No. 80496-6

OWENS, J. (dissenting) -- The United States and Washington Constitutions require that defendants be given notice of the essential elements of a crime prior to trial. The United States Supreme Court has stated that an essential element of a crime is one that exposes the defendant to a greater punishment than the one authorized by statute. Aggravating circumstances inherently expose a defendant to a punishment greater than the one authorized by statute, so the State is required to provide notice that it is seeking aggravating circumstances *prior* to trial. Furthermore, the plain language of RCW 9.94A.537 requires notice prior to trial when the State seeks to prove aggravating circumstances. I must dissent to the lead opinion's conclusion that a new jury panel can be impaneled for sentencing as, contrary to both the United States and Washington Constitutions and the plain language of the statute, the defendant did not receive his due notice prior to trial.

I. Aggravating Circumstances Are Essential Elements of a Crime

It is long established that "essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). Recent United States Supreme Court precedent and this court's own precedent have clarified the definition of an essential element of a crime to include any factor that exposes a defendant to punishment greater than that authorized by the jury's verdict. *See*, *e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008); *State v. Goodman*, 150 Wn.2d 774, 786, 83 P.3d 410 (2004). The lead opinion incorrectly relies on the proposition that essential elements include only those facts that must be proved beyond a reasonable doubt to *convict* a defendant of the charged crime. The lead opinion contends that since an aggravating circumstance is not a fact that must be proved beyond a reasonable doubt to convict a defendant of a crime, it is not an essential element.

The *Apprendi* case showed that facts can indeed be essential elements even absent the requirement that they be proved beyond a reasonable doubt to *convict* a defendant of the charged crime. In *Apprendi*, the United States Supreme Court found that the key distinction as to whether a factor becomes an essential element of the

crime is when it "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict." 530 U.S. at 494. Furthermore, the Court stated that "'any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'" *Id*. at 476 (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999)).

The United States Supreme Court later clarified its holding in *Apprendi*, stating that "[o]ur precedents make clear, however, that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d. 403 (2004). The Court further stated that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id*. at 303-04. Essentially, *Apprendi* and *Blakely* instruct us that essential elements of a crime include not only those facts needed to prove that a crime was committed, but also those facts used to increase the maximum penalty of a crime. The lead opinion's holding that aggravating circumstances are not essential elements of a crime is therefore directly contrary to United States Supreme Court precedent, as aggravating circumstances increase the

maximum penalty beyond the statutory maximum and must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. The key here is that essential elements include *not only* those facts that must be proved beyond a reasonable doubt to convict a defendant of a crime, *but also* those facts that increase the penalty beyond the statutory maximum.

Though federal precedent is sufficient to address this issue, previous precedent from this court should also guide our actions. Though this court has never explicitly dealt with the issue of whether an aggravating circumstance is an essential element of a crime that must be detailed in a charging document, this court has dealt with related matters on several occasions. In *Recuenco*, this court held that a sentencing enhancement stemming from a weapons violation had to be included in an information so as "to provide defendants with notice of the crime charged and to allow defendants to prepare a defense." 163 Wn.2d at 434. In that case, the sentencing enhancement would add an additional two years to the defendant's sentence. *Id*. at 436. This court relied on *Apprendi* to find that where a sentence enhancement increases the maximum authorized statutory sentence, it becomes equivalent to an element of the offense. *Id*. at 434 (citing *Apprendi*, 530 U.S. at 494 n.19). This court explicitly stated that "'[w]hen prosecutors seek enhanced penalties, notice of their intent must be set forth in the information.'" *Id*. at 435 (alteration in original) (quoting *State v. Theroff*, 95

Wn.2d 385, 392, 622 P.2d 1240 (1980)).

In *Goodman*, this court again noted that any fact that increased the penalty for a crime beyond the statutory maximum must be charged in an information. 150 Wn.2d at 786. In that case, this court held that where the identity of a particular controlled substance (methamphetamine) increased the maximum sentence from 5 years to 10 years, the substance's identity must be alleged in the information. *Id*. It is important to note that this court explicitly based its ruling on *Apprendi*'s holding that any fact that increases a penalty beyond a statutory maximum must be alleged in the information. *Id*. This court made its decision because the identity of methamphetamine increased the possible punishment, just as *Apprendi* instructed.

Precedent from both the United States Supreme Court and our court establishes that where a fact increases the potential punishment beyond the statutory maximum, it must be detailed in the information. In the instant case, the aggravating circumstances listed in RCW 9.94A.535(3) permit the court to impose a sentence beyond the prescribed statutory maximum, just like the sentence enhancement from *Recuenco* and the controlled substance's identity from *Goodman*. All of these factors expose defendants to increased punishment beyond the statutory maximum. Thus, the aggravating circumstances must be considered essential elements of the crime.

II. Notice after Trial Does Not Constitute Due Process

The Sixth Amendment to the United States Constitution gives every defendant the right "to be informed of the nature and cause of the accusation." U.S. Const. amend. VI. The Washington State Constitution also provides that a defendant has the right "to demand the nature and cause of the accusation against him." Wash. Const. art. I, § 22. This court has consistently interpreted these provisions to require that the State must give the defendant notice of the essential elements of the crime prior to trial. *See*, *e.g.*, *Recuenco*, 163 Wn.2d at 440-41 ("to ensure due process, the notice of the charge on which a defendant will be tried must be logically given at some point prior to the opening statements of the trial"); *State v. McCarty*, 140 Wn.2d 420, 427, 998 P.2d 296 (2000) (holding that the notice of a charge must be provided prior to trial); *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995) (holding that all essential elements of a crime must be in the charging document "so as to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense").

The lead opinion apparently believes that constitutional due process is satisfied because the 2002 information referenced a statute that referenced the "aggravating circumstance" statute and because Terrance Powell received notice of the aggravating circumstances *after* trial. Lead Opinion at 12-13. At no time prior to trial, however, was Powell ever provided notice that the State would be alleging aggravating

circumstances. The State never informed Powell prior to trial what aggravating circumstances he would have to defend against at trial. This was simply not adequate "to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense." *Vangerpen*, 125 Wn.2d at 787. Defendants must be given notice of the nature and cause of the accusation, including *all* essential elements of a crime, *before* they have been convicted, not after. Since aggravating circumstances are essential elements of a crime that must be charged in an information, submitted to a jury, and proved beyond a reasonable doubt, in the absence of such notice, I must respectfully dissent.

II. RCW 9.94A.537 Plainly Requires Notice of Aggravating Circumstances

In addition to being unconstitutional, the State's failure to provide notice of aggravating circumstances in the information is also contrary to the plain language of RCW 9.94A.537. When interpreting the meaning of statutes, "we must derive our understanding of the legislature's intent from the plain language before us, especially in matters of criminal sentencing." *State v. Delgado*, 148 Wn.2d 723, 730, 63 P.3d 792 (2003). We read statutes as a whole to give effect to all of the language and to harmonize all provisions. *City of Seattle v. Fontanilla*, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996).

RCW 9.94A.537 as a whole addresses six different concerns in imposing

exceptional sentences, including notice, impaneling juries, standard of proof, etc.[1]

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[1] The full language of RCW 9.94A.537 reads:

> (1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.
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> (2) In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.
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> (3) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.
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> (4) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for resentencing, or unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste [sic] of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.
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> (5) If the superior court conducts a separate proceeding to determine the existence of aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t), the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.
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> (6) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW

Contrary to the lead opinion's assertion, these subsections are not alternative requirements. They are not separated by the word "or" and each one outlines an important aspect of the process of exceptional sentencing. Further, when the legislature intends for one of the six provisions to apply only in certain circumstances, it says so. *See* RCW 9.94A.537(2) ("where a new sentencing hearing is required"); RCW 9.94A.537(5) ("If the superior court conducts a separate proceeding"). Subsection (1), the notice provision, contains no such qualifying language. Therefore, even in the absence of the constitutional provisions, the statute requires pretrial notice in all cases where the State seeks to present aggravating circumstances.

IV. Conclusion

The right to notice is guaranteed under both the federal and state constitutions. It is a critical right that guarantees that defendants have the knowledge and ability to effectively defend themselves. This is not a right that should be taken away lightly. Powell did not receive proper notice of the State's intention to use aggravating circumstances, so based on both constitutional requirements and the plain meaning of the statute, I must respectfully dissent.

9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

AUTHOR:
Justice Susan Owens

WE CONCUR:

Justice Richard B. Sanders

Justice Tom Chambers