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**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, PETITIONER

v.

LARRY HAYES, RESPONDENT

Court of Appeals No. 43207-2

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 07-1-05967-1

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES PERTAINING TO GRANT OF REVIEW.

1. May a trial court impose an exceptional sentence based upon the jury returning special verdicts finding defendant's crimes to be major economic offenses under RCW 9.94A.535(3)(d)(i) and (iii), when the trial court's instructions to the jury permitted it to convict defendant based upon accomplice liability?

2. As this Court's decisions in *McKim* and *Silva-Baltazar* instruct that a sentencing enhancement provision may sometimes be applied to an accomplice even though that term does not appear in the statute, did the Court of Appeals err in holding that the absence of the term "accomplice" in RCW 9.94A.535(3)(d)(i) and (iii) precluded applicability of those aggravating circumstances to any accomplice?

3. When the "major economic offense" aggravating circumstance under RCW 9.94A.535(3)(d)(i), and (iii) is defined as one where a crime has additional factor beyond the elements that more fully describes the nature of the resulting crime - as opposed to an aggravating circumstance that focuses on an aspect of the defendant's actions, motivation, or intent - may the jury's finding that the offense was a "major economic offense" be applied to any participant in the offense?

B. STATEMENT OF THE CASE.

This is the second time this case has been before the appellate courts, although the first time it has been in this Court.

In the trial court, defendant Larry Hayes was convicted of one count of identity theft in the first degree, two counts of possession of a stolen vehicle, five counts of identity theft in the second degree, five counts of possessing stolen property in the second degree, one count of unlawful possession of a personal identification device and one count of unlawful possession of a controlled substance and one count leading organized crime following a jury trial. *State v. Hayes*, 164 Wn. App. 459, 464-66, 262 P.3d 534 (2011)(“*Hayes I*”). Additional information about the evidence used to convict defendant of these crimes can be found in the published decision in the first appeal. *Id.* The “to convict” instructions allowed the jury to convict based on accomplice liability. *Id.* at 466-67; CP 129-177. The State’s case-in-chief adduced evidence showing that defendant was the principal person organizing others to commit acts of fraud and theft; the evidence that he was a lesser participant was based upon evidence adduced in the defense case. *Hayes I* at 464-66, 471. In addition to finding defendant guilty, the jury returned several special verdicts finding that the offenses were major economic offenses. *Hayes I*, at 466. The trial court imposed an exceptional sentence of 180 months on

the count of leading organized crime. *Id.*; CP 178-202. Defendant appealed; on review the Court of Appeals vacated his leading organized crime conviction, which also vacated the exceptional sentence, as well as the two convictions for possession of a stolen vehicle, then remanded the matter to the trial court. *Hayes I*, at 485.

On remand from the first direct appeal, defendant was brought before the court for re-sentencing on eleven crimes; on each the jury had returned a special verdict finding the crime to be a major economic offense. CP 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 98-111. At the re-sentencing, the trial court imposed an exceptional sentence on Count 1 (identity theft in the first degree) based upon the jury's special verdicts, and added twelve months to the standard range for a total term of confinement of 96 months. CP 98-111; RCW 9.94A.535(3)(d).

Defendant again appealed; he challenged his exceptional sentence based upon the jury's finding that he committed a major economic offense under RCW 9.94A.535, arguing that as the jury could have found him guilty based upon accomplice liability and any sentencing enhancement *must* be predicated on his own actions. In a published decision, the Court of Appeals, Division II, held that the "major economic offense" aggravating circumstance found in RCW 9.94A.535(3)(d) cannot be applied to accomplices because the Legislature did not use the term

"accomplice" in that statute. *State v. Hayes*, 177 Wn. App. 801, 807-11, 312 P.3d 784 (2013) (“*Hayes II*”). The court relied heavily upon the decision in *State v. Pineda-Pineda*, 154 Wn. App. 653, 226 P.3d 164 (2010) (Division I), which held "triggering language" in a sentence enhancement is required to show a legislative intent to apply the enhancement to an accomplice. The Court of Appeals vacated defendant's exceptional sentence. *Id.* This Court granted the State's petition for review as to whether the court erred in its construction of RCW 9.94A.535(3)(d).

C. ARGUMENT.

1. THIS COURT SHOULD UPHOLD THE EXCEPTIONAL SENTENCE BASED UPON THE JURY'S FINDING THAT THE CRIMES DEFENDANT PARTICIPATED IN WERE "MAJOR ECONOMIC OFFENSES" UNDER RCW 9.94A.535(3)(d)(i), AND (iii) AS THIS AGGRAVATING CIRCUMSTANCE DESCRIBES THE RESULTING CRIME RATHER THAN ANY ASPECT OF A PARTICULAR OFFENDER'S ACTIONS, MOTIVATION, OR INTENT, AND, THUS, MAY BE APPLIED TO ANY PARTICIPANT IN THE OFFENSE.
 - a. Existing Washington Law Is Clear That The Complicity Statute Found In RCW 9A.08.020 is Limited To Liability For The Substantive Offense And That Liability For A Sentencing Enhancement Provision Is A Separate Question.

As a general rule under Washington law, penalty enhancement provisions must depend on the accused's own misconduct rather than that of an accomplice's because the complicity statute found in RCW 9A.08.020(1) is "limited to accountability for crimes." *State v. McKim*, 98 Wn.2d 111, 116, 653 P.2d 1040 (1982). The Washington Legislature defined the nature of accomplice liability in RCW 9A.08.020.¹ Criminal

¹ Under RCW 9A.08.020, a "person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable." RCW 9A.08.020(1). "A person is legally accountable for the conduct of another person when he is the accomplice of such other person in the commission of a crime." RCW 9A.08.020(2)(c). An individual is "an accomplice" if he or she "solicits, commands, encourages, or requests" another person to commit a crime or aids in its planning or commission, knowing that his or her act will promote or facilitate the commission of the crime. RCW 9A.08.020(3).

liability attaches to anyone who participates in a crime and there is no difference between principal and accomplice liability. *State v. McDonald*, 138 Wn.2d 680, 688, 981 P.2d 443 (1999). The Washington Supreme Court has summarized the legislative intent behind RCW 9A.08.020(3) as:

The legislature has said that anyone who participates in the commission of a crime is guilty of the crime and should be charged as a principal, regardless of the degree or nature of his participation. Whether he holds the gun, holds the victim, keeps a lookout, stands by ready to help the assailant, or aids in some other way, he is a participant. The elements of the crime remain the same.

State v. Carothers, 84 Wn.2d 256, 264, 525 P.2d 731 (1974), *disapproved on other grounds by*, *State v. Harris*, 102 Wn.2d 148, 153-54, 685 P.2d 584 (1984).

Consistent with the holdings of *McDonald* and *Carothers*, the word "accomplice" accurately denotes a relationship between two or more participants in a crime, but is not a particularly useful term to denote the level of a person's participation in that crime. If a crime is committed by three persons- two of whom could be considered principals (or major participants) and the third is a minor participant, then legally each one is "an accomplice" of the other two. Throughout this brief, the word "accomplice" will be used to denote another participant in a crime regardless of their level of involvement; the term "minor participant" will

be used to denote someone whose *mens rea* is less than a principal's or who does not perform any of the acts that are elements of the crime.

At issue in *McKim* was whether the deadly weapon statute, which increased punishment for an "accused [who] was armed with a deadly weapon, as defined by RCW 9.95.040, at the time of the commission of the crime" could be applied to a defendant who was not personally armed during the commission of an offense, but whose accomplice was armed. This Court determined that the accomplice liability statute, RCW 9A.08.020, makes a participant in a crime "equally liable [with other participants] only for the substantive crime." *McKim*, at 117. This court's analysis focused on the fact that under RCW 9A.08.020, there is no strict liability for the conduct of another in regard to a sentence enhancement provision; this contrasted with an earlier accomplice liability statute that had imposed liability for punishment as well. *Id.* at 116-17. As liability for increased punishment did not flow from the general accomplice liability statute, the court then looked at the language of the deadly weapon statute itself. The court concluded that this language allowed for enhanced punishment upon a special finding that:

... an accused was either actually armed with a deadly weapon or was constructively armed with such a weapon. The phrase "constructively armed with a deadly weapon" means the accused's accomplice must have been actually

armed with a deadly weapon and the accused must have had knowledge that the accomplice was so armed.

McKim, 98 Wn.2d at 117. In sum, the court in *McKim* found that the enhancement provision could be applied to accomplices under certain circumstances even though the statute did not specifically use the term "accomplice."²

Under the principles set forth in *McKim*, liability for sentencing enhancement provisions does not flow automatically from RCW 9A.08.020. Thus, the question arises when construing any sentencing enhancement provision whether or not the Legislature intended to impose strict liability for the enhancement on all participants of a crime or just upon certain participants. Some sentencing enhancements expressly allow for punishment premised on accomplice liability. For instance, the firearm enhancement statute, RCW 9.94A.533, contains language demonstrating the legislature's intent to extend it to include all participants in a crime. RCW 9.94A.533(3) reads, "The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender *or an accomplice* was armed with a firearm as defined in RCW 9.41.010." (Emphasis added).

² While *McKim* has been superceded by statutory changes made by the Sentencing Reform Act of 1981 to the deadly weapon enhancement provision, see *State v. Bilal*, 54 Wn. App. 778, 776 P.2d 153, review denied, 113 Wn.2d 1020, 781 P.2d 1322 (1989), the lesson it teaches about determining legislative intent in sentencing enhancements remains valid.

This Court has also found that the sentencing enhancement found in RCW 69.50.435, which increases punishment on certain controlled substance offenses committed in locations specified in the statute (hereinafter "drug free zones") could be applied to accomplices who were physically present in the "drug free zone." *State v. Silva-Baltazar*, 125 Wn.2d 472, 886 P.2d 138 (1994). This Court noted that nothing in the language of RCW 69.50.435 required knowledge on the part of any of the participants in the controlled substance offense that they were in a "drug free zone" for the enhancement to apply - an indication that the Legislature was intending to impose strict liability. *Id.* at 482. This Court did not find persuasive arguments that because the term "accomplice" was omitted from RCW 69.50.435 that the Legislature did not intend it to apply to accomplices. *Id.* at 483. The court expressly left open, however, "whether the enhancement applies to accomplices who are not themselves within the drug free zone, but are liable for a crime of another who does conduct the prohibited drug activity in a drug free zone." *Id.* at 474.

At issue in the instant case is the aggravating circumstances related to "major economic offenses" found in 9.94A.535(3)(d).³ This court has yet to construe any aggravating circumstance provision of RCW 9.94A.535 and its applicability to accomplices.

³ See Appendix A for full text of statute.

b. The Varying Language Used In The
Numerous Subsections Of RCW
9.94A.535(3) Reveals Differing Legislative
Intent As To Whether A Particular
Subsection Applies To A Particular
Defendant Or All Participants In A Crime.

The meaning of a statute is a question of law that this court reviews *de novo*. *State v. Mitchell*, 169 Wn.2d 437, 442, 237 P.3d 282 (2010). The goal of statutory interpretation is to discern and implement the legislature's intent. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). When interpreting a statute, “if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002). The “plain meaning” of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *State v. Lilyblad*, 163 Wn.2d 1, 9, 177 P.3d 686 (2008); *State v. Jacobs*, 154 Wn.2d 596, 600-601, 115 P.3d 281, 283 (2005). A statute is deemed ambiguous when the language is susceptible to more than one reasonable interpretation. *Jacobs*, 154 Wn.2d at 600–01.

At issue in the case now before the court is a portion of the aggravating circumstance found in RCW 9.94A.535(3)(d). That provision reads in its entirety:

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

- (i) The current offense involved multiple victims or multiple incidents per victim;
- (ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;
- (iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or
- (iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

RCW 9.94A.535(3)(d). In this case the jury was instructed that if it were to find defendant guilty of any offense that it must also determine whether the crime was a major economic offense, under two of the four factors listed in the statute. CP 129-177, Instruction No. 44. Specifically, the jury was instructed that:

To find that a crime is a major economic offense, at least one of the following factors must be proved beyond a reasonable doubt:

- (1) The crime involved multiple victims or multiple incidents per victim; or

(2) The crime involved a high degree of sophistication or planning or occurred over a lengthy period of time.

...

CP 129-177, Instruction No. 45 (in part).

After remand from the first direct appeal in this case, defendant Hayes remained convicted of eleven crimes for which the jury had returned special verdicts finding the crimes to be major economic offenses. CP 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 98-111. At his re-sentencing hearing, the sentencing court used the jury's findings to impose an exceptional sentence of an additional twelve months on Count 1. CP 98-111; RCW 9.94A.535(3)(d).

On review the Court of Appeals, Division II, vacated this exceptional sentence because it did not find any "triggering language" in RCW 9.94A.535(3)(d) specifically invoking accomplice liability for this aggravating circumstance. Division II relied heavily upon the decision of Division I of the Court of Appeals in *State v. Pineda-Pineda*, 154 Wn. App. 653, 226 P.3d 164 (2010), in reaching its decision. In *Pineda-Pineda*, Division I concluded that an accomplice who was not physically in the "drug free zone" at the time of the delivery of a controlled substance could not be subject to an increased sentence under RCW 69.50.435. It held "where there is no explicit statutory authorization for imposition of a

sentence enhancement on an accomplice, the defendants' own acts must form the basis for the enhancement." *Id.* at 664.

In *Hayes II*, Division II indicated that it would not find any sentence enhancement provision applicable to accomplices unless the statute specifically mentioned accomplices. *See Hayes II*, 177 Wn. App. at 810, 312 P.3d at 810 ("if the Legislature wanted this major economic offense enhancement to apply to accomplices, it could have easily and clearly mentioned accomplice liability in RCW 9.94A.535 as it did the firearm enhancement" and "nowhere in RCW 9.94A.535 did the legislature choose to reference accomplices."). The court below noted that there were differences in the language used in the various enhancement provisions, but did not find that any of these differences relevant to its construction because the Legislature had not included an explicit reference to accomplices. *Id.*

In both *McKim* and *Silva-Baltazar*, the fact that the Legislature did not use the term "accomplice" in an enhancement provision was not determinative of whether the statutory provision could be applied to accomplices. Had the court below paid greater attention to the jurisprudence of this Court, it would have given greater consideration to the differences in language that the Legislature did use in enacting RCW 9.94A.535, rather than focusing solely on the absence of a word.

The aggravating circumstances set forth in RCW 9.94A.535 cover a broad range of factors. Some of the circumstances focus on the defendant's actions such as when the defendant manifests deliberate cruelty to the victim, RCW 9.94A.535(3)(a), or the defendant uses his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the offense, RCW 9.94A.535(3)(n). Other circumstances discuss what the defendant knew or should have known about his victim, such as being particularly vulnerable, RCW 9.94A.535(3)(b), or pregnant, RCW 9.94A.535(3)(c). Other circumstances do not focus on the defendant's actions or what he knew, but on the impact of the crime, i.e. a rape of child resulting in the victim's pregnancy, RCW 9.94A.535(3)(i), or the victim's injuries substantially exceeding the level of bodily harm necessary for the element of crime, RCW 9.94A.535(3)(y). Some aggravating circumstances simply describe some quality of the offense: it involved a high degree of sophistication or planning, RCW 9.94A.535(3)(m), or an invasion of the victim's privacy, RCW 9.94A.535(3)(p). It is the State's position that that the correct answer to whether an aggravating circumstance in RCW 9.94A.535(3) can be applied to the actions of an accomplice cannot be answered with a blanket "yes" or a "no," but will depend on which aggravating circumstance in RCW 9.94A.535 is being considered.

Examination of the varied wording of these aggravating circumstances indicates that the Legislature intended some of them to apply to any participant in the substantive crime while others must be attributed to a particular defendant. Generally, the Legislature's use of the phrase "the defendant" or "the offender" in setting forth an aggravating circumstance signals an intent that the circumstance be assessed against an individualized defendant rather than all accomplices or participants in the offense. *See e.g.*, RCW 9.94A.535(3)(a), (b), (c), (j), (n), (o), (q), (s), (t), (v), (w), (x), (aa), (cc), and (ee). In contrast, many of the aggravating circumstances make no mention of an "offender" or "defendant," but describes some aspect of the crime committed. *See e.g.*, RCW 9.94A.535(3)(e), (g), (i), (k), (l), (m), (p), (u), (v), (y), (z), (bb), and (dd). The Legislature's use of the term "the current offense" usually signals⁴ where it has identified when commission of a crime, combined with an additional factor describing an aspect about the crime, results in an offense that warrants increased punishment. The aggravating circumstances setting forth such factors are focused on the nature of the current substantive offense and not the motive, knowledge, or specific actions of

⁴ A couple of the subsections reference both the "current offense" and "the defendant;" the use of the latter term indicates the Legislature authorized increased punishment when there is a specialized determination that a particular defendant's actions, knowledge or motivation is found within the current offense. *See e.g.*, RCW 9.94A.535(3)(b), (c) and (j).

any one participant. These aggravating circumstances describe the resulting substantive crime, and do not reference the entity responsible for the creation of that aggravating aspect. Under *McDonald*, all participants in a crime are equally culpable for the resulting substantive crime. Therefore, it follows that any participant in an offense should be subject to a legislative enhancement that describes the nature of substantive crime that is worthy of increased punishment when it is done without reference to any particular actor. Such a construction gives meaning to the varying language in RCW 9.94A.535 and is also consistent with general liability principles set forth in *McDonald* and *McKim*.

As mentioned above, at issue in this case is RCW 9.94A.535(3)(d). This provision provides four factors that define whether an offense (or series of offenses) qualifies as major economic offense. Three of the four factors describe the nature of the offense as involving: 1) multiple victims or multiple incidents per victim; 2) attempted or actual monetary loss substantially greater than typical for the offense; or, 3) a high degree of sophistication or planning or occurring over a lengthy period of time. RCW 9.94A.535(3)(d)(i-iii). Under the State's analysis, since these factors describe the resulting offense and do not reference an actor, they should be applicable to any participant in the crime. The fourth factor that can define a major economic offense is that the "defendant used his or her

position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense." RCW 9.94A.535(3)(d)(iv). Because the Legislature has focused on the attributes of a particular defendant in this subsection, this could not be applied to any participant in the crime, but only those participants who used a position of trust to facilitate the commission of the crime.

As noted earlier, subsection (iv) is not at issue in this case because the jury was not instructed upon it; only subsections (i) and (iii) are at issue. CP 129-177, Instruction No. 45. Both of these subsections describe the nature of the crime and not the person committing it. Neither of these subsections references "the defendant" or even makes an indirect reference to the entity committing the crime. Because these factors describe the resulting crime and not an action, motivation or aspect of the person committing the crime, the applicability of these factors does not change from one participant in the crime to the next. Once the jury finds the crime meets the criteria set forth in the aggravating circumstance, it has found an aggravating circumstance that is applicable to all the participants in the crime. Consequently, the aggravating factor should not be assessed on an individualized basis, but apply equally to all participants in a crime regardless of whether they are a minor or major participant.

Division II of the Court of Appeals reached a similar conclusion in *State v. Allen*, 178 Wn. App. 893, 317 P.3d 494, *review granted*, 180 Wn.2d 1008, 325 P.3d 913 (2014). In that case, Division II held that the aggravating factor found in RCW 9.94A.535(3)(v), pertaining to crimes committed against a law enforcement officers, was applicable to Allen even though his guilt of substantive crime - murder- was predicated on accomplice liability. The court noted that the wording of the aggravator focuses on "the victims' statuses" rather than the defendant's acts. *Id.* at 916. The *Allen* decision found *Pineda-Pineda* distinguishable and did not reference the decision in *Hayes II* or address the apparent conflict.

The State asserts that the Division II's construction of RCW 9.94A.535(3) was correct in *Allen* and incorrect in the decision below. This Court should reverse the Court of Appeals' decision in *Hayes II* and reinstate the exceptional sentence imposed by the trial court.

D. CONCLUSION.

For the foregoing reasons, the State asks this Court to find that the Court of Appeals erred in construing RCW 9.94A.535(3) and in reversing the defendant's exceptional sentence.

DATED: This 30th day of June, 2014.

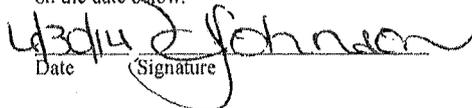
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WSB # 14811

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The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date: 6/30/14 Signature

APPENDIX "A"

RCW 9.94A.535

Westlaw.

West's RCWA 9.94A.535

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Effective: September 28, 2013

West's Revised Code of Washington Annotated Currentness

Title 9. Crimes and Punishments (Refs & Annos)

Chapter 9.94A. Sentencing Reform Act of 1981 (Refs & Annos)

Sentencing

→→ 9.94A.535. Departures from the guidelines

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

(1) Mitigating Circumstances--Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

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(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(i) The defendant was making a good faith effort to obtain or provide medical assistance for someone who is experiencing a drug-related overdose.

(j) The current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse.

(2) Aggravating Circumstances--Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances--Considered by a Jury--Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural

or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

(z)(i)(A) The current offense is theft in the first degree, theft in the second degree, possession of stolen property in the first degree, or possession of stolen property in the second degree; (B) the stolen property involved is metal property; and (C) the property damage to the victim caused in the course of the theft of metal property is more than three times the value of the stolen metal property, or the theft of the metal property creates a public hazard.

(ii) For purposes of this subsection, "metal property" means commercial metal property, private metal property, or nonferrous metal property, as defined in RCW 19.290.010.

(aa) The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.

(bb) The current offense involved paying to view, over the internet in violation of RCW 9.68A.075, depictions of a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (g).

(cc) The offense was intentionally committed because the defendant perceived the victim to be homeless, as defined in RCW 9.94A.030.

(dd) The current offense involved a felony crime against persons, except for assault in the third degree pursuant to RCW 9A.36.031(1)(k), that occurs in a courtroom, jury room, judge's chamber, or any waiting area or corridor immediately adjacent to a courtroom, jury room, or judge's chamber. This subsection shall apply only: (i) During the times when a courtroom, jury room, or judge's chamber is being used for judicial purposes during court proceedings; and (ii) if signage was posted in compliance with RCW 2.28.200 at the time of the offense.

(ee) During the commission of the current offense, the defendant was driving in the opposite direction of the normal flow of traffic on a multiple lane highway, as defined by RCW 46.04.350, with a posted speed limit of forty-five miles per hour or greater.

CREDIT(S)

[2013 2nd sp.s. c 35 § 37, eff. Sept. 28, 2013. Prior: 2013 c 256 § 2, eff. July 28, 2013; 2013 c 84 § 26, eff. July 28, 2013; 2011 c 87 § 1, eff. July 22, 2011; prior: 2010 c 274 § 402, eff. June 10, 2010; 2010 c 227 § 10, eff. June 10, 2010; 2010 c 9 § 4, eff. June 10, 2010; prior: 2008 c 276 § 303, eff. June 12, 2008; 2008 c 233 § 9, eff. June 12, 2008; 2007 c 377 § 10, eff. July 22, 2007; 2005 c 68 § 3, eff. April 15, 2005; 2003 c 267 § 4, eff. July 27, 2003; 2002 c 169 § 1; 2001 2nd sp.s. c 12 § 314; 2000 c 28 § 8; 1999 c 330 § 1; 1997 c 52 § 4; prior: 1996 c 248 § 2; 1996 c 121 § 1; 1995 c 316 § 2; 1990 c 3 § 603; 1989 c 408 § 1; 1987 c 131 § 2; 1986 c 257 § 27; 1984 c 209 § 24; 1983 c 115 § 10. Formerly RCW 9.94A.390.]

Current with 2014 Legislation effective on June 12, 2014, the General Effective Date for the 2014 Regular Session, and 2014 Legislation effective July 1, 2014

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Attached please find the Supplemental Brief of Petitioner