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No.  
COA No. 65348-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

**FILED**  
DEC 28 2011  
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STATE OF WASHINGTON  
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STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS ANTHONY PAPPAS,

Appellant.

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

The Honorable Anita L. Faris

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Nicholas Pappas asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the published Court of Appeals decision in *State v. Nicholas Pappas*, \_\_\_ Wn.App. \_\_\_, 2011 WL 5830459 (No. 64512-9-I, November 21, 2011). A copy of the ruling is in the Appendix at pages A-1 to A-7.

A similar issue is raised in a case decided the same day and by the same panel of judges; *State v. Richard Duncalf*, \_\_\_ Wn.App. \_\_\_ 2011 WL 5830453 (62237-4-I, November 21, 2011). The petition for review in that matter was filed simultaneously with this petition on December 21, 2011.

C. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals decision directly conflict with this Court's decisions in *State v. Cardenas*, 129 Wn.2d 1, 914 P.2d 57 (1996), and *State v. Nordby*, 106 Wn.2d 514, 723 P.2d 1117 (1986)?

2. An exceptional sentence may not be based on circumstances contemplated by the Legislature in setting the standard range for the underlying offense. This Court has previously held that a finding of injuries that exceeded those necessary to satisfy the elements of vehicular assault may not be used to enhance a sentence for vehicular assault, as this circumstance is inherent in the “substantial bodily injury” element and the standard range of the offense. Is an issue of substantial public interest that this Court should determine presented mandating reversal of Mr. Pappas’ exceptional sentence?

D. STATEMENT OF THE CASE

Melanie Thielman and appellant Nicholas Pappas attended the same Alcoholics Anonymous (AA) meeting in Edmonds on August 12, 2008. RP1 97-98. Ms. Thielman accepted Mr. Pappas’ offer for a ride on his motorcycle. RP1 115.

Mr. Pappas was piloting the motorcycle with Ms. Thielman as his passenger when he quickly came upon a car driven by Glen Wilhelm. RP2 155. Mr. Wilhelm slowed suddenly and Mr. Pappas quickly passed the car. As the car and motorcycle came upon a curve in the road, the motorcycle failed to negotiate a turn, instead going straight on the curve and hitting a utility pole. RP1 157. Mr.

Pappas was thrown onto the pavement suffering, facial fractures and a fractured elbow. CP 144-45.

Ms. Thielman was thrown further up the embankment behind the utility pole and suffered a severe traumatic brain injury. RP2 22. Since the accident, Ms. Thielman has been cared for in an adult care home, unable to speak, limited in her ability to feed herself, able to move around only by wheelchair and dependent on others for everyday care. RP3 4-11.

Mr. Pappas was charged with vehicular assault under the reckless manner and disregard for the safety of others alternative means. CP 186. The State also gave notice that it sought an exceptional sentence based upon the excessive injuries suffered by Ms. Thielman. CP 186. Following a jury trial, Mr. Pappas was acquitted of the reckless manner alternative means of vehicular assault but convicted under the disregard for the safety of others prong. CP 122-23. In a special verdict, the jury also found the aggravating factor that Ms. Thielman suffered excessive injuries. CP 121.

The trial court imposed an exceptional sentence based upon the jury's finding. CP 18-19, 27-28.

I am giving an exceptional sentence of 18 months in the state penitentiary on this case. I'm well aware of the case law indicating anything over double the standard range may be looked at as excessive, but in this case I do not believe it is excessive given the degree of injuries in the case and the finding of the jury.

4/29/2010RP 13.

On appeal, Mr. Pappas contended the Legislature precluded the use of the victim's excessive injuries as an aggravating factor for vehicular assault as the injuries inhered in the verdict for the offense. The Court of Appeals rejected the argument and affirmed Mr. Pappas' exceptional sentence:

Because only "substantial bodily harm" is required for conviction of vehicular assault, and because higher level of bodily harm – "great bodily harm" – has been defined by our legislature, *Stubbs* does not foreclose the imposition of an exceptional sentence in a vehicular assault case based upon the aggravating circumstance set forth in RCW 9.94A.535(3)(y). Rather, such a sentence may be imposed where the victim's injuries constitute "great bodily harm." See *Stubbs*, 170 Wn.2d at 130.

Decision at 5.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

EXCESSIVE INJURIES CANNOT BE THE BASIS FOR AN EXCEPTIONAL SENTENCE FOR VEHICULAR ASSAULT BECAUSE THE SEVERITY OF THE INJURIES HAS ALREADY BEEN CONTEMPLATED BY THE LEGISLATURE IN SETTING THE STANDARD RANGE

Pursuant to RCW 9.94A.535, the trial court may impose a sentence outside the standard sentence range if it finds that there are substantial and compelling reasons justifying an exceptional sentence. The facts supporting aggravating circumstances justifying an exceptional sentence shall be proved to a jury beyond a reasonable doubt. RCW 9.94A.537(3). If the jury finds, unanimously and beyond a reasonable doubt, one or more of the aggravating factors, the court may sentence the defendant pursuant to RCW 9.94A.535 to a term of confinement up to the statutory maximum for the underlying conviction. RCW 9.94A.537(6). But, in imposing an exceptional sentence, the trial court's reasons supporting the exceptional sentence must be substantial and compelling *and must take into account factors not already considered by the Legislature in computing the presumptive range of the offense.* RCW 9.94A.537(6); *Nordby*, 106 Wn.2d at 518.

Here, pursuant to RCW 9.94A.535(3)(y), the trial court imposed an exceptional sentence based upon the jury finding that:

[t]he victim's injuries substantially exceed[ed] the level of bodily harm necessary to satisfy the elements of the offense.

To convict Mr. Pappas of vehicular assault under the alternative means found by the jury, the State had to prove that he drove "[w]ith disregard for the safety of others and cause[d] substantial bodily harm to another." RCW 46.61.522(1)(c).

Relying on this Court's decisions in *Nordby, supra*, and *Cardenas, supra*, Mr. Pappas submitted that the trial court's reasons for imposing an exceptional sentence here were already considered by the Legislature in computing the standard range for vehicular assault. *Cardenas*, 129 Wn.2d at 6-7 (victim's injuries, "although severe, are evidently the type of injuries envisioned by the Legislature in setting the standard reange. Consequently, the severity of injuries cannot justify an exceptional sentence.").

In *Nordby*, this Court determined that the seriousness of the injuries suffered by the victim could not justify an exceptional sentence for vehicular assault because the injuries suffered were considered by the Legislature in setting the standard range for the offense of vehicular assault. 106 Wn.2d at 519. In *Nordby*, this

Court noted that the element of “serious bodily injury” for a conviction for vehicular assault “was already considered in setting the presumptive term for vehicular assault. It cannot, therefore, be a basis for a sentence outside the presumptive range.” *Id.*

Relying on this Court’s decision in *State v. Stubbs*, 170 Wn.2d 117, 240 P.3d 143 (2010), the Court of Appeals ruled that excessive injuries could be considered in imposing an exceptional sentence in a vehicular assault conviction. The *Stubbs* Court ruled that excessive injuries could be considered in light of the varying degrees of injury defined within the four degrees of assault. 170 Wn.2d at 128-31.

But, the Legislature has elected to divide vehicular offenses into only two degrees: vehicular assault involving injury and vehicular homicide involving death. See RCW 46.61.520 (vehicular homicide) and RCW 46.61.522 (vehicular assault). Thus, *any* injuries short of death were necessarily also considered by the Legislature in defining vehicular assault and cannot be considered in imposing an exceptional sentence. *Cardenas*, 129 Wn.2d at 6-7; *Nordby*, 106 Wn.2d at 519.

This Court should grant review to reaffirm *Cardenas* and *Nordby*’s expressions that excessive injuries suffered by the victim

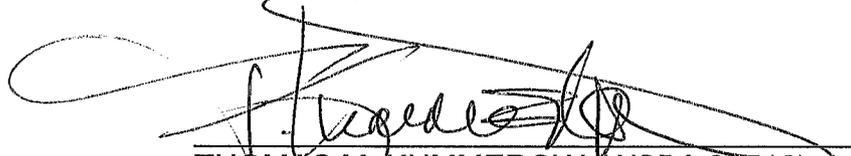
have already been considered by the Legislature in setting the standard range for vehicular assault, thereby barring their consideration for purposes of an exceptional sentence. This Court should then reverse Mr. Pappas' exceptional sentence and remand for resentencing within the standard range.

F. CONCLUSION

For the reasons stated, Mr. Pappas requests this Court grant review, reverse the Court of Appeals decision affirming his exceptional sentence, and remand for resentencing within the standard range.

DATED this 21<sup>st</sup> day of December 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Kummerow', is written over a horizontal line. The signature is stylized and somewhat cursive.

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## APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	DIVISION ONE
	)	
Respondent,	)	No. 65348-2-1
	)	
v.	)	
	)	
NICHOLAS ANTHONY PAPPAS,	)	PUBLISHED OPINION
	)	
Appellant.	)	FILED: November 21, 2011
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Dwyer, C.J. — Where a jury finds by special verdict that the injuries sustained by a vehicular assault victim constitute bodily harm which substantially exceeds that necessary to satisfy the elements of the offense, the trial court may impose a sentence beyond the standard sentence range for that crime. Here, the jury made such a finding, thus authorizing the exceptional sentence imposed. Accordingly, we affirm.

1

Pappas was charged with vehicular assault based upon a motorcycle collision in which his victim, Melanie Thielman, sustained severe injuries. Thielman, who was thrown from Pappas's motorcycle when he drove into a telephone pole, suffered a severe brain injury as a result of the collision. The State sought an exceptional sentence based upon the severity of Thielman's injuries.

The jury convicted Pappas of vehicular assault, finding that he had

operated a motor vehicle with disregard for the safety of others and thereby caused "substantial bodily harm" to another. See RCW 46.61.522. In addition to so finding, the jury, by special verdict, also found that Thielman's injuries substantially exceeded the level of bodily harm necessary to constitute "substantial bodily harm." See RCW 9.94A.535(3)(y). Based upon the jury's finding of the alleged aggravating factor, the trial court imposed a sentence beyond the standard sentence range.

Pappas appeals.

## II

In his sole assignment of error, Pappas contends that the trial court erred, as a matter of law, by imposing an exceptional sentence based upon the severity of the victim's injuries, which, he asserts, can never be the proper basis for an exceptional sentence where the underlying crime is vehicular assault. We disagree.

We review the trial court's imposition of an exceptional sentence pursuant to the standards set forth in RCW 9.94A.585(4), which provides:

To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

Pappas contends neither that insufficient evidence supports the jury finding upon

which the trial court relied in imposing the exceptional sentence nor that the sentence imposed was excessive. Thus, the sole issue raised by Pappas on appeal is whether the jury finding justifies the imposition of the exceptional sentence.

A trial court “may impose a sentence outside the standard sentence range for an offense if it finds . . . that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. Prior to the 2005 amendments to the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, our Supreme Court had determined that “particularly severe injuries may be used to justify an exceptional sentence” only where the bodily harm sustained by a victim is “greater than that contemplated by the Legislature in setting the standard range.” State v. Cardenas, 129 Wn.2d 1, 6, 914 P.2d 57 (1996). However, pursuant to the 2005 amendments, which codified the aggravating circumstances that can be used to support an exceptional sentence, such a sentence may be imposed where “[t]he victim’s injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense.” RCW 9.94A.535(3)(y).

Our Supreme Court recently recognized that this statutory aggravating circumstance “creates a somewhat different test than we have employed in the past.” State v. Stubbs, 170 Wn.2d 117, 128, 240 P.3d 143 (2010). Rather than “looking at the bodily harm element of the offense to see if the victim’s injuries fit

within the definition of that element,” the statute “directs the trier of fact to measure the victim’s actual injuries against the minimum injury that would satisfy” the bodily harm element of the offense and to determine whether those injuries “substantially exceed” the harm required for conviction. Stubbs, 170 Wn.2d at 128-29.

There, Stubbs was convicted of assault in the first degree and received an exceptional sentence based upon the severity of the victim’s injuries. Stubbs, 170 Wn.2d at 119. The jury found, as an element of the offense, that Stubbs had inflicted “great bodily harm” upon the victim of the assault. Stubbs, 170 Wn.2d 119. The jury additionally found, by special verdict, that the victim’s injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the crime, and the trial court imposed an exceptional sentence based upon that finding. Stubbs, 170 Wn.2d at 122. Our Supreme Court held that, pursuant to the SRA’s statutory sentencing scheme, “no injury can ‘substantially exceed’ the level of bodily harm necessary to satisfy the element of ‘great bodily harm.’” Stubbs, 170 Wn.2d at 131. Rather, the court determined, one case of “great bodily harm” “is not qualitatively different than another case. Such a leap is best understood as the jump from ‘bodily harm’ to ‘substantial bodily harm,’ or from ‘substantial bodily harm’ to ‘great bodily harm.’ That is what is meant by ‘substantially exceeds.’” Stubbs, 170 Wn.2d at 130.

Pappas asserts that an exceptional sentence for vehicular assault can

never be imposed based upon the severity of the victim's injuries and, thus, that the jury finding here cannot support the sentence that he received.<sup>1</sup> Stubbs does not support this contention. According to Stubbs, "substantially exceed" can be understood as "the jump from 'bodily harm' to 'substantial bodily harm,' or from 'substantial bodily harm' to 'great bodily harm.'" 170 Wn.2d at 130.<sup>2</sup> Because only "substantial bodily harm" is required for conviction of vehicular assault, and because a higher level of bodily harm—"great bodily harm"—has been defined by our legislature, Stubbs does not legally foreclose the imposition of an exceptional sentence in a vehicular assault case based upon the aggravating circumstance set forth in RCW 9.94A.535(3)(y). Rather, such a

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<sup>1</sup> Pappas cites to State v. Cardenas, 129 Wn.2d 1, 914 P.2d 57 (1996), and State v. Nordby, 106 Wn.2d 514, 723 P.2d 1117 (1986), in support of his contention that the severity of a vehicular assault victim's injuries can never justify the imposition of an exceptional sentence. However, when those cases were decided, the vehicular assault statute required that the victim sustain "serious bodily injury"—defined as "bodily injury which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body"—in order to convict a defendant of that crime. See Cardenas, 129 Wn.2d at 6 (quoting former RCW 46.61.522(2) (1983)). Because our Supreme Court found that the injuries sustained by the victims in the cases cited were considered by the legislature in defining the crime, the court determined that an exceptional sentence could not be imposed based upon those injuries. Cardenas, 129 Wn.2d at 6-7; Nordby, 106 Wn.2d at 519. The vehicular assault statute has since been amended, however, and now requires that the victim sustain "substantial bodily harm," a level of bodily harm lower than that of "great bodily harm." See RCW 46.61.522.

<sup>2</sup> Our legislature has defined three levels of bodily harm—in ascending order, they are "bodily harm," "substantial bodily harm," and "great bodily harm." RCW 9A.04.110(4)(a), (b), (c). "Bodily harm" consists of "physical pain or injury, illness, or an impairment of physical condition." RCW 9A.04.110(4)(a). "Substantial bodily harm," required for conviction of vehicular assault, means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part. RCW 9A.04.110(4)(b); see also RCW 46.61.522(3). "Great bodily harm," the highest level of bodily harm defined by our legislature, means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ. RCW 9A.04.110(4)(c).

sentence may be imposed where the victim's injuries constitute "great bodily harm." See Stubbs, 170 Wn.2d at 130.

Pappas does not challenge the sufficiency of the evidence supporting the jury finding that Thielman's injuries substantially exceed the benchmark of "substantial bodily harm"—nor could he.<sup>3</sup> Thielman suffered a severe brain injury as a result of the collision. Consequently, she has little control over the left side of her body, she cannot eat or bathe unassisted, and she can barely talk. Due to this injury, Thielman will require care for the rest of her life. Moreover, there is no question that these injuries constitute "great bodily harm," defined by our legislature as "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c).

The jury found that the injuries sustained by Thielman substantially exceeded the level of bodily harm necessary to constitute substantial bodily harm, an element of the offense of vehicular assault. Those injuries are, indeed, clearly encompassed within our legislature's definition of "great bodily harm." Thus, the jury's special verdict finding authorized the exceptional sentence imposed. The trial court did not err.

Affirmed.

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<sup>3</sup> Nor does Pappas assign error to the trial court's instruction to the jury regarding the alleged aggravating circumstance. Indeed, any such claim of error, had it been asserted on appeal, would nonetheless be waived, as Pappas did not object to the court's instruction on the matter at trial. See State v. Gordon, No. 84240-0, 2011 WL 4089893 (Wash. Sept. 15, 2011).

No. 65348-2-1/7

Dupe, C. S.

We concur:

Grosse, J

\_\_\_\_\_

State of Washington v. Nicholas Pappas, No. 65348-2-I

Cox, J. (concurring) — I agree with the majority that Nicholas Pappas cannot prevail in this appeal. For the reasons stated in my special concurrence in State v. Duncalf,<sup>1</sup> I write separately in this case to state my belief that an instruction defining “substantially exceed” should be required in future cases of this type where a jury is considering aggravating circumstances.<sup>2</sup> Nevertheless, I concur in the result reached by the majority in this case.

Cox, J.

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<sup>1</sup> State v. Duncalf, No. 62237-4-I (Wash. Ct. App. Nov. 21, 2011) (Cox J., concurring).

<sup>2</sup> State v. Stubbs, 170 Wn.2d 117, 129, 240 P.3d 143 (2010) (“substantially exceed” means that the injuries sustained by the defendant reached the level of bodily harm necessary to satisfy the elements of the greater offense, not charged).

**DECLARATION OF FILING AND MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 65348-2-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Seth Fine, DPA  
Snohomish County Prosecutor's Office
- petitioner
- Attorney for other party

  
MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: December 21, 2011

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