

No. 96599-4

No. 49284-9-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

ARNOLD MAFNAS CRUZ,

Appellant.

---

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

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The amended information was constitutionally deficient. CP 578-79.<sup>1</sup>

2. The trial court erred in imposing an exceptional sentence.

3. The trial court erred in entering Conclusion of Law 2 in its Findings of Fact and Conclusions of Law for Exceptional Sentence.<sup>2</sup>

4. The trial court erred in entering Conclusion of Law 3 in its Findings of Fact and Conclusions of Law for Exceptional Sentence.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. An information is constitutionally deficient if it fails to set forth every element of the crime charged, and the remedy for a violation of this “essential elements” rule is reversal of the conviction and dismissal of the charge

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<sup>1</sup> For the Court’s convenience, the amended information is attached to this brief as Appendix A.

<sup>2</sup> This case (no. 15-1-01503-4) was sentenced together with a case in which Mr. Cruz pleaded guilty to drug possession and bail jumping (no. 15-1-00436-9). The Findings and Conclusions were filed only under the other cause number. They have been designated in appeal no. 49264-4-II and are attached as Appendix B to this brief.

without prejudice to the State's ability to refile. The State charged Arnold Cruz with rendering criminal assistance, but the information omitted several elements of the crime, including both *mens rea* elements. Was the information in this case constitutionally deficient, requiring reversal of the conviction and dismissal of the charge without prejudice to the State's ability to refile?

2. Reversal of an exceptional sentence is required where the trial court's reasoning does not justify the departure from the standard range. The trial court imposed consecutive sentences against Mr. Cruz based on a determination that, because his current offenses elevated his offender score to 10, "some of the current offenses" would otherwise go unpunished. However, only *one* current offense failed to increase Mr. Cruz's potential period of confinement. Given that the plain language of the statute allows for an exceptional sentence only where multiple offenses will otherwise go unpunished, should this Court reverse?

### C. STATEMENT OF THE CASE

Robert Pry and Joshua Rodgers Jones beat and robbed 89-year-old Archie Hood. Mr. Hood eventually died of his injuries. RP (5/9/16) 1393; RP (7/6/16) 5280-83. Arnold Cruz had nothing to do with these events.

Mr. Pry subsequently enlisted the help of other individuals to attempt to break into Mr. Hood's bank accounts. RP (5/18/16) 2420; RP (6/9/16) 4036. Arnold Cruz had nothing to do with it.

When Mr. Pry became concerned about the possibility of law enforcement discovering Mr. Hood's remains, he sought assistance in disposing of the evidence. Detectives suspected that Mr. Pry asked Mr. Cruz, whom he viewed as an "uncle," for help. RP (5/23/16) 2756-58. After police discovered Mr. Hood's remains, Arnold Cruz was one of many people whose names and faces were released to the press as being sought in connection with the crimes. CP 733-46.

Arnold Cruz immediately turned himself in. RP (3/15/16) 490; RP (5/10/16) 1552-53. The State charged

Mr. Cruz with the felony of first-degree rendering criminal assistance, and the misdemeanor of concealing a deceased body. CP 578-80. Mr. Cruz was tried with Mr. Pry, who was convicted of murder and other crimes, and Robert Davis, who was convicted of identity theft. RP (7/6/16) 5280-83.

Mr. Cruz was convicted of rendering and concealment as charged. RP (7/6/16) 5284. His offender score on the felony was eight, but at sentencing, he pleaded guilty to drug possession and bail jumping under another cause number. RP (7/29/16) 4-5. This raised his offender score to ten, but ensured a presumption of concurrent sentences for the two cause numbers. RP (7/29/16) 3.

The State nevertheless sought consecutive sentences under the exceptional sentence provision of the Sentencing Reform Act, alleging that – even if the court applied a sentence at the top of the standard range – one of the offenses would go unpunished if concurrent sentences were imposed. RP (7/29/16) 27-30.

The court largely adopted the State's recommendation. It sentenced Mr. Cruz to the top of the standard range (96

months) for the rendering conviction, and ordered this sentence be run consecutively to the 55-month sentence imposed under the other cause number. In other words, the total sentence was 151 months (plus 180 days for the misdemeanor), or over 13 years of imprisonment. RP (7/29/16) 56-61; CP 1159; CoA No. 49264-4-II CP 39 (App. B at 2).

Mr. Cruz appeals. CP 1168.

D. ARGUMENT

The amended information omits three essential elements of the crime of rendering criminal assistance, including both *mens rea* elements. This Court should accordingly reverse the conviction and remand for dismissal of the charge without prejudice to the State's ability to refile.

In the alternative, the sentence should be reversed because the relevant statute does not authorize an exceptional sentence in these circumstances.

**1. The conviction on count one should be reversed and the charge dismissed without prejudice because the information is constitutionally deficient.**

- a. An information is constitutionally deficient if it fails to set forth every element of the crime charged.

Article I, section 22 of our state constitution<sup>3</sup> and the Sixth Amendment to the federal constitution<sup>4</sup> require the State to provide an accused person with notice of the offense charged. *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). An offense is not properly charged unless the information sets forth every essential element of the crime, both statutory and nonstatutory. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The charging document must contain: (1) the elements of the crime charged, and (2) a description of the specific conduct of the defendant which allegedly constituted that crime. *Auburn v. Brooke*, 119 Wn.2d 623, 630, 836 P.2d 212 (1992). “This doctrine is elementary and of universal application, and is founded on

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<sup>3</sup> “In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him ...”

<sup>4</sup> “In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation ....”

the plainest principle of justice.” *Pelkey*, 109 Wn.2d at 488 (quoting *State v. Ackles*, 8 Wash. 462, 464-65, 36 P. 597 (1894)).

A challenge to the sufficiency of the charging document is of constitutional magnitude and may be raised for the first time on appeal. *State v. Leach*, 113 Wn.2d 679, 691, 782 P.2d 552 (1989); RAP 2.5(a)(3). Where, as here, the issue is raised for the first time on appeal, the standard of review set forth in *Kjorsvik* applies. This Court asks: (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice? *Kjorsvik*, 117 Wn.2d at 105-06. If the answer to the first question is “no,” reversal is required without reaching the second question. *State v. Zillyette*, 173 Wn.2d 784, 786, 270 P.3d 589 (2012); *State v. McCarty*, 140 Wn.2d 420, 425-28, 998 P.2d 296 (2000).

- b. The amended information here is deficient because it omits both *mens rea* elements and an *actus reus* element.

Here, the answer to the first question is “no,” i.e., a necessary element of the crime is neither explicitly stated nor fairly implied. *See McCarty*, 140 Wn.2d. at 428; CP 578-79. Indeed, the information omits both *mens rea* elements and an *actus reus* element. Accordingly, reversal is required. *Id.*

The statute at issue provides, in relevant part:

As used in RCW 9A.76.070, 9A.76.080, and 9A.76.090, a person “renders criminal assistance” if, **with intent** to prevent, hinder, or delay the apprehension or prosecution of another person who he or she **knows** has committed a crime or juvenile offense or is being sought by law enforcement officials for the commission of a crime or juvenile offense or has escaped from a detention facility, he or she:

(1) ...

...

(5) **Conceals, alters, or destroys any physical evidence that might aid in the discovery or apprehension of such person;** or

(6) ....

RCW 9A.76.050 (emphases added). “In other words, a person renders criminal assistance if he or she **(1) knows** that another person (a) ‘has committed a crime or juvenile offense’ or (b) ‘is being sought by law enforcement officials for

the commission of a crime or juvenile offense’ or (c) ‘has escaped from a detention facility’ and **(2) intends** ‘to prevent, hinder, or delay the apprehension or prosecution’ of that other person and **(3) undertakes one of the six specified actions.**” *State v. Budik*, 173 Wn. 2d 727, 734, 272 P.3d 816 (2012) (emphases added).<sup>5</sup>

All three of these elements are missing from the amended information, which provides:

Count I  
Rendering Criminal Assistance in the First Degree [Non-Relative]

On or about or between December 17, 2015 and December 30, 2015, in the County of Kitsap, State of Washington, the above-named Defendant, rendered criminal assistance to a person who had committed or was being sought for any class A felony; contrary to the Revised Code of Washington 9A.76.070(1).

CP 578.<sup>6</sup>

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<sup>5</sup> An additional element raises the crime to rendering in the first degree: “A person is guilty of rendering criminal assistance in the first degree if he or she renders criminal assistance to a person who has committed or is being sought for murder in the first degree or any class A felony or equivalent juvenile offense.” RCW 9A.76.070(1).

<sup>6</sup> The “to convict” instruction included both *mens rea* elements that were missing from the informations, but omitted the *actus reus* element. CP 1068. The *actus reus* element was wrongly relegated to a definitional instruction. CP 1067. Nevertheless, Mr.

The omission of these essential elements may not be excused simply because the information named the crime (“rendered criminal assistance”) and referenced the relevant statute (RCW 9A.76.070). *See Brooke*, 119 Wn.2d at 627 (“the recitation of no more than a numerical code section and the title of an offense does not satisfy that [essential elements] rule unless such abbreviated form contains all essential elements of the crime(s) charged.”). Instead, “all elements of a crime must be included in the charging document.” *Id.* at 635 (citing *Kjorsvik*, 117 Wn.2d at 102).

In *Brooke*, for example, the Supreme Court reversed where the charging document alleged “Disorderly Conduct” and cited “9.40.10(A)(2).” 119 Wn.2d at 636-37. This charging document was constitutionally deficient because the municipal code at issue set forth the following elements of the crime:

A. A person is guilty of disorderly conduct if, with a purpose to cause public danger, alarm, disorder, nuisance, or if with the knowledge that

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Cruz does not separately challenge the omission of the single element from the “to convict” instruction, because the omission of three essential elements from the amended information requires reversal.

he is likely to create such public danger, alarm, disorder or nuisance, he willfully:

.....

2. Engages in fighting or in violent, threatening or tumultuous behavior; ...

*Id.* Because the elements were missing from the charging document, reversal was required without reaching the second prong of the *Kjorsvik* test. *Id.* at 638.

The same is true here, where three essential elements are missing from the charging document. CP 578; RCW 9A.76.050; *Budik*, 173 Wn. 2d at 734. Even if only one element were missing, the information would be constitutionally deficient. *See McCarty*, 140 Wn.2d at 428. Given that multiple elements were omitted, there can be no doubt that the amended information is insufficient under article I, section 22 and the Sixth Amendment. <sup>7</sup> *Id.*

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<sup>7</sup> For the Court's convenience, the following is an example of a proper information charging a defendant with rendering:

That the defendant JERRY ALLEN FLUKER in King County, Washington, on or about August 12, 2015, with intent to prevent, hinder or delay the apprehension or prosecution of Marque Deandre Fluker, did render criminal assistance to Marque Deandre Fluker, a person who he knew committed Murder in the Second Degree, a Class A felony, or Assault in the First Degree, a Class A felony, by providing such person with transportation, disguise,

- c. The remedy is reversal of the conviction on count one and remand for dismissal of the charge without prejudice to the State's ability to refile.

Washington courts “have repeatedly and recently held that the remedy for an insufficient charging document is reversal and dismissal of charges without prejudice to the State’s ability to refile charges.” *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). Mr. Cruz accordingly asks this Court to reverse the conviction on count one, and remand for dismissal of the charge without prejudice.

**2. The exceptional sentence is improper because the plain language of the statute did not authorize consecutive sentences.<sup>8</sup>**

Appellate review of a defendant’s sentence is dictated by statute. RCW 9.94A.585(4); *State v. Law*, 154 Wn.2d 85,

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or other means of avoiding discovery or apprehension;

Contrary to RCW 9A.76.070(1), (2)(a) and 9A.76.050, and against the peace and dignity of the State of Washington.

*State v. Fluker*, No. 74859-9-I, at CP 92-93.

<sup>8</sup> This Court need not reach the sentencing issue if it agrees that reversal of the rendering conviction is required because of the violation of the essential elements rule. The sentencing issue is the same as that raised in CoA No. 49264-4-II.

93, 110 P.3d 717 (2005). To reverse an exceptional sentence, the Court must determine whether:

- (1) under a clearly erroneous standard, there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence;
- (2) under a de novo standard, the reasons supplied by the sentencing court do not justify a departure from the standard range; or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too lenient.

*State v. Feely*, 192 Wn. App. 751, 770, 368 P.3d 514 (2016);  
*Law*, 154 Wn.2d at 93.

Here, this Court should apply de novo review and reverse because the trial court's reasoning does not justify the departure from the standard range. De novo review is also appropriate because the issue is one of statutory construction. *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015).

- a. Consecutive sentences may be imposed under the statute only when "some" of the current offenses would otherwise go unpunished.

Mr. Cruz faced sentencing on three separate felony counts under two different cause numbers. RP (7/29/16) 1-5. Under the Sentencing Reform Act, when an individual is

sentenced on two or more offenses at the same time, the sentences imposed on each count must be served concurrently. RCW 9.94A.589. Consecutive sentences may be imposed only under the exceptional sentence provisions of RCW 9.94A.535. RCW 9.94A.589(1)(a).

The State asked the trial court to impose consecutive sentences in Mr. Cruz's case based on RCW 9.94A.535(2)(c).

This provision states:

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

....

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

RCW 9.94A.535(2)(c).

If he had not elected to plead guilty to drug possession and bail jumping on the same day he was sentenced for this case, Mr. Cruz's offender score for the rendering conviction would have been eight.<sup>9</sup> RP (7/29/16) 4, 12, 46. However, because the court sentenced Mr. Cruz on the three felonies

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<sup>9</sup> The concealment conviction on count two is a gross misdemeanor and is not relevant to this felony sentencing issue.

at one sentencing hearing, his offender score increased to a 10. CP 1158; RP (7/29/16) 30; RCW 9.94A.589(1)(a) (“other current offenses” count as prior convictions for purposes of a defendant’s offender score); *In re Finstad*, 177 Wn.2d 501, 507, 301 P.3d 450 (2013) (finding the term “current offense” is “defined functionally as convictions entered or sentenced on the same day”).

Despite this increase in Mr. Cruz’s score, the State argued some of the current offenses were going unpunished because the possession and bail jumping charges increased Mr. Cruz’s offender score to 10, and the standard ranges for a single crime ended at “9 or more.” RP (7/29/16) 27-31; RCW 9.94A.510. The trial court agreed, concluding that Mr. Cruz’s “high offender score” resulted “in some of the current offenses going unpunished.” CoA No. 49264-4-II CP 39 (App. B at 2).

- b. Under the plain language of the provision and applying settled principles of statutory construction, the requirements of the statute were not satisfied where only one offense failed to increase the potential prison time.

The trial court's conclusion that the requirements of RCW 9.94A.535(2)(c) had been satisfied was reached in error. First, relatively speaking, a score of 10 is not high. *See, e.g., State v. Alvarado*, 164 Wn.2d 556, 563, 192 P.3d 345 (2008) (consecutive sentences appropriate under RCW 9.94A.535(2)(c) where offender score was 21). Second, contrary to the court's finding that "some" offenses went unpunished, the record demonstrates that only *one* offense failed to increase Mr. Cruz's potential period of incarceration. *See id.* at 562 ("punishment" is expressed in terms of the total confinement time); RCW 9.94A.510 (each point up to 9 increases potential punishment); CP 1158 (Mr. Cruz's score is 10).

In order to properly interpret RCW 9.94A.535(2)(c), this Court must determine the legislature's intent. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Where a statute is plain on its face, "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). This Court may determine a statute’s plain language by examining the statute in which the provision is found, related provisions, and the larger statutory scheme as a whole. *State v. Larson*, 184 Wn.2d 843, 365 P.3d 740 (2015) (citing *Ervin*, 169 Wn.2d at 820). “When a term has a well-accepted, ordinary meaning, we may consult a dictionary to ascertain the term’s meaning.” *Alvarado*, 164 Wn.2d at 562.

The plain language of RCW 9.94A.535(2)(c) demonstrates that the legislature did not intend for a trial court to impose an exceptional sentence where multiple convictions increased a defendant’s period of incarceration and only one count failed to increase the standard range. The word “some,” when used in this manner, indicates more than one.

“Some” is a term that means different things in different contexts. As the Collins English Dictionary explains, the word “some” is used to refer to a quantity of

something that is not precise.<sup>10</sup> When used as a determiner, meaning at the beginning of a noun group to indicate a reference to one thing or several things,<sup>11</sup> it can indicate the quantity of things is either fairly large or fairly small.<sup>12</sup> For example, an activity may take “some time” or something may only happen to “some extent.”

However, when the word “some” is placed in front of the word “of” – as it is in RCW 9.94A.535(2)(c) – it acts as a quantifier.<sup>13</sup> “Some of” a particular thing means a part of the thing but not all of it, whereas “some of” things means *a few* of the things but not all of them.<sup>14</sup> For example, when cooking one might place “some of” the sauce into a bowl, or “some of” the carrots into a bowl.

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<sup>10</sup> COLLINS ENGLISH DICTIONARY, *available at* [https://www.collinsdictionary.com/dictionary/english/some\\_1](https://www.collinsdictionary.com/dictionary/english/some_1) (last accessed April 4, 2017).

<sup>11</sup> *See* COLLINS ENGLISH DICTIONARY, *available at* <https://www.collinsdictionary.com/us/dictionary/english/determiner> (last accessed April 4, 2017) (definition of “determiner”).

<sup>12</sup> COLLINS ENGLISH DICTIONARY, *available at* [https://www.collinsdictionary.com/dictionary/english/some\\_1](https://www.collinsdictionary.com/dictionary/english/some_1) (last accessed April 4, 2017).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

Using this analogy here, if a person has a bunch of carrots and places *one* into a bowl, that person is *not* placing “some of” the carrots into the bowl. When describing “some of” a discrete thing, the term “some” is synonymous with the word “few.” Thus, when the legislature expressed its concern as “some of the current offenses” going unpunished, it indicated that the trial court could impose an aggravated exceptional sentence where a few of the crimes would otherwise go unpunished. RCW 9.94A.535(2)(c).

An examination of the larger statutory scheme demonstrates that, in contrast to the use of the word “some” in RCW 9.94A.535(2)(c), the legislature employs the use of the phrase “one or more” in other provisions. *See State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005) (a “fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms”); *accord Conover*, 183 Wn.2d at 713 (“Clearly, the legislature's choice of different language indicates a different legislative intent.”). For example, the legislature describes “one or more crimes” in RCW

9.94A.730, “one or more of the facts” in RCW 9.94A.537, and “one or more violent acts” in RCW 9.94A.562.

The use of “some of” rather than “one or more” in RCW 9.94A.535(2)(c) demonstrates the legislature did not intend for the imposition of consecutive sentences where only one charge went unpunished. *See State v. Slattum*, 173 Wn. App. 640, 656, 295 P.3d 788 (2013) (use of particular language in one statute demonstrated legislature “knew how to say it” when it intended to do so, and did not intend same meaning when using different language); *accord Matal v. Tam*, 582 U.S. \_\_\_, \_\_\_ S.Ct. \_\_\_ (No. 15-1293, filed 6/19/17) at 10-11 (use of phrase “particular living individual” in one provision showed Congress meant something different when using “persons” in another provision). Because the plain language of the statutory provision is unambiguous, the Court’s inquiry should end here. *See State v. K.L.B.*, 180 Wn.2d 735, 739, 328 P.3d 886 (2014); *Tam* at 11.

- c. The State fails to address the language of the statute; furthermore, to the extent the language is ambiguous, the rule of lenity applies.

In its response brief in appeal number 49264-4-II, the State ignores the plain language of the provision and disregards the well-settled canons of statutory construction discussed above. Instead, it points to a 2005 session law stating that the legislature's intent in amending and enacting numerous subsections of the SRA was only to comply with case law regarding the right to jury findings on facts that increase punishment. *See Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Laws 2005, ch. 68, § 1. The State claims that case law construing a common-law precursor to this provision therefore controls. *See State v. Smith*, 123 Wn.2d 51, 864 P.2d 1371 (1993).

The State is wrong, for at least two reasons. First, the Supreme Court subsequently overruled *Smith* and described it as holding that, before the statute at issue here existed, a court could determine as a factual matter that "allowing a current offense to go unpunished is clearly too lenient[.]" *State v. Hughes*, 154 Wn.2d 118, 140, 110 P.3d 192 (2005).

*Smith* was overruled because such findings must be made by a jury. *Id.*; accord *Alvarado*, 164 Wn.2d at 564 & n.2.

Whatever *Smith* held with respect to a “clearly too lenient” finding is therefore inapplicable to the statute at issue here, because that language is not part of the provision. If the legislature had wanted to include it, it would have done so and would have moved it to the next section listing aggravating factors that may be found by a jury. See RCW 9.94A.535(3).

Second, a plain language analysis, aided by principles of statutory construction, controls over any external statement of intent. See *State v. Reis*, 183 Wn. 2d 197, 212, 351 P.3d 127 (2015) (“legislative intent ... does not trump the plain language of the statute”). Courts have addressed different arguments regarding the provision at issue here by resorting to the usual plain-language principles of statutory construction on which Mr. Cruz relies. In *Alvarado*, for instance, the court addressed an argument regarding the meaning of the word “unpunished” under RCW 9.94A.535(2)(c) by invoking the plain-meaning rule,

including consideration of related provisions and dictionary definitions. *Alvarado*, 164 Wn.2d at 561-63. And in *State v. France*, this Court addressed an argument that RCW 9.94A.535(2)(c) permitted only six, rather than nine, of his convictions to be run consecutively. *State v. France*, 176 Wn. App. 463, 469-71, 308 P.3d 812 (2013). This Court applied the plain language rule and concluded that because the legislature could have, but did not, use language consistent with the defendant's position, the defendant's arguments failed. *Id.* at 470.

The same principles must be applied here. The plain language permits an exceptional sentence only where “*some of*” the current offenses would otherwise go unpunished. RCW 9.94A.535(2)(c). The legislature could have, but did not, say an exceptional sentence is available where “one or more” current offenses go unpunished. The legislature used such language in several other provisions, indicating it “knew how to say it” when that is what it meant. *Slattum*, 173 Wn. App. at 656. As in *Alvarado* and *France*, the meaning of this provision is dictated by the plain language. It does not

permit an exceptional sentence where only one offense fails to increase the potential punishment.

Finally, even if the Court were to find the language of RCW 9.94A.535(2)(c) is susceptible to more than one reasonable interpretation, the rule of lenity requires the Court to construe the statute strictly against the State and in favor of Mr. Cruz. *State v. Weatherwax*, 188 Wn. 2d 139, 155, 392 P.3d 1054 (2017); *Conover*, 183 Wn.2d at 712. The underlying rationale for the rule of lenity is to place the burden on the legislature to be clear and definite in criminalizing conduct and establishing criminal penalties. *Weatherwax*, 188 Wn.2d at 155. Under the rule of lenity, RCW 9.94A.535(2)(c) must be construed so as to require that more than one offense will go unpunished before permitting the trial court to impose an exceptional sentence.

d. The remedy is reversal and remand for resentencing.

Where an exceptional sentence is not legally justified by the aggravating factor, reversal is required. *State v. Davis*, 182 Wn.2d 222, 232, 340 P.3d 820 (2014). Here, the record is clear that only one charge, rather than “some of” the

charges, failed to increase Mr. Cruz's sentence. When the trial court found the requirements of RCW 9.94A.535(2)(c) had been satisfied, it mistakenly interchanged the word "some" with "one." Because the trial court was wrong to impose consecutive sentences against Mr. Cruz based on the plain language of this provision, this Court should reverse and remand his case for resentencing.

E. CONCLUSION

For the reasons set forth above, the conviction on count one should be reversed and the charge dismissed without prejudice to the State's ability to refile. In the alternative, the exceptional sentence should be reversed and the case remanded for resentencing.

Respectfully submitted this 21st day of June, 2017.

/s Lila J. Silverstein

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## APPENDIX A

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DAVID W. PETERSON  
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IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,	)	
	)	No. 15-1-01503-4
Plaintiff,	)	
	)	FIRST AMENDED INFORMATION
v.	)	
	)	(Total Counts Filed - 2)
ARNOLD MAFNAS CRUZ,	)	
Age: 47; DOB: 10/22/1968,	)	
	)	
Defendant.	)	

COMES NOW the Plaintiff, STATE OF WASHINGTON, by and through its attorney, COREEN E. SCHNEPF, WSBA NO. 37966, Deputy Prosecuting Attorney, and hereby alleges that contrary to the form, force and effect of the ordinances and/or statutes in such cases made and provided, and against the peace and dignity of the STATE OF WASHINGTON, the above-named Defendant did commit the following offense(s)-

**Count I**  
**Rendering Criminal Assistance in the First Degree [Non-Relative]**

On or about or between December 17, 2015 and December 30, 2015, in the County of Kitsap, State of Washington, the above-named Defendant, rendered criminal assistance to a person who had committed or was being sought for any class A felony; contrary to the Revised Code of Washington 9A.76.070(1).

(MAXIMUM PENALTY-Ten (10) years imprisonment and/or a \$20,000 fine pursuant to RCW 9A.76.070(2)(a) and RCW 9A.20.021(1)(b), plus restitution and assessments.)

JIS Code: 9A.76.070.2A Criminal Assistance-1

CHARGING DOCUMENT; Page 1 of 4



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Special Allegation--Aggravating Circumstance--Lack of Remorse

AND FURTHERMORE, the Defendant demonstrated or displayed an egregious lack of remorse, contrary to RCW 9.94A.535(3)(q).

Special Allegation--Aggravating Circumstance--Impact on Persons Other than Victim

AND FURTHERMORE, the offense involved a destructive and foreseeable impact on persons other than the victim, contrary to RCW 9.94A.535(3)(r).

Count II

Removal or Concealment of Deceased Body

On or about or between December 17, 2015 and December 30, 2015, in the County of Kitsap, State of Washington, the above-named Defendant, not having been authorized by the Kitsap County Coroner or his or her deputies, did remove the body of a deceased person (1) not claimed by a relative or friend; and/or (2) who came to his or her death by reason of violence or from unnatural causes; and/or (3) where there existed reasonable grounds for the belief that such death had been caused by unlawful means at the hands of another; and/or (4) to any undertaking rooms or elsewhere; and/or (5) and direct, aid or abet such taking; and/or (6) and in any way conceal the body of a deceased person for the purpose of taking the same to any undertaking rooms or elsewhere; contrary to Revised Code of Washington 68.50.050.

(MAXIMUM PENALTY-Three hundred sixty-four (364) days in jail or \$1,000 fine, or both, pursuant to RCW 68.50.050, plus restitution, assessments and court costs.)

JIS Code: 68.50.050 Removing or Concealing a Dead Body

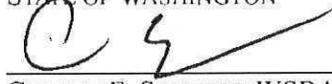
I certify (or declare) under penalty of perjury under the laws of the State of Washington that I have probable cause to believe that the above-named Defendant committed the above offense(s), and that the foregoing is true and correct to the best of my knowledge, information and belief.



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1 DATED: February 19, 2016  
2 PLACE: Port Orchard, WA

STATE OF WASHINGTON



COREEN E. SCHNEPF, WSBA NO. 37966  
Deputy Prosecuting Attorney

5 All suspects associated with this incident are--

6 Arnold Mafnas Cruz  
7 Robert Lavalley Davis  
8 Shawna Cheri Dudley Pry  
9 Robert Lee Pry  
10 Alisha G. Small  
11 Joshua Owen Rodgers Jones  
12 Miranda Elizabeth Bond  
13 Ocean Aarib Wilson  
14 Special Inquiry

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CHARGING DOCUMENT; Page 3 of 4



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## APPENDIX B

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DAVID W. PETERSON

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Plaintiff,

v.

ARNOLD MAFNAS CRUZ,  
Age: 47; DOB: 10/22/1968,

Defendant.

No. 15-1-01503-4  
15-1-00436-9 ✓

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW FOR EXCEPTIONAL SENTENCE

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled Court pursuant to a hearing on sentencing; the parties appearing by and through their attorneys of record below-named; and the Court having considered the motion, briefing, testimony of witnesses, if any, argument of counsel and the records and files herein, and being fully advised in the premises, now, therefore, makes the following-

FINDINGS OF FACT

I.

That the Defendant has been convicted of Count I, Rendering Criminal Assistance in the First Degree [Non-Relative] and Count II, Removal or Concealment of Deceased Body (before 6-9-2016) in cause number 15-1-01503-4. The Defendant's standard range is 72-96 on Count I and 0-364 on Count II. The statutory maximum is ten (10) years incarceration on Count I and 364 days of incarceration on Count II. Count II is a gross misdemeanor. Count I is a felony.

II.

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
FOR EXCEPTIONAL SENTENCE; Page 1 of 3



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1 That the Defendant has been convicted of Possession of a controlled substance and bail  
2 jumping in cause number 15-1-00436-9. The defendant's standard range on Count I is 12+24  
3 months and on Count II is 51-60 months.

4 III.

5 That the defendant's offender score on each of the felonies is a 10.

6  
7 CONCLUSIONS OF LAW

8 I.

9 That the above-entitled Court has jurisdiction over the parties and the subject matter of  
10 this action.

11 II.

12 That there are substantial and compelling reasons to impose an exceptional sentence  
13 consisting of a consecutive sentence between the felonies charged in 15-1-01503-4 and 15-1-  
14 00436-9. The defendant was sentenced to 96 months in 15-1-01503-4 to be served consecutive to  
15 the sentence of 55 months in 15-1-00436-9 (the defendant was sentenced to 24 months on Count I  
16 and 55 months on Count II in 15-1-00436-9 to be served concurrently with each other and  
17 consecutively with 15-1-01503-4).

18 III.

19 That the exceptional sentence is justified by the following aggravating circumstances—  
20 RCW 9.94A.535(2)(c): the defendant has committed multiple current offenses and the  
21 defendant's high offender score results in some of the current offenses going unpunished.

22  
23 DONE IN OPEN COURT this 23 day of September, 2016.

24  
25  
26  9/30/16  
27 JUDGE

28 PRESENTED BY--

29   
30 COREEN E. SCHNEPF, WSBA NO. 37966  
31 Deputy Prosecuting Attorney

APPROVED FOR ENTRY

32   
33 \_\_\_\_\_, WSBA No. 22488  
Attorney for Defendant

Prosecutor's File Number-15-125342-25

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
FOR EXCEPTIONAL SENTENCE; Page 2 of 3



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FINDINGS OF FACT AND CONCLUSIONS OF LAW  
FOR EXCEPTIONAL SENTENCE; Page 3 of 3



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 49284-9-II
	)	
ARNOLD CRUZ,	)	
	)	
Appellant.	)	

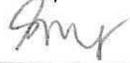
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| [X] JENNIFER WINKLER               | ( ) | U.S. MAIL            |
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| 791749                             | ( ) | HAND DELIVERY        |
| STAFFORD CREEK CORRECTIONS CENTER  | ( ) | _____                |
| 191 CONSTANTINE WAY                |     |                      |
| ABERDEEN, WA 98520                 |     |                      |

**SIGNED** IN SEATTLE, WASHINGTON THIS 21<sup>ST</sup> DAY OF JUNE, 2017

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
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# WASHINGTON APPELLATE PROJECT

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**Appellate Court Case Number:** 49284-9  
**Appellate Court Case Title:** State of Washington, Respondent v. Robert L. Davis, Arnold M. Cruz, & Robert Pry, Appellants  
**Superior Court Case Number:** 16-1-00002-7

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