

STATE OF WASHINGTON  
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BY RONALD R. CENTER  
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No. 84554-9

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,

v.

JAMES L. GRIFFIN  
Appellant.

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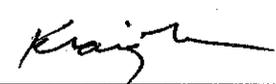
SUPPLEMENTAL BRIEF OF RESPONDENT

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THE HONORABLE DAVID L. EDWARDS, JUDGE

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## **BACKGROUND**

On October 2, 2008, James L. Griffin, the appellant, entered the apartment building at 210 East 5<sup>th</sup> Street in Aberdeen, Washington. (RP, 12-10-08, p. 4) He walked through until he reached apartment three, where he kicked open the door. (RP. 10) This was heard by a number of people on the ground floor, including Alina Navarra and her son Anthony, who live in apartment three. *Id.* Ms. Navarra and her son worked to open the front door of the apartment, but had difficulty, because it had been damaged by the appellant. *Id.*

As Ms. Navarra entered the apartment, she saw a person duck through her backdoor. *Id.* When she reached the backdoor of her apartment, she saw the appellant attempting to open the backdoor of the building. Ms. Navarra was able to convince the defendant to come back in the apartment, promising him that she would not call the police. (RP 13) When he returned to the apartment, the appellant handed Ms. Navarra a box of jewelry that he had taken from her bedroom. *Id.*

After the appellant heard that the police were on their way, he tried to flee out the back door. There was an altercation. (RP 15) Ms. Navarra was scratched on the side of the face during this altercation. The appellant ran away from the apartment building. (RP 17) Officer John Hudson of the Aberdeen Police Department apprehended the appellant running down the road on 5<sup>th</sup> Street. (RP 59)

The appellant was charged with Residential Burglary. The State made an allegation that at the time of the offense the appellant had recently been released from incarceration. (CP 1) On December 10, 2008, a bench trial was held and the appellant was found guilty as charged. The trial court made the finding that the defendant was recently released from incarceration at the time of his crime. (RP 74)

At trial, the State presented evidence that the appellant was released from the Grays Harbor County Jail after a commitment on August 19, 2008. (RP 65) The State called Sergeant Travis Davis of the Grays Harbor Sheriff's Department. (RP 62) Davis testified that part of his duties was to maintain records of the department. *Id.* The records of the department indicated that the appellant was released from incarceration on the above date. (RP 63)

The Court Appeals held that this was inadmissible hearsay. The Court of Appeals further held that this was not error because ER 1101 states that ER 801 need not apply to sentencing hearings.

#### ARGUMENT

##### **Hearsay is admissible to prove aggravating factor.**

Prior to *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), facts regarding aggravating factors found for the imposition of an exceptional sentence were determined pursuant to the former RCW 9.94A.370. *State v. Talley*, 83 Wash.App 750, 923 P.2d 721, (1996). This statute established the "real facts" doctrine, which required

that all facts relied on by the court during sentencing be “admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” *Id.* If there was a dispute of facts then the court was required to either not consider the facts or hold a sentencing hearing. At the hearing, the rules of evidence did not apply pursuant to ER 1101. *State v. Strauss*, 119 Wash.2d 401, 832 P.2d 78, (1992). Evidence presented at such a hearing need only meet the basic requirements of due process. *Id.*

*Blakely* held that the Washington State sentencing scheme was unconstitutional as far as the finding of an aggravating factors for the purposes of exceptional sentences. *Id.* at 313. The Supreme Court did not address the issue of evidence as applied to such a fact finding. This is clear from the dissent written by Justice Breyer, where he questions “[w]hat, then, are the evidentiary rules?” *Id.* at 346.

After the U.S. Supreme Court's ruling in *Blakely*, the Washington State Legislature passed RCW 9.94A.537 pertaining, in part, to procedures regarding aggravating findings for the purpose of sentencing. Among the procedures that were implemented in RCW 9.94A.537 was a provision stating that

“if one of the aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the *res gestae* of the crime, if the evidence is *not otherwise admissible* in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravating factors substantially outweighed by the prejudicial effect on the jury's ability to determine the guilt or innocence of the underlying crime.”

The stated intent of this statute was “[t]he legislature intends to conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in *Blakely v. Washington*, 542 U.S. . . . (2004).”

The defendant argues that the Rules of Evidence apply to hearings on aggravating factors for the purpose of sentencing. The defendant cites no case stating that the admission of hearsay against a criminal defendant at any stage in the proceeding violates his constitutional rights, nor does the defendant present any case that states that ER 801 is of constitutional importance.

The appellant cites *United States v. Buckland* 289 F.3d 558 (9th Cir. 2002) for the proposition that the Rules of Evidence must apply during findings on aggravating factors. In *Buckland*, the 9th Circuit was making a finding as to whether or not *Blakely* applied to the Federal Sentencing Guidelines. The court held that the holding in *Blakely* did apply to the Federal Sentencing Guidelines, and went on to say that "due process requires that any contested enhancement be based on facts established beyond a reasonable doubt in accordance with the Rules of Evidence." *Blakely* never held this. *Blakely* only held that these facts must be presented to the jury and proven beyond a reasonable doubt. The statement "in accordance with the Rules of Evidence" is dicta. The Court of Appeals has held that "[a]n error in admitting evidence is non-constitutional if the hearsay declarant and recipient testify and are cross-examined. *State v. Floreck*, 111 Wash.App. 135, 43 P.3d 1264,

(2002). The only constitutional concern regarding hearsay is the right to confront.

The issue before the court is not one of constitutional magnitude, but one of state law. Does state law require the rules of evidence at a hearing pursuant to RCW 9.94A.537? The Court of Appeals below ruled that state law did not, because it is a fact finding for the purposes of sentencing, and ER 1101 states that the rule need not apply at such a hearing. The court below was correct in this holding.

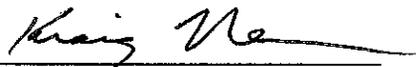
This was true before *Blakely* and it remains true. The legislature specifically stated in its intent that RCW 9.94A.537 was only written to conform to *Blakely*. The holding in *Blakely* did not require a change in any procedure of the Washington State law regarding exceptional sentence findings other than who made the findings and what burden would apply. The Supreme Court could have addressed this but it did not, because it is a matter of state law and beyond its jurisdiction.

If the legislature intended to make changes to the applicability of the rules of evidence in such hearings, it would have made that change clear. But, the opposite is true. The statute states that a separate hearing will be held when the evidence is not otherwise admissible at trial. This is referring to evidence not otherwise admissible by the Rules of Evidence. This acknowledges that proof that does not conform to the Rules of Evidence might be introduced at a hearing allowed by RCW 9.94A.537.

If the court chooses to side with the appellant, then the remedy is remand for additional fact finding. RCW 9.94A.537 provides that "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." In this case the defendant has waived his right to a jury trial and to have a jury make findings on the exceptional sentence. The ultimate remedy would be to conduct a subsequent hearing in the Grays Harbor Superior Court where Judge Edwards would be allowed to review certified copies of jail records that would be properly admitted under the Rules of Evidence to make a determination as to whether the defendant had recently been released from incarceration when he committed his crime.

DATED this 12 day of November, 2010.

Respectfully Submitted,

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