.94A.535(3)(y).

a. "Great bodily harm" is an element of first-degree assault; thus the severity of the victim's injuries could not authorize an exceptional sentence. It is settled law that "[a]n element of the charged offense may not be used to justify an exceptional sentence." State v. Ferguson, 142 Wn.2d 631, 647-48, 16 P.3d 1271 (2001). The rationale for this rule is that some factors are

inherent in the crime – inherent in the sense that they were necessarily considered by the Legislature [in establishing the standard sentence range for the offense] and do not distinguish the defendant's behavior from that inherent in all crimes of that type.

Id. (citing State v. Chadderton, 119 Wn.2d 390, 396, 832 P.2d 481 (1992) (alterations in original)). Thus, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense." State v. Gore, 143 Wn.2d 288, 316, 21 P.3d 362 (2001)

(same) (rev'd on other grounds, State v. Hughes, 154 Wn.2d 118, 132, 110 P.3d 192 (2005)).

As was explained prior to Blakely,

we use a two-part analysis to determine the validity of an aggravating factor: "First, a trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range. Second, the asserted aggravating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category." Under the second prong of this analysis, a "typical" offense is defined by the elements of the charged crime.

State v. Owens, 95 Wn. App. 619, 624, 976 P.2d 656 (1999)

(emphasis added, citation omitted).

Appellate courts have repeatedly stricken exceptional sentences where the alleged "aggravating circumstance" inhered in the jury verdict for the underlying offense. 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. Dunaway, 109 Wn.2d 207, 218-19, 743 P.2d 1237 (1987) (planning is inherent in the premeditation element of first degree murder, thus may not be used to justify an exceptional sentence for the crime of first degree murder); Gore, 143 Wn.2d at 320 (same); State v. Bourgeois, 72 Wn. App. 650, 662, 866 P.2d 43 (1994) (serious wounds inflicted on victims fell within the scope of the statutory

definition of first-degree assault, and could not support sentence outside standard range); State v. Baker, 40 Wn. App. 845, 848-49, 700 P.2d 1198 (1985) (planning inherent in verdict for attempted first-degree escape); 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); State v. Cardenas, 129 Wn.2d 1, 6-7, 914 P.2d 57 (1996) (same).

The State prosecuted Stubbs for both alternative means of committing assault in the first degree. Consistent with the statutory definition of "great bodily harm," the jury was instructed,

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 (emphases added); see RCW 9A.04.110(4)(c). By its plain terms, the statute contemplates all injuries more significant than "substantial

bodily harm” short of death. RCW 9A.04.110(4)(c); Bourgeois, 72 Wn. App. at 662.

The Legislature considers assault in the first degree to be a very serious crime. It is classified under the Sentencing Reform Act of 1981 (“SRA”) as a “most serious offense” and “serious violent offense.” RCW 9.94A.030(28), (37). It is assigned a seriousness level of XII by the SRA – the highest seriousness level available for any crime short of aggravated murder in the first degree, murder in the first degree, homicide by abuse, murder in the second degree, malicious explosion in the first and second degrees, and malicious placement of an explosive in the first degree. RCW 9.94A.515.

In addition to authorizing severe punishment for all first-degree assaults, the Legislature created a broad standard range for assault in the first degree which permits particularly egregious offenders to receive sentences approximately five years greater than their counterparts whose conduct is less serious. In short, it is absurd to assume the Legislature did not consider the possibility that serious injury might result from a first degree assault, or that the Legislature only contemplated no-injury or minor-injury offenses in fixing the standard range for the crime.

But in upholding the 480-month exceptional sentence, Division Three approved a paradigm in which any injuries that exceed a baseline

sufficient to withstand a sufficiency challenge become exceptional. According to this construct, the standard range only applies to the “level” of injuries “necessary to satisfy the elements of the offense” and any injuries that “substantially exceed” this “level” – whatever that may mean – authorize a sentence outside the standard range.

As evidenced by its oral ruling at the sentencing hearing, this was the precise standard employed by the trial court:

I think that there are injuries which will qualify, minimally, the—a particular assault as a first degree assault, egregious injuries, to be sure, such as loss of a finger, loss of an eye. Nobody wants to lose their hearing, nobody wants to lose a tooth, no one wants to lose any kind of—have any kind of substantial impairment of any bodily part or organ. Maybe a tooth isn't a correct example, but certainly losing an eye, losing a finger, losing a limb of any kind can qualify as a first degree assault. This is a case where these injuries were substantially in excess of that minimal requirement.

9/17/06 RP 57.

In Bourgeois, the court repudiated this approach. Bourgeois, a juvenile, had shot his victims with a handgun. 72 Wn. App. at 652. Both victims “would have died as a result of the gunshot wounds had they not received emergency care.” Id. As a result of the wounds, one victim had portions of his pancreas, colon, and his entire spleen removed. Id.

The trial court had reasoned a manifest injustice disposition upward was appropriate because “the injuries actually inflicted were more severe

than the minimum injuries that could have led to the same conviction.” Id. at

662. The court of appeals responded,

We believe that this approach avoids the relevant question: did the Legislature contemplate the injuries actually inflicted in defining, and setting the standard range for, the crime of conviction?

Id. Answering this question in the affirmative, the court reversed the disposition.

In this case, the answer to this question is also yes. This Court should conclude that because the “great bodily harm” prong of assault in the first degree contemplates serious injuries short of death, imposing an exceptional sentence based on the degree of injuries is contrary to legislative intent.

b. The remedy is reversal of the exceptional sentence and remand for a sentence within the standard range. Where an exceptional sentence is based on reasons insufficient to justify the sentence as a matter of law, the sentence must be reversed and remanded for resentencing within the standard range. Ferguson, 142 Wn.2d at 649; State v. Batista, 116 Wn.2d 777, 793, 808 P.2d 1141 (1991). Stubbs’ sentence must be reversed and remanded for imposition of a standard range sentence.

2. THE STATUTE AND INSTRUCTION PERMITTING AN EXCEPTIONAL SENTENCE TO BE IMPOSED IF "THE INJURIES SUBSTANTIALLY EXCEED THE LEVEL NECESSARY TO SATISFY THE ELEMENTS" OF THE CRIME VIOLATE DUE PROCESS VAGUENESS PROHIBITIONS.

The vagueness doctrine of the due process clause rests on two principles. First, penal statutes must provide citizens with fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). "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." Id. at 108-09.

a. The void-for-vagueness doctrine applies to statutes that authorize increased punishment based on factual findings by juries. Before Blakely, in State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003), this Court held that "the void for vagueness doctrine should have application only to laws that "proscribe or prescribe conduct" and ... it was "analytically unsound" to apply the doctrine to laws that merely provide directives that judges should consider when imposing sentences." Baldwin, 150 Wn.2d at 458 (quoting State v. Jacobsen, 92 Wn. App. 958,

966, 965 P.2d 1140, rev. denied, 137 Wn.2d 1033 (1999) (internal quotation omitted)). This Court concluded that the due process vagueness doctrine did not apply to statutory aggravating factors, reasoning, “before a state law can create a liberty interest, it must contain “substantive predicates” to the exercise of discretion and “specific directives to the decisionmaker that if the regulations’ substantive predicates are present, a particular outcome must follow.” 150 Wn.2d at 460 (quoting In re Personal Restraint of Cashaw, 123 Wn.2d 138, 144, 866 P.2d 8 (1994)). Relying on this premise, this Court concluded that sentencing guidelines “do not define conduct ... nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature[,]” and so found the void-for-vagueness doctrine “[has] no application in the context of sentencing guidelines.” Baldwin, 150 Wn.2d at 459.

In light of Blakely and its progeny, however, the opposite is true. I.e., if “laws that dictate particular decisions given particular facts can create liberty interests, but laws granting a significant degree of discretion cannot,” Baldwin, 150 Wn.2d at 460, then an accused person has a liberty interest in laws authorizing exceptional sentences based on factual findings by juries. The void-for-vagueness doctrine must be applied to statutory aggravating circumstances.

Indeed, after Blakely, this conclusion is inescapable. The Supreme Court has repeatedly made it clear that the right to a jury determination of facts essential to punishment channels sentencing judges' discretion – not the other way around. Blakely, 542 U.S. at 304-05. This rule is closely tied to the other foundational premise of Blakely, Apprendi, and the many decisions applying Apprendi's rule: because they increase the maximum punishment to which an accused person would otherwise be exposed, aggravating circumstances are elements. Blakely, 542 U.S. at 306-07; Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). If a fact “increases the maximum punishment that may be imposed on a defendant, that fact – no matter how the State labels it – constitutes an element, and must be found by a jury beyond a reasonable doubt.” Sattazahn v. Pennsylvania, 537 U.S. 101, 111, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003); see also Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2348, 153 L.Ed.2d 556 (2002); Harris v. United States, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002).

b. The statute and instruction requiring a jury to decide whether the victim's injuries “substantially exceed the level necessary to satisfy the elements of the offense” violate due process vagueness prohibitions. Citing Baldwin, Division Three concluded “the void for vagueness doctrine does not apply to a sentencing scheme.” State v.

Stubbs, 144 Wn. App. 644, 650, 184 P.3d 660 (2008). The court alternately concluded the statute was not vague “because it apprises the individuals that inflicting serious bodily injury upon another would subject them to a higher sentence” and found,

[T]he 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.

Id. at 651. The court concluded the special verdict had a “commonsense meaning that juries could understand.” Id. at 650-51 (citing Tuilaepa v. California, 512 U.S. 967, 976, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994)).

The flaws in the court’s reasoning are inherent in its analysis. Citizens are apprised by the plain language of the first-degree assault statute that a “typical” assault in the first degree will result in serious injury or even the probability of death. Cf., Stubbs, 144 Wn. App. at 644. Because the definition of assault in the first degree encompasses life-threatening injuries, RCW 9.94A.535(3)(y) does nothing to enhance citizens’ understanding that more severe penalties may follow from some assaults.

Further, while judges may understand what “substantially exceeds” means, the term is so imprecise that it carries no “commonsense meaning”

that could consistently be applied by jurors. This is especially true here because the jurors were given no definition of the aggravating circumstance. Because the jury was told that some assaults in the first degree may occur by threat of deadly weapon, some jurors may have imagined that any injury will “substantially exceed” the level of bodily harm necessary to establish the elements of the offense. Without further instruction, there is no way to ascertain how the jury defined “the level necessary to satisfy the elements of the offense” or what injuries might “substantially exceed” that level.

When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face.

Walton v. Arizona, 497 U.S. 639, 653, 110 S.Ct. 3047, 111 L.Ed.2d 511

(1990), overruled in part by Ring, 536 U.S. at 609.

After California’s determinate sentencing scheme was struck down in Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2006), the California Supreme Court addressed the problems with submitting factors typically decided by judges to juries:

[T]o the extent a potential aggravating circumstance at issue in a particular case rests on a somewhat vague or subjective standard, it may be difficult for a reviewing court to conclude with confidence that, had the issue been submitted to the jury, the jury would have assessed the

facts in the same manner as did the trial court. The sentencing rules that set forth aggravating circumstances were not drafted with a jury in mind. Rather, they were intended to “provid[e] criteria for the consideration of the trial judge.” ... It has been recognized that, because the rules provide criteria intended to be applied to a broad spectrum of offenses, they are “framed more broadly than” criminal statutes and necessarily “partake of a certain amount of vagueness which would be impermissible if those standards were attempting to define specific criminal offenses.” ... Many of the aggravating circumstances described in the rules require an imprecise quantitative or comparative evaluation of the facts. For example, aggravating circumstances set forth in the sentencing rules call for a determination as to whether “[t]he victim was “particularly vulnerable,” whether the crime “involved ... a taking or damage of great monetary value,” or whether the “quantity of contraband” involved was “large.”

People v. Sandoval, 41 Cal. 4th 825, 161 P.3d 1146, 1155-56 (2007)

(emphasis in original).

The Court of Appeals cited Tuilaepa for the proposition that the instruction was not vague, but in the Eighth Amendment context, vague aggravators such as the one at issue here have consistently been stricken.

In fact, in Tuilaepa 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). Those concerns are mitigated when a factor does not require a yes or no answer to a specific question, but only points the sentencer to a subject matter.

Tuilaepa, 512 U.S. 974-75.

The aggravating circumstance submitted to this jury asked for a “yes or no” answer to a question that required an “an imprecise quantitative or comparative evaluation of the facts.” Cf. Sandoval, 161 P.3d at 1156. As such, it created an “unacceptable risk of randomness,” Tuilaepa, 512 U.S. at 974, in violation of due process. This Court should conclude RCW 9.94A.535(3)(y) is void for vagueness.

c. The constitutional violation cannot be cured by constitutional harmless error analysis or de novo review. The Ninth Circuit has explained that when a sentence is based on an unconstitutionally vague aggravating circumstance, the state appellate court may affirm the sentence in three ways, only two of which are relevant here.⁴ Valerio v. Crawford, 306 F.3d 742, 756-57 (9th Cir. 2002), cert. denied sub nom., McDaniel v. Valerio, 538 U.S. 994 (2003).

First, the court may find the error harmless under Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Valerio, 306 F.3d at 756. Under this method, the sentence may be affirmed only if

⁴ The third method, which permits an appellate court to cure a penalty-phase instructional error by “reweighing” aggravating and mitigating circumstances is relevant only in capital cases. See Valerio, 306 F.3d at 757.

the court finds beyond a reasonable doubt the same result would have been obtained without the unconstitutional aggravating circumstance. Id. (citing Clemons v. Mississippi, 404 U.S. 738, 752-53, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990)). Here, the exceptional sentence was based on a single aggravating circumstance; thus, the elimination of the improperly-considered aggravating circumstance requires remand for a standard range sentence.

With respect to the second method – de novo review of the evidence under a narrowed construction of the aggravator, as prescribed in Walton – the Court in Valerio found this violates the defendant’s Sixth Amendment jury trial guarantee. 306 F.3d at 756-57. The Court reasoned, “[i]n performing a Walton analysis, the state appellate court is not reviewing a lower court finding for correctness; it is, instead, acting as a primary factfinder.” Valerio, 306 F.3d at 756-57. On this basis, the Court found it “inescapable that this aspect of Walton is invalid under the rationale of Ring.”

The Supreme Court has not yet resolved whether an appellate court may, consistent with Ring, cure the finding of a vague aggravating circumstance by applying a narrower construction. However, the Valerio Court properly concluded that de novo review where the jury was the factfinder cannot be undertaken without violating the Sixth Amendment.

Because Stubbs' sentence was based on a single, unconstitutional, aggravator and neither a constitutional harmless error analysis nor a Walton analysis may cure the error, Stubbs must be resentenced within the standard range.

F. CONCLUSION

This Court should hold that the Legislature contemplated serious injuries in setting the standard range for assault in the first degree, and thus it was improper to impose an exceptional sentence based on RCW 9.94A.535(3)(y). This Court should also hold that this aggravating circumstance violates due process vagueness prohibitions, and must be stricken.

DATED this 19th day of June, 2009.

Respectfully submitted:



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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BY RONALD R. CARPENTER

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 TROY STUBBS,)
)
 Petitioner.)

CLERK

NO. 81650-6

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF JUNE, 2009, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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