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No. 86859-0

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS PAPPAS,

Petitioner.

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

The Honorable Anita L. Farris

SUPPLEMENTAL BRIEF OF PETITIONER

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ORIGINAL

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A. ISSUES PRESENTED

1. Are the severity of the injuries suffered by the victim necessarily contemplated by the Legislature in setting the standard range for vehicular assault, thus foreclosing the exceptional sentence imposed upon Mr. Pappas for causing excessive injuries?

2. Must this Court reverse its 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), which held that any injuries suffered are necessarily contemplated by the Legislature in setting the standard range for vehicular assault?

B. STATEMENT OF FACTS

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 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 both the reckless manner and the disregard for the safety of others alternatives. 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 that Ms. Thielman suffered excessive injury for the purposes of the aggravating factor. 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.

Mr. Pappas challenged the exceptional sentence on appeal, contending that the Legislature had already contemplated the injuries that were incurred here when it set the standard range for vehicular assault. The Court of Appeals rejected Mr. Pappas' arguments and held:

> The jury found that the injuries suffered 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.

State v. Pappas, 164 Wn.App. 917, 922-23, 265 P.3d 948 (2011), *review granted*, 173 Wn.2d 1026 (2012).

C. ARGUMENT

THE COURT'S IMPOSITION OF AN EXCEPTIONAL SENTENCE BASED ON THE VICTIM'S EXCESSIVE INJURIES MUST BE REVERSED AS THE DEGREE OF INJURIES SUFFERED WAS CONTEMPLATED BY THE LEGISLATURE IN SETTING THE PRESUMPTIVE RANGE FOR VEHICULAR ASSAULT

1. An exceptional sentence cannot be based on factors already considered by the Legislature in setting the presumptive range for the offense. An appellate court reviews *de novo* the legal justification for a sentence. RCW 9.94A.585(4); *State v. Ferguson*, 142 Wn.2d 631, 646, 15 P.3d 1271 (2001). The 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); *State v. Nordby*, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986).[1]

This Court has held that "factors inherent in the crime – inherent in the sense that they were necessarily considered by the

[1] After the decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the trial court retains its discretion to determine whether the jury's findings "are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.537 (6). But, the jury must determine the factual basis for the aggravating circumstances, and the trial court is "left only with the legal conclusion of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence." *State v. Suleiman*, 158 Wn.2d 280, 290-91, 143 P.3d 795 (2006).

Legislature and do not distinguish the defendant's behavior from that inherent in all crimes of that type – may not be relied upon to justify an exceptional sentence." *Ferguson*, 142 Wn.2d at 647-48, *citing State v. Chadderton*, 119 Wn.2d 390, 396, 832 P.2d 481 (1992). Stated differently, "an enhanced sentence may not be based on those factors the Legislature necessarily considered in setting the sentence range for the *type* of offense." *Chadderton*, 119 Wn.2d at 395 (emphasis in original). The aggravating circumstance, "[t]he victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense[,]"[2] was contemplated by the Legislature in setting the standard range for vehicular assault, and inhered in the jury's guilty verdict here.

Courts have repeatedly stricken exceptional sentences where the alleged "aggravating circumstance" inhered in the jury verdict for the underlying offense. *State v. Dunaway*, 109 Wn.2d 207, 218-19, 743 P.2d 1237 (1987) (planning is inherent in the premeditation element of first degree murder, thus may not be used to justify an exceptional sentence for the crime of first degree murder); *State v. Gore*, 143 Wn.2d 288, 320, 21 P.3d 362 (2001)

[2] RCW 9.94A.535(3)(y).

(same), *rev'd on other grounds, State v. Hughes*, 154 Wn.2d 118, 132, 110 P.3d 192 (2005); *State v. Baker*, 40 Wn.App. 845, 848-49, 700 P.2d 1198 (1985) (planning inherent in verdict for attempted first-degree escape); *Ferguson*, 142 Wn.2d at 648 ("deliberate cruelty" finding inhered in jury's verdict for assault by intentionally exposing the human immunodeficiency virus (HIV) to another person with intent to inflict bodily harm); *State v. Armstrong*, 106 Wn.2d 547, 551, 723 P.2d 1111 (1986) (burns inflicted on the 10-month-old victim by defendant's throwing boiling coffee on the child and plunging the child's foot in the coffee were injuries accounted for in the offense of second degree assault and could not justify an exceptional sentence).

The rationale underlying these cases is that by defining an offense and assigning a certain seriousness level and sentence range to that offense, the Legislature necessarily took into consideration the potential for variances in conduct. "[T]he idea of a range, rather than a fixed term . . ., is to allow the judge some flexibility in tailoring the sentence to the person and crime before him; the court may impose any sentence within the range that it deems appropriate." *Baker*, 40 Wn.App. at 848.

Here, because the jury made the requisite finding, the issue is whether the trial court committed an error of law in imposing an exceptional sentence based on the severity of Ms. Thielman's injuries. The exceptional sentence should be vacated and the case remanded for resentencing within the standard range.

2. This Court's prior decisions in *Cardenas* and *Nordby* ruled the severity of the victim's injures could not be used to impose an exceptional sentence. The jury convicted Mr. Pappas of vehicular assault with a special verdict that the injuries suffered were substantially exceeded those necessary to prove vehicular assault. CP 18-19, 27-28.

Under RCW 9.94A.535 (3)(y), a jury may find an aggravating factor justifying an exceptional sentence where the State proves beyond a reasonable doubt that:

> [t]he victim's injuries substantially exceed 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). "Substantial bodily harm" is defined as "bodily injury which involves

a temporal 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).

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. Therefore, this Court held that the injuries suffered could not be a basis for a sentence outside the presumptive range." *Id.*

Subsequently in *State v. Cardenas*, relying upon its earlier decision in *Nordby*, this Court again held that an exceptional sentence for vehicular assault cannot be based upon the severity of the victim's injuries. 129 Wn.2d 1, 6-7, 914 P.2d 57 (1996) ("[The victim's] injuries, while severe, are evidently the type of injuries envisioned by the Legislature in setting the standard range.

Consequently, the severity of injuries cannot justify an exceptional sentence.").

This Court should continue to follow the underlying rationale for the decisions in *Cardenas* and *Nordby*, that the severity of the injuries suffered cannot be the basis for an exceptional sentence where this fact was already contemplated by the Legislature in setting the presumptive range for vehicular assault.

3. Excessive injuries suffered by the victim were necessarily considered by the Legislature in setting the presumptive sentencing range for vehicular assault. The Legislature enacted two classifications of offenses dealing with injuries caused by driving a vehicle: vehicular assault (if the accident causes injury that is at least substantial bodily harm) and vehicular homicide (if the accident results in death within three years). RCW 46.61.520; RCW 46.61.522. The Legislature did not enact an intermediate level of culpability where injury exceeds substantial bodily harm but does not result in death. *See* RCW 46.61.500 *et seq.*

The Court of Appeals ruled that since vehicular assault only requires "substantial bodily harm" as a minimum for proving the offense, a victim's injuries which constitute "great bodily injury," a higher level of harm defined by the Legislature, could be the basis

for imposition of an exceptional sentence. *Pappas*, 164 Wn.App. at 921-22. But, because the Legislature enacted only two crimes involving vehicles – vehicular homicide and vehicular assault – it necessarily intended vehicular assault to cover a wide range of harm, beginning with the minimal harm that would qualify as substantial bodily harm, and ending with harm that falls just short of death. Thus, where a person's driving causes great bodily harm, he is guilty of vehicular assault and subject only to the penalties for that offense.

As a consequence, the seriousness of the injuries suffered by the victim of vehicular assault can never justify an exceptional sentence as a matter of law. Any such injuries were necessarily considered by the Legislature when it set the presumptive range for that offense. This Court recognized this fact well before the decision in *Blakely v. Washington* necessitated changing the mechanism for imposing exceptional sentences when it issued its decisions in *Nordby, supra* and *Cardenas, supra*.

In setting the presumptive range for vehicular assault, the Legislature accounted for the likelihood of life-threatening injuries; to assume otherwise would be to ignore the fact such injuries are an inherent risk whenever a vehicle collision occurs. Furthermore,

if the legislatively set presumptive range applied only to the minimum level of injury required to prove the offense, exceptional sentences would be the rule rather than the exception.

The exceptional sentence imposed here violated these principles. The jury's findings, that Ms. Thielman's injuries substantially exceeded those necessary to establish the offense, cannot support the exceptional sentence imposed. *Nordby, supra; Cardenas, supra.* The Legislature necessarily considered such injuries when setting the penalties for vehicular assault. Accordingly, Mr. Pappas is entitled to reversal of the exceptional sentence.

4. Mr. Pappas is entitled to reversal of his sentence and remand for imposition of a standard range sentence. 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). Since the excessive injuries suffered by Ms. Thielman were the sole aggravating factor upon which the court imposed the exceptional sentence, reversal of the exceptional

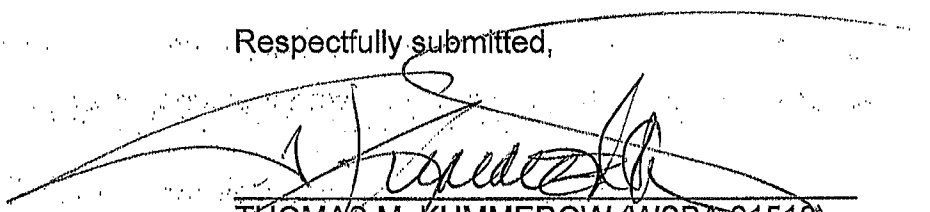
sentence and remand for resentencing within the standard range is required.

D. CONCLUSION

For the reasons stated, Mr. Pappas requests that this Court uphold its decisions in *Nordby* and *Cardenas*, find that the severity of the injuries suffered were contemplated by the Legislature in setting the presumptive sentencing range, reverse his exceptional sentence, and remand for imposition of a standard range sentence.

DATED this 25th day of May 2012.

Respectfully submitted,



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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No. 86859-0

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