

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

NO. 82029-5

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THE SUPREME COURT OF THE STATE OF WASHINGTON
BY RONALD R. CARPENTER

CLERK

STATE OF WASHINGTON,

Respondent,

v.

RICHARD MUTCH,

Appellant.

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

APPELLANT'S OPENING BRIEF

NANCY P. COLLINS
Attorney for Appellant

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

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A. SUMMARY OF ARGUMENT.

In 2008, this Court reversed Richard Mutch's 1994 sentence of life without the possibility of parole imposed under the "three-strikes" sentencing law, and remanded the case for re-sentencing. Upon remand, the prosecution asked the trial court to impose an exceptional sentence more than double the standard range based on Mr. Mutch's high offender score.

The exceptional sentence imposed must be reversed. The statute authorizing a court to impose an exceptional sentence expressly applies in a re-sentencing only where the individual previously received an exceptional sentence and Mr. Mutch did not previously receive an exceptional sentence. The statute also mandates the prosecution provide notice before the trial or plea, and they did not give such notice. Moreover, the "unpunished crimes" aggravating factor cannot be the basis for an exceptional sentence when the trial court miscalculated the offender score. Finally, the court's increased punishment based on facts not found by a jury or proven beyond a reasonable doubt violates the state and federal constitutional rights to fair trial by jury.

B. ASSIGNMENTS OF ERROR.

1. The court lacked authority to impose an exceptional sentence under RCW 9.94A.535 and RCW 9.94A.537.

2. The prosecution lacked authority to request an exceptional sentence as it had not complied with the mandatory notice requirements of RCW 9.94A.537.

3. The court erred by imposing an exceptional sentence above the standard range based on an incorrect calculation of Mr. Mutch's offender score.

4. The court erred by entering Finding of Fact 4, which incorrectly asserts Mr. Mutch did not challenge his criminal history. CP 23 (attached as Appendix A).

5. The court violated Mr. Mutch's Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process when it found he had out-of-state convictions that were comparable as "violent" felonies and used his high offender score to impose an exceptional sentence far in excess of the standard sentence range.

6. The court erred in imposing an exceptional sentence based on prior out-of-state convictions in the absence of a jury verdict finding the prior convictions were proven beyond a reasonable doubt.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A trial court's sentencing authority is narrowly construed based upon the governing statutes. The Legislature amended the Sentencing Reform Act in 2005 and 2007 to permit a court to impose exceptional sentences but these amendments only apply to earlier cases when the offender previously received an exceptional sentence. Where Mr. Mutch was resentenced in 2008 for a 1994 conviction, and he did not previously receive an exceptional sentence, did the court lack authority to impose an exceptional sentence?

2. RCW 9.94A.537 expressly requires the prosecution to provide notice before the entry of a plea or trial if it seeks an exceptional sentence. The notice requirement is not limited to aggravating factors that may be found by a court and not a jury. Did the prosecution's failure to provide the statutorily required notice to Mr. Mutch invalidate its request for an exceptional sentence?

3. Where the court has statutory authority, it may impose an exceptional sentence based on a high offender score resulting in several offenses going unpunished. Here, the prosecution concedes the court miscalculated Mr. Mutch's offender score.

Does the court's imposition of an exceptional sentence require remand and the imposition of a standard range term when the court's exceptional sentence is based on an erroneous calculation of an offender score?

4. A defendant possesses a Sixth Amendment right to a jury trial and a Fourteenth Amendment right to proof beyond a reasonable doubt on every fact that increases the sentence beyond that authorized by the facts as found by the jury. A finding that the defendant was convicted of out-of-state offenses comparable to a Washington felony, which provides a basis to impose a sentence far in excess of the standard sentencing range, is made by the trial court at sentencing by a preponderance of the evidence. Did the trial court violate Mr. Mutch's right to a jury trial when it found he had prior out-of-state convictions comparable to violent felonies in Washington, in the absence of a jury finding beyond a reasonable doubt that he had suffered prior convictions which qualified as violent felonies, which were the basis of a sentence far in excess of the standard range?

D. STATEMENT OF THE CASE.

In 1994, Richard Mutch was convicted of five counts of second degree rape and one count of second degree kidnapping.

CP 22. The jury did not convict him of first degree rape as charged. CP 137-38. The charges stemmed from a single incident, where Mr. Mutch used the threat of force to have sexual intercourse several times over the course of an evening with a woman with whom he had been romantically involved and the next day he took her to the courthouse to get a marriage application.¹

In 1994, the trial court imposed a sentence of life without the possibility of parole based on prior convictions for federal bank robbery in 1981 and robbery in California in 1966. CP 23. Several years later, this Court ruled that the federal bank robbery statute was not comparable to a Washington most serious offense and could not serve as the basis for a "three-strikes" life sentence.² This Court granted Mr. Mutch's personal restraint petition due to this change in the law and remanded his case for resentencing. CP 63, 105-06.

After this Court remanded the case for resentencing, the prosecution filed a notice of intent to request an exceptional sentence. CP 104. Mr. Mutch objected. CP 95-99. The

¹ The partially-published decision from Mr. Mutch's direct appeal sets forth the allegations underlying the charges. See State v. Mutch, 87 Wn.App. 433, 435, 942 P.2d 1018 (1997), rev. denied, 134 Wn.2d 1016 (1998).

prosecution argued that the court should impose an exceptional sentence, without any jury findings, based on Mr. Mutch's high offender score. 7/28/08RP 8-15. The prosecution repeatedly asserted that the judge had "inherent authority" to impose a sentence above the standard range, even if the prosecution did not have statutory authority to ask for an exceptional sentence under RCW 9.94A.537. *Id.* at 14-15, 27, 32-33.

The court imposed an exceptional sentence of 400 months, more than double the high end of the standard range. CP 9, 22-25. The court reasoned that Mr. Mutch's offender score was "20" and he was therefore not receiving punishment for most of his current convictions. CP 24. The court endorsed the State's argument that it had inherent power to impose an exceptional sentence regardless of the statutory requirements. 7/31/08RP 44, 47.

Mr. Mutch sought direct review in this Court. After Mr. Mutch filed a Statement of Grounds for Direct Review, the prosecution conceded that it miscalculated Mr. Mutch's offender score and premised its request for an exceptional sentence based on its claim that Mr. Mutch's offender score was higher than it actually is. In

² See *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 256, 111 P.3d 837 (2005).

the interim, the prosecution has sought a resentencing hearing where it intends to “correct” the offender score without otherwise altering the exceptional sentence imposed. This hearing has not yet occurred as of the time of filing this brief, but the State discussed its intent in its motions arguing in favor of remand.

E. ARGUMENT.

1. BECAUSE NO STATUTORY SCHEME AUTHORIZES AN EXCEPTIONAL SENTENCE, THE EXCEPTIONAL SENTENCE MUST BE STRICKEN

a. A court’s sentencing authority is derived solely from statute. Sentencing authority derives strictly from statute, subject to the constitutional rights to due process, a jury trial, and prohibition against cruel and unusual punishment. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); State v. Ammons, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986); U.S. Const. amends. 6,³ 8,⁴ 14;⁵ Wash. Const. art. I, § 22.⁶

³ The Sixth Amendment provides, in relevant part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .”

⁴ The Eighth Amendment provides, “Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted.” Washington Constitution, Article I, § 14 likewise states, “excessive bail shall not be required, . . . nor cruel punishment inflicted.”

The legislative branch retains the power to set the terms of a sentence. As this Court said in Ammons, “the fixing of legal punishments for criminal offenses is a legislative function.” Id. at 180. In Washington, the Legislature delegated sentencing authority to the court in the Sentencing Reform Act (SRA) within the limits set by the statute. Id. at 181. The constitutional separation of powers doctrine both precludes the judiciary and executive branch from asserting sentencing powers not expressly granted by the Legislature. Id. at 180.

The Legislature historically has set the parameters of sentencing laws and granted the courts specific authority to impose sentences within its guidelines. See State v. Le Pitre, 54 Wash. 166, 169, 103 P. 27 (1909) (legislature exercises control over sentences by setting minimum and maximum terms and giving court broad discretion within these limits); State v. Mulcare, 189

⁵ The Fourteenth Amendment to the United States Constitution provides, in relevant part, “No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .”

⁶ Article I, § 22 provides:

Wash. 625, 628, 66 P.2d 360 (1937) (legislative function to fix penalties); State v. Monday, 85 Wn.2d 906, 909-10, 540 P.2d 416 (1975) (legislature not judiciary has power to alter sentencing process).

The court's authority under the SRA is drawn from the language of the statute delegating authority. Principles of statutory construction require courts to presume the legislative body did not use any nonessential words and to rely upon the plain language of the statute. State v. Delgado, 148 Wn.2d 723, 729, 63 P.3d 792 (2003); State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002). The court is required to give meaning to every word in a statute if possible. Beaver, 148 Wn.2d at 343. When the Legislature uses different words in the same statute, courts recognize the legislature intended a different meaning. Id.

The sentencing statutes at issue in the case at bar do not permit the trial court to impose an exceptional sentence above the standard range under the circumstances of this case.

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in

b. No statute authorizes an exceptional sentence for Mr. Mutch. In Blakely, the United States Supreme Court invalidated the SRA's scheme for imposing aggravated exceptional sentences as it existed at the time of the 1994 offenses for which Mr. Mutch was convicted. State v. Hughes, 154 Wn.2d 118, 131-34, 110 P.3d 192 (2005), overruled in part on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L. Ed. 2d 466 (2006).

i. The 2005 "Blakely fix" does not authorize an exceptional sentence for Mr. Mutch. In 2005, the Washington Legislature amended the SRA to comply with Blakely. This act, colloquially known as the 2005 "Blakely fix," creates exceptional sentencing procedures for new offenses, that had not been subject to conviction. The law, "by its terms, applies to all pending criminal matters where trials have not begun or pleas not yet accepted." State v. Pillatos, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007). The Legislature's statement of intent provides:

The legislature intends to create a new criminal procedure for imposing greater punishment than the standard range or conditions [sic] and to codify existing common law aggravating factors, without

which the offense is charged to have been committed and the right to appeal in all cases

expanding or restricting existing statutory or common law aggravating circumstances.

Laws of 2005, ch. 68, § 1. This “new criminal procedure” does not apply to Mr. Mutch, who was convicted in 1994.

The law in effect at the time the offense was committed is the law controlling the applicable sentencing procedure and rules. RCW 9.94A.345; see In re Restraint of LaChappelle, 153 Wn.2d 1, 12, 100 P.3d 805 (2004).

In Pillatos, the Washington Supreme Court addressed whether the act applies to offenses committed before April 15, 2005, in the context of four cases: Pillatos, Butters, Base and Metcalf. The Court also addressed whether the judicial branch had inherent authority to empanel juries to deliberate on sentence aggravators in those cases in which the amendments did not apply. Id.

Adhering to its prior decision in Hughes and State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980), the Pillatos Court held the judicial branch lacks inherent authority to impose exceptional sentences because altering the sentencing process is the legislature's function. 159 Wn.2d at 469. The Pillatos Court also held the 2005 law applies only to those “pending criminal matters

where trials have not begun or pleas not yet accepted.” 159 Wn.2d at 470 (citing Laws of 2005, ch. 68, § 4(1) (“At any time prior to trial or entry of the guilty plea...”). The court therefore invalidated the State's effort to impose exceptional sentences on Pillatos or Butters, because both had entered guilty pleas before April 15, 2005. 159 Wn.2d at 470.

Pillatos requires this Court to reject the state's request for an exceptional sentence after this Court remanded Mr. Mutch's case for resentencing. See also State v. Womac, 160 Wn.2d 643, 663, 160 P.3d 40 (2007) (new exceptional sentencing procedures do not apply to person tried prior to enactment). Mr. Mutch was found guilty by jury verdict in 1994. Under Pillatos, the 2005 amendments do not apply because Mutch was tried and found guilty years before April 15, 2005.

ii. The 2007 “Blakely fix” does not authorize an exceptional sentence for Mr. Mutch. After Pillatos, the Legislature altered RCW 9.94A.537(2) to provide the court with authority to impose an exceptional sentence when a prior exceptional sentence was reversed and the case remanded for further proceedings. But this “Blakely fix” has a narrow application: it extends only to “any case where an exceptional sentence above the standard range was

imposed and where a new sentencing hearing is required[.]”
(emphasis added).

Mr. Mutch did not previously receive an exceptional sentence, and thus, the 2007 amendments to RCW 9.94A.537(2) do not give the court authority to impose an exceptional sentence after the reversal of his prior sentence. The prosecution’s effort to depict Mr. Mutch’s prior persistent offender sentence as an “exceptional sentence” is without merit and unmoored from the legal underpinnings of the sentencing statutes, under the versions of the SRA in effect in 1994 or today. Former RCW 9.94A.390 (1994) (describing exceptional sentences); former RCW 9.94A.120(2), (3), (4) (1994) (describing the difference between exceptional sentences and persistent offender sentences); see also RCW 9.94A.505, .535, .570; State v. Magers, 164 Wn.2d 174, 193, 189 P.3d 126 (2008) (rejecting effort to analogize exceptional sentence to POAA sentence); State v. Crumble, 142 Wn.App. 798, 802, 177 P.3d 129 (2008) (POAA supercedes and is “exclusive statutory authority” for qualifying offender).

A life sentence under the POAA is not an “exceptional sentence” as defined by statute and the requirements of RCW 9.94A.537 or RCW 9.94A.535 have no relationship to the

persistent offender sentence Mr. Mutch previously received. RCW 9.94A.537 applies only when court previously imposed an “exceptional sentence,” and this term has a distinct meaning under the SRA that is not the equivalent of any long sentence.

Because an exceptional sentence was not initially “imposed,” the 2007 act does not grant the trial court authority to empanel a jury on remand. Delgado, 148 Wn.2d at 730 (courts will not construe an unambiguous statute, but must instead give effect to its plain meaning); Beaver, 148 Wn.2d at 343 (plain language does not require construction).

c. The trial court based its exceptional sentence on the incorrect assertion that it had “inherent authority” to impose a sentence far in excess of the standard range. The prosecution repeatedly urged the trial court to impose an exceptional sentence based on its “inherent authority.” 7/28/08RP 14, 15, 27, 32-33. The State offered no source for this purportedly inherent power, because none exists. The court adopted this rationale and when explaining its authority to impose an exceptional sentence, said, “I also believe the court is empowered by law with inherent power to exceed the standard range” 7/31/08RP 44.

It has long been the rule in Washington, even before the SRA, that a court's sentencing authority is derived solely from statute. Ammons, 105 Wn.2d at 179-81 (rejecting claim SRA impermissibly limits judicial sentencing discretion after discussing history of legislature power to determine punishment). Where the statute does not authorize a particular sentence, the court may not impose it. Consequently, the court erroneously imposed an exceptional sentence in the case at bar under the mistaken belief that it had inherent power to do so, without regard for its authority under the pertinent legislative scheme. Because the court lacked statutory or inherent power to impose an exceptional sentence upon Mr. Mutch, the sentence must be reversed and a standard range term imposed.

2. THE STATE MUST PROVIDE NOTICE IT WILL
SEEK AN EXCEPTIONAL SENTENCE PRIOR TO
TRIAL

a. The prosecution must provide notice of its intent to seek an exceptional aggravated sentence. Notice of aggravating factors is required by RCW 9.94A.537, as well as the Sixth and Fourteenth Amendments and Articles I, §§ 3, 22 of the Washington Constitution.

In Gault v. Lewis, 489 F.3d 993, 1002-03 (9th Cir. 2007), the

Ninth Circuit ruled that the constitutional right to notice of the charges against an accused includes sentencing enhancements. Adequate notice must appraise the accused of the elements with sufficient clarity to let the defendant know what he must be prepared to defend against. Id. at 1003.

Washington has long required a complete and comprehensive charging document. See e.g., Leonard v. Territory, 2 Wash.Terr. 381, 392, 7 P. 872 (1885) (“Under our laws an indictment must be direct and certain, both as regards the crime charged and as regards the particular circumstances thereof, when they are necessary to constitute a complete crime.”); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989) (“essential elements” rule requires that a charging document *allege facts supporting every element of the offense*, in addition to adequately identifying the crime charged.” (emphasis in original)). Any fact increasing punishment is an element of the offense. Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Even if notice of prior convictions is not expressly required by the constitution, notice of intent to seek an exceptional sentence is statutorily required in Washington.

b. The statute specifically requires notice by the prosecution before trial. RCW 9.94A.537(1) expressly mandates the prosecution must “give notice” that it intends to seek an exceptional sentence prior to trial or entry of a guilty plea. Here, Mr. Mutch did not receive notice of an exceptional sentence prior to trial. CP 104 (notice of intent to seek exceptional sentence filed June 17, 2008); see also CP 137-39 (Information filed in 1994). His previous sentence was not an exceptional sentence, and thus does not qualify as notice under RCW 9.94A.537.

In a case remanded for resentencing, RCW 9.94A.537 authorizes exceptional sentences only where an exceptional sentence was previously imposed. See RCW 9.94A.537(2) (“In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.”).

The requirements of RCW 9.94A.537 are plain and unambiguous. A trial court is authorized to impose an exceptional sentence only after compliance with specified statutory procedures.

The defendant must have received notice, prior to trial, of the aggravating factors the prosecution would seek to establish. Because Mr. Mutch did not receive notice of the aggravating factors, and he did not receive an exceptional sentence previously, the trial court lacks authority to impose an exceptional sentence.

c. The statutory notice requirement is not superfluous when the aggravating factor is not submitted to a jury. The language of RCW 9.94A.537 dictates the steps the prosecution must follow anytime it seeks an exceptional sentence. By its plain terms, the State must give notice prior to trial or plea, any time it seeks an exceptional sentence. RCW 9.94A.537(1).

The statute does not create any alternatives excusing the State from complying with the mandatory notice requirement. It does not excuse the State from providing notice of its intent to seek an exceptional sentence when the factors underlying the sentence are not ones that must be found by a jury, although it could have done so if that was its intent. See Delgado, 148 Wn.2d at 730 (refusing to construe statute absent clear inconsistency rendering statute meaning, as “[t]his court has exhibited a long history of restraint in compensating for legislative omissions.” State v. Taylor, 97 Wn.2d 724, 728, 649 P.2d 633 (1982)).

Because the statute is unambiguous, it requires no construction and its plain terms must be enforced. Here, the prosecution did not provide notice of its intent to seek an exceptional sentence prior to Mr. Mutch's trial. The prosecution's failure to comply with the statute invalidates the sentence imposed where the sentence was predicated upon the prosecution's vigorous efforts to obtain an exceptional sentence yet the State did not provide notice it would seek such a sentence before trial. See e.g., 7/28/08RP 8-15, 26-27, 32-33; CP 40-64; CP 65-94 (prosecution's written and oral arguments requesting exceptional sentence).

The prosecution cannot void its plain statutory obligation by encouraging the court to impose a sentence that it has no authority to seek on its own. Although RCW 9.94A.535 permits a court to impose an exceptional sentence based on the offender's criminal history without providing notice before trial, the prosecution may not circumvent its statutory obligations by asking the court to do what the prosecution cannot do.

3. WHERE AN EXCEPTIONAL SENTENCE IS IMPOSED BASED UPON "UNCOUNTED CRIMINAL HISTORY," THE TRIAL COURT MISCALCULATION OF CRIMINAL HISTORY INVALIDATES THE BASIS FOR AN EXCEPTIONAL SENTENCE.

Before sentencing any offender, the court must determine the offender's standard sentence range, and that calculation includes a determination of the offender score. Former RCW 9.94A.120 (1994); RCW 9.94A.505(2)(a)(i); State v. Haddock, 141 Wn.2d 103, 108, 3 P.3d 733 (2000). Where the State alleges a defendant's criminal history contains out-of-state felony convictions, the SRA requires the State to prove the existence and comparability of those convictions by a preponderance of the evidence. Former RCW 9.94A.360 (1994); RCW 9.94A.525; Ford, 137 Wn.2d at 480.

Additionally, when a criminal defendant registers an objection to the calculation of his or her offender score, the court is required to properly calculate the score based on proof offered by the prosecution. State v. Bergstrom, 162 Wn.2d 87, 93, 169 P.3d 816 (2007). The calculation of the offender score requires the court to add the current and prior convictions, and determine the comparability and classification of any out-of-state convictions

when not agreed by the parties. Id. at 92-93. If elements of the foreign conviction are different from or broader than the elements of the parallel crime in Washington, the court must determine whether the underlying facts, necessarily proven beyond a reasonable doubt or expressly admitted by the defendant, make the offense comparable. Lavery, 154 Wn.2d at 258.

Here, Mr. Mutch objected to the State's calculation of his criminal history. CP 97-98 (noting objections to prior convictions and lack of court finding of comparability); Supp. CP __, sub. no. 299 (requesting State provide "hard evidence" of prior convictions). The trial court's Finding of Fact 4, asserting Mr. Mutch did not challenge his criminal history in his personal restraint petition, is not meritless, but also only illogical. CP 23. The very basis of the petition and the reversal order was the court's erroneous inclusion of a prior offense in his criminal history. The trial court relied on its 1994 sentencing rulings, even including the very out-of-state conviction, a federal bank robbery, that prompted the new sentencing hearing. The court calculated Mr. Mutch's offender score without any analysis whatsoever. CP 23.

Although the court imposed an exceptional sentence because it claimed Mr. Mutch had an offender score of "20," in fact,

the court miscalculated Mr. Mutch's criminal history. In addition to the court's erroneous assumption that out-of-state convictions count as if they are Washington felonies of the same title, the court counted two out-of-state robbery convictions from 1966 separately, and as two points each, when prior offenses committed before 1981, served concurrently, must be counted as a one offense. Former RCW 9.94A.360(6)(c) (1994). It counted Mr. Mutch's current conviction for second degree kidnapping as a violent felony, and thus as two points, when it was not classified as such in 1994. Former RCW 9.94A.030(36) (1994).

Because the court relied on an erroneous impression of Mr. Mutch's offender score, and refused to hold the prosecution to its burden of proving Mr. Mutch's criminal history despite his objection, the exceptional sentence violates due process of law and is contrary to the court's sentencing authority. Ford, 137 Wn.2d at 495 . On remand, the court lacks authority to impose an exceptional sentence. Accordingly, because Mr. Mutch has already served the entirety of the top of the standard sentencing range, this Court should direct the court order that Mr. Mutch be released from custody forthwith.

4. THE TRIAL COURT'S DETERMINATION BY A PREPONDERANCE OF THE EVIDENCE THAT MR. MUTCH HAD SUFFERED OUT-OF-STATE VIOLENT PRIOR CONVICTIONS AND HIS CRIMINAL HISTORY REQUIRED THE COURT TO IMPOSE AN AGGRAVATED SENTENCE VIOLATED HIS CONSTITUTIONALLY PROTECTED RIGHT TO A JURY TRIAL

a. A defendant has a constitutionally protected right to a jury determination of every element of the charged crime. The Sixth Amendment guarantees a criminal defendant the right to a trial by jury. Blakely, 542 U.S. at 302; Ring, 536 U.S. at 602; Apprendi, 530 U.S. at 476-77. This right includes the right to “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” Id. If the State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt. Apprendi, 530 U.S. at 482-83, see also id., at 501 (Thomas J., concurring) (“[I]f the legislature defines some core crime and then provides for increasing punishment of that crime upon a finding of some aggravating fact[,] . . . the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The

aggravating fact is an element of the aggravated crime.”); Blakely, 542 U.S. at 303-04; Ring, 536 U.S. at 602 (“A defendant may not be ‘expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts as reflected in the jury verdict alone.”), quoting Apprendi, 530 U.S. at 482-83 (emphasis in original).

Whether the State calls the fact which increases the sentence a “sentencing factor” and not an element is of no moment:

Our decision in Apprendi makes clear that “[a]ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.” 530 U.S. at 478, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (footnote omitted). Accordingly, we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt. Id., at 483-484, 120 S. Ct. 2348, 147 L. Ed. 2d 435.

Recuenco, 126 S.Ct. at 2552.

Here, the court relied on several prior out-of-state convictions that the court ruled were comparable violent convictions and then elevated Mr. Mutch’s sentence because his criminal history led him to have a high offender score, which thus made the factors underlying the sentence to become elements of the offense

which were required to be proved beyond a reasonable doubt and found by a jury.

b. Whether Mr. Mutch had prior, comparable convictions that constituted violent felonies was required to be determined by the jury beyond a reasonable doubt. Based upon the jury's verdict, the maximum sentence Mr. Mutch would have faced would be 198 months. Former RCW 9.94A.120 (1994); Former RCW 9.94A.360.

The State's allegation of prior, out-of-state robbery convictions, which were double-counted because they were "violent" offenses, elevated Mr. Mutch's offender score by several points and this elevated offender score was the basis of the State's request for an exceptional sentence more than double the high end of the standard range. See Former RCW 9.94A.360(3), (6), (9) (1994). Although the prosecution now concedes one of these prior convictions, for federal bank robbery, may not be included in Mr. Mutch's offender score, it insists on including two California robbery convictions from 1966.

It may be argued the "fact" that increased Mr. Mutch's sentence from a standard range to an exceptional sentence was the fact of a prior conviction, which was excluded in Appendi.

Apprendi, 530 U.S. at 489. But this argument overlooks two important factors.

First, the “exception” for prior convictions in Apprendi was taken from the Court’s decision in Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).

Yet, the Court has retrenched from this position. In Apprendi, the Court criticized the “exception” for prior convictions, noting that it was arguable that Almendarez-Torres was incorrectly decided.

Apprendi, 530 U.S. at 489.

Even though it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision’s validity and we need not revisit it for the purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset.

Id.⁷

The Court also noted that Almendarez-Torres represented “at best an exceptional departure from the historic practice we have

⁷ Justice Thomas continues to adhere to his position that the exception to the jury trial and due process requirement for prior convictions violates *Blakely* and Apprendi and has repeatedly urged the Court to reexamine the decision in Almendarez-Torres as it was wrongly decided. See United States v. Shepard, 544 U.S. 13, 15, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (Thomas, J., concurring) (“Almendarez-Torres like Taylor, has been eroded by this Court’s subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that Almendarez-Torres was wrongly decided.”).

described.” Id. at 487. Further, the Court noted one of the reasons for the decision in Almendarez-Torres was the fact the defendant had pleaded guilty and admitted the prior convictions, thus mitigating “the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a ‘fact’ increasing punishment beyond the maximum of the statutory range.” Id. at 488. Finally, in Ring, the Court expanded Apprendi so that it applied to *any* fact which increases the punishment beyond that authorized by the jury verdict, thus seemingly overruling Almendarez-Torres *sub silentio*. Ring, 536 U.S. at 607-09.

But more importantly in this case, it is not the simple “fact” of the prior convictions that increases the punishment, but it extends beyond that to specific “types” of prior convictions. To raise Mr. Mutch’s offender score, the offenses had to be based on comparable law and fact as a particular Washington felony and constitute “violent” felonies in Washington. Former RCW 9.94A.030 (1994); Former RCW 9.94A.360 (1994). Thus it is not simply the fact of the prior conviction that is at issue, but the particular type of prior conviction. As a consequence, the

"exception" for the fact of prior convictions enumerated in Almendarez-Torres does not apply.

c. Mr. Mutch's exceptional sentence must be reversed and remanded for resentencing within the standard range.

The remedy for a court's imposition of a sentence which exceeds the jury verdict is reversal of the sentence and remand for resentencing to a term authorized by the jury's verdict. Blakely, 542 U.S. at 303-04; Apprendi, 530 U.S. at 482-83.

Here, the jury was not required to find beyond a reasonable doubt that Mr. Mutch had suffered two prior convictions which constituted violent offenses. Thus, the court could only sentence to a maximum term of 198 months. This Court must reverse Mr. Mutch's sentence and remand for resentencing to a term authorized by the jury's verdict.

F. CONCLUSION.

For the foregoing reasons, Mr. Mutch respectfully requests this Court grant review, reverse the improperly imposed exceptional sentence, and order the imposition of a standard range sentence.

DATED this 17th day of November 2008.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
DAVID DONNAN (WSBA 19271)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

FILED IN OPEN COURT
7/31/2008
WHATCOM COUNTY CLERK
By [Signature]
Deputy

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON FOR
WHATCOM COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

RICHARD HENRY MUTCH,

Defendant

Case No. 94-1-00117-8

FINDINGS OF FACT AND CONCLUSIONS
OF LAW SUPPORTING EXCEPTIONAL
SENTENCE

THIS MATTER having come on regularly before the above-entitled court, and the State of Washington being represented by David S. McEachran, the Prosecuting Attorney in and for Whatcom County, Washington, and the defendant, RICHARD HENRY MUTCH, being personally resent and representing himself and also being represented by counsel, Jon Komorowski, and the Court being fully advised in the premises and having received memorandums from the parties and heard argument of counsel, now therefore,

The Court makes the following FINDINGS OF FACT:

- 1) That the defendant, Richard Henry Mutch was convicted of Rape in the Second Degree, Counts, I-V and Kidnapping in the Second Degree, Count VI, by jury verdict on the 28th day of September, 1994.

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1 2) The defendant, Richard Henry Mutch, was sentenced in the Whatcom County
3 Superior Court as a "Persistent Offender" to a term of life without parole on the 16th
5 day of December, 1994.

7 3) The defendant subsequently filed a Personal Restraint Petition with the Washington
9 State Supreme Court challenging the comparability of one of the "strike" offenses
11 underlying his sentence. This Personal Restraint Petition was granted by order of the
13 Supreme Court on the 30th day of April, 2008, and this matter was returned to this
15 Court for resentencing.

17 4) The defendant did not challenge the criminal history presented at his 1994 sentencing
19 in the Personal Restraint Petition that brought him back to this Court. The trial court
21 took testimony and admitted exhibits identifying defendant as the person who was
23 convicted of the below listed offenses at the original sentencing hearing held in
25 Whatcom County Superior Court on the 16th day of December, 1994. Findings of Fact
27 and conclusions of law relating to the criminal history were also entered by the trial
29 court. This court has taken judicial notice of the hearing, exhibits admitted, Findings
31 of Fact and Conclusions of Law, and finds the defendant's criminal history consists
33 of the following:

- 35 a. Robbery in the First Degree 7/14/1966
- 37 b. Robbery in the First Degree 7/14/1966
- 39 c. Bank Robbery 1/16/1981

41 Based upon the above Findings of Fact, the Court makes the following:

43 **CONCLUSIONS OF LAW:**

- 45 1. The defendant's Offender Score under the Sentencing Reform Act is 20. The
47 Sentencing Grid only goes to a score of 9.

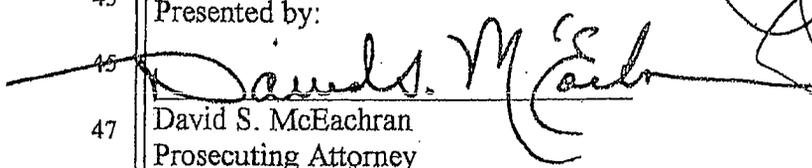
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2. The Defendant's presumptive sentence under the Sentencing Reform Act is identical to that which would be imposed if he had committed only two counts of Rape in the Second Degree, instead of five counts of Rape in the Second Degree and one count of Kidnapping in the Second Degree.
3. The defendant has committed multiple current offenses and his high offender score will result in three counts of Rape in the Second Degree and one count of Kidnapping in the Second Degree going unpunished.
4. The State of Washington has given adequate notice to defendant Mutch that a sentence exceeding the presumptive standard range was being sought by the State, through the imposition of the "Persistent Offender" sentencing in 1994.
5. Pursuant to the argument of the State, the defendant should receive an exceptional sentence over the standard range based on RCW 9.94A.535(2)(c).
6. Independent of any argument by the State relating to notice given of an exceptional sentence, or reasons supporting an exceptional sentence, the Court has reached its own determination that the defendant should receive an exceptional sentence over the presumptive standard range based on RCW 9.94A.535(2)(c).

DONE IN OPEN COURT this 31 day of July, 2008.

JUDGE/COMMISSIONER

Presented by:



David S. McEachran
Prosecuting Attorney
WSB # 2496

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Copy Received and Approved for Entry:

Jon Komorowski
Attorney for Defendant
WSB # _____

Copy Received and Approved for Entry:

Richard Henry Mutch
Pro Se

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SUPREME COURT
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

2008 NOV 18 P 3:14

STATE OF WASHINGTON,)	BY RONALD R. CARPENTER
)	
RESPONDENT,)	_____
)	CLERK
v.)	NO. 82029-5
)	
RICHARD MUTCH,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF NOVEMBER, 2008, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	HILARY THOMAS DAVID MCEACHRAN WHATCOM COUNTY PROSECUTING ATTORNEY 311 GRAND AVENUE BELLINGHAM, WA 98225	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X]	RICHARD MUTCH BKG NO. 188533 WHATCOM COUNTY JAIL 311 GRAND AVE BELLINGHAM, WA 98225	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF NOVEMBER, 2008.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711