SUPERIOR COURT OF WASHINGTON FOR ISLAND COUNTY

STATE OF WASHINGTON Respondent	)	No. 15-1-00078-1 Court of Appeals No. 75279-1
v. JONATHAN SAGE Defendant/Appellant	)	MOTION FOR SUPPLEMENTAL ORDER OF INDIGENCY

MOTION

The appellant/defendant, Jonathan Sage, through his attorney, Gregory C. Link, and moves this Court for a Supplemental Order of Indigency allowing preparation at public expense of the record of **jury voir dire** and **opening statements** - held **April 5, 2016.** The Honorable Alan R. Hancock presided over the trial.

This part of the record is reasonably necessary for review pursuant to RAP 9.2(b), RAP 15.2(b), State v. Giles, 148 Wn.2d 449, 60 P.3d 1208 (2003), Draper v. Washington, 372 U.S. 487, 496, 83 S.Ct. 774, 9 L. Ed. 2d 899 (1963), and State v. Harvey, 175 Wash.2d 919, 288 P.3d 1111 (2012).

Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

This motion is based upon the attached declaration and the court file.

DATED this 11th day of July, 2016

Respectfully submitted,

Gregory C. Link – WSBA 25228
Attorney for Appellant

DECLARATION

Gregory Link makes this declaration under penalty of perjury and the laws of the State of Washington, on the basis of personal knowledge, information and belief.

1. The Washington Appellate Project has been appointed to represent Mr. Sage on appeal. I am the attorney assigned to his case.

2. On May 12, 2016, this Court found Mr. Sage was unable to pay the costs of direct appellate review by reason of poverty and ordered that a verbatim report of his trial court proceedings be prepared at public expense.

3. Pursuant to RAP 9.2(b), the verbatim report of jury voir dire and/or opening statements is not prepared at public expense unless specifically ordered by the trial court. The Order of Indigency in this case does not include a specific authorization for preparation of jury voir dire or opening statements.

4. After having the opportunity to review the file in more depth, I have determined it is necessary to include jury voir dire and opening statements in the appellate record. Review is required to ensure all potential issues have been addressed.

5. Review of the record of jury voir dire and opening statements is necessary in order to effectively represent Mr. Sage on appeal.

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1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

6. There has been no significant improvement in Mr. Sage's financial situation since his sentencing and I believe he is entitled to a continuing presumption of indigency pursuant to RAP 15.2(f).

SIGNED in Seattle, Washington this 11th day of July, 2016

Gregory C. Link – WSBA 25228
Attorney for Appellant

Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JONATHAN SAGE - PETITIONER

VS.

STATE OF WASHINGTON - RESPONDENT

ON PETITON FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

PETITION FOR WRIT OF CERTIORARI

JONATHAN S. SAGE
Petitioner, Pro Se

COYOTE RIDGE CORRECTIONS CENTER
1301 N. Ephrata Avenue, IA062U
Connell, Washington 99326
(509) 543-5800

QUESTION PRESENTED

1. It is well established that when a person is charged with multiple counts of the same crime committed against the same person at the same time, the trial court must instruct the jury to find separate and distinct conduct. The State charged me with identical, overlapping offenses and the trial court did not instruct the jury each verdict must rest on separate and distinct conduct.

Should this Court grant review where Washington State's published Court of Appeals decision affirmed these multiple convictions despite ambiguous and contested evidence and no clear jury instruction, in a decision that conflicts with cases from this Court, the State's Supreme Court, and is contrary to the protections of the double jeopardy clauses of the federal and state constitutions?

QUESTION PRESENTED

2. The right to cross-examine a complaining witness about matters relevant to credibility is a fundamental constitutional guarantee, essential to the accuracy of the fact-finding process. The trial court precluded me from questioning a complainant about material evidence relevant to credibility for truthfulness and bias in the circumstances of this case. The Washington State Court of Appeals refused to consider the merits of the claim by labeling the issue as a confrontation violation and deeming it waived because the defense did not cite the confrontation clause when objecting.

Should this Court grant review of a published Court of Appeals decision where it creates a new threshold for preserving an error involving an objected-to restriction on the right to cross-examine a complaining witness, in conflict with established precedent and as an issue of substantial public importance?

QUESTION PRESENTED

3. Allegations of uncharged wrongful acts are particularly prejudicial in a case involving charges of sexual offenses. The trial court admitted a host of highly prejudicial allegations. Several of which were admitted without finding that the misconduct occurred, identifying the purpose for which the evidence was sought to be admitted, or weighing their probative value against their plain prejudicial effect, and without any limiting instruction on how the jury should use this evidence.

Does Washington State's published decision which misapplied the test for admitting prejudicial evidence of uncharged misconduct, merit review by this Court due to its effect on the right to a fair trial?

QUESTION PRESENTED

4. A person accused of a crime is presumed innocent and must be accorded the dignity of an innocent person at trial. When a complaining witness hissed at me and assumed a fighting stance mid-trial, the jurors reacted with horror, and I moved for a mistrial. Did the jurors' horrified reaction to the complainant's emotional outburst, which resulted in the removal of the witness from the courtroom and forced a recess, undermine the fairness of the proceedings, meriting this Court's review?

QUESTION PRESENTED

5. This Court recently clarified that when a judge must authorize additional punishment by weighing the jury's advisory verdict, this judicial fact-finding violates the Sixth Amendment. Hurst v. Florida, 577 U.S. _, 136 S.Ct 616,621, 193 L. Ed. 2d 504 (2016). In Washington State, a trial court may impose an exceptional sentence after the jury finds aggravating factors, only after it weighs the evidence and decides substantial and compelling reasons exist for added punishment. Should this Court grant review where Hurst demonstrates the judge's additional findings necessary for an exceptional sentence violates the Sixth Amendment?

QUESTION PRESENTED

6. By Washington State statute and under State v. Friedlund, 182 Wn.2d 388, 341 P.3d 280 (2015), the sentencing judge must enter findings of facts and conclusions of law explaining the factual and legal basis of an exceptional sentence. Here the written findings do not explain any substantial and compelling reasons for imposing an exceptional sentence. Do the trial court's inadequate findings conflict with its obligation under Friedlund and merit review based on the Washington State Court of Appeals' confusion over the necessary findings of fact at sentencing?

QUESTION PRESENTED

7. When Washington State seeks an exceptional sentence, it must give fair notice to the accused of the aggravating circumstances and may proceed only on the factors charged. The State charged me with several aggravating circumstances under a defined charging period but sought verdicts based on conduct that far exceeded the charging period. Did the trial court lack authority to impose an exceptional sentence when the jury's verdict reflects conduct not in the charging document?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is reported at State v. Sage, 1 Wn.App.2d 685; 407 P.3d 359; 2017 Wash.App. LEXIS 2854.

JURISDICTION

The date on which the highest state court decided my case was September 5, 2018. A copy of that decision appears at Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Washington State Constitution

Washington State Statutes

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STATEMENT OF THE CASE

Brothers J.M. and E.M. met me through their mother, Rebecca, who was portrayed at trial as having suffered from chronic drug addition and was largely unable to care for them. RP 348,363,369-70. I employed Rebecca for a time and helped her find a place to live when she had no home. RP 337,349-50. J.M. and E.M.'s father, Jason moved away after he met another woman when they were nine and eight years old. RP 328,434,526.

In 2015, their father and step-mother, Jason and Kristina, initiated efforts to regain custody when J.M. and E.M. were teenagers. RP 336,343,435,500-01; CP 67. In the interim, Rebecca was portrayed as having abandoned care of her sons to me. RP 370,597.

J.M. told police he had sexual contact with me years earlier. RP 372-73. J.M. said he initiated the contact but could not keep track of chronological details and recognized he was unable to describe specific incidents. RP 463-64,466,479. E.M. said he similarly had sexual contact with me but was also unclear on details of time, place and occurrence. RP 615-16; see Amended Mot. Recon. at 6-7.

These allegations arose in the context of a child custody dispute between Rebecca and Jason. RP 336,343,713-16. Just days before Jason reported J.M and E.M.'s claims to the

police, Jason and his new wife faced an investigation by Child Protective Services into allegations of distributing marijuana and firearms to three minors, including J.M. and E.M. RP 44,46,343,458. Jason and his wife Kristina used the later allegations against me to present to the authorities as they sought custody. RP 343,544,714-16,720.

The State charged me with four counts of rape of a child in the second degree, two counts for J.M. and two counts for E.M. Each set of counts had identical charging periods. CP 83-87. Because the charged offense required J.M. and E.M. to be a specific age (older than 12 and younger than 14), the prosecution needed to prove specific acts occurring within a nine or 12 month charging period. Id. However, the prosecution elicited allegations of a range of identical sexual conduct after the charging period ended, under the theory of res gestae and lustful disposition. The court rejected my objection to the admissibility of this evidence. RP 8-11.

Over my objection, the court admitted other uncharged allegations of highly prejudicial conduct, including unproved claims I made child pornography, encouraged E.M. to have sexual contact with an animal, and kept a gun and ammunition in my home where E.M. could readily access it. CP 149-51,193-94; RP 8-11,924-26. However, the court refused to let me question E.M. about his credibility for truthfulness,

including evidence of having lied on several occasions to investigators. RP 666-68.

Among other things, E.M. had repeatedly denied all previous allegations of having access to marijuana and firearms at his father's house. CP 65. His statements were contrary to photographic evidence of E.M. in posession of firearms and marijuana in his father's residence. CP 72, RP 39-46. The evidence was later suppressed by the deputy prosecuting attorney on the first day of trial. CP 72, RP 39-46,662-65,668-74. The State later denied on appeal any evidence that E.M.'s father supplied guns or marijuana to E.M. had ever existed. See State's Resp. to App. Amend. Mot. Recon. at 8-9.

When E.M. was about to testify against me, he stopped in the middle of the courtroom and made a threatening gesture as if preparing to fight. RP 573-76. Defense counsel immediately objected and described the jurors as looking horrified. Id. The prosecutor told E.M. to leave the courtroom. RP 573. Defense counsel moved for a mistrial based on the observable effect E.M.'s behavior had on the jurors' demeanor. RP 574-76. The judge and prosecutor had not watched the jurors' reactions. Id. The judge denied the motion and told the jurors to disregard whatever they observed. RP 577,580.

The jurors convicted me of the charged offenses and found several aggravating factors. CP 27-40. The court weighed

those aggravating factors and imposed an exceptional sentence above the standard range of 420 months to life in prison. CP 25-26.

Washington State's Court of Appeals issued a published decision affirming my convictions and sentence, but remanding to strike several unauthorized conditions of community custody. Slip op. at 1.

REASONS FOR GRANTING THE PETITION

1. **The published Court of Appeals decision misapplies double jeopardy law governing multiple identical charges without critical jury instructions, contrary to Mutch.**

   a. The court's instructions failed to explain the mandatory requirement that multiple convictions for the same offense may not involve the same conduct.

When the prosecution charges a person with several counts of the same offense, during the same period of time, and against the same person, double jeopardy bars multiple convictions. North Carolina v. Pearce, 395 U.S. 711,717,726 89 S. Ct. 2072, 23 L. Ed. 2d 659 (1969); State v. Mutch, 171 Wn.2d 646,664, 254 P.3d 803 (2011); U.S. Const. amend. 5; Const. art I, § 9. To avoid violating double jeopardy, the court must instruct the jury their verdicts must rest on unanimous agreement of separate and distinct conduct. Mutch, 171 Wn.2d at 664.

Here, the court did not give the jury this mandatory instruction. Without it, reversal is required unless it was "manifestly apparent" that the conviction for each count was based on a separate act. Mutch, 171 Wn.2d at 664. The Washington State Supreme Court's review is "rigorous" and it will be "a rare circumstance" where the appellate court should affirm without expressly instructing jurors on the requirements of separate and distinct conduct underlying each

conviction. Id. at 664-665.

Here, despite well-established law mandating courts instruct the jury the separate and distinct conduct must be the basis for their verdicts when presented with multiple identical charges, the court did not give the jury this instruction. See, e.g., State v. Borsheim, 140 Wn.App. 357,367, 165 P.3d 417 (2007)("in sexual abuse case where multiple counts are alleged to have occured within the same charging period, the trial court must instruct the jury 'that they are to find "separate and distinct acts" for each count.'" (quoting State v. Hayes, 81 Wn. App. 425,431, 914 P.2d 788 (1996)); State v. Carter, 156 Wn. App. 561,567, 234 P.3d 275 (2010); State v. Berg, 147 Wn. App. 923,934-35, 198 P.3d 529 (2008).

b. Contrary to the published Court of Appeals decision, the prosecution's closing argument does not protect against a double jeopardy violation.

Division One of the Washington State Court of Appeals ruled that no error occured because the prosecution's closing argument explained what evidence it desired the jury to rely upon in convicting me. Slip op. at 12.

However, the Court of Appeals' analysis is directly contrary to Washington State's Supreme Court rulings in Mutch and Kier. In Kier, the Supreme Court ruled the prosecution's closing argument could not rectify the ambiguity of the verdict to avoid violating double jeopardy. 164 Wn.2d at 813.

Where the jury instructions permitted jurors to convict Kier based on the same victim, it did not matter that the State's closing argument clearly explained the jury should view the two offenses as involving separate victims. Id.

The Washington State Supreme Court applied the same principle in Mutch, where there were five identical charges of rape. But unlike Kier, everyone in Mutch agreed five separate, distinct acts of sexual intercourse occurred. Because no one disputed the separate and distinct conduct at any part of the case, (and instead focused on whether the conduct was consensual), the court found no double jeopardy violation even though the court had not given a "separate and distinct" conduct instruction. 171 Wn.2d at 664. But the State's Supreme Court emphasized this case was "rare" and it rested on the mutual agreement the separate acts actually occured. Id. It is imperative to clearly instruct the jury that its verdicts must rest on separate and distinct conduct to overcome a violation of double jeopardy. Id.

Inexplicably, the Washington State Court of Appeals relied on the prosecution's closing argument to ascertain the basis of the jury's verdict. Slip op. at 12. It disregarded the sharply contested allegations, where I never agreed any of the acts occurred and had pressed the complainants on their claims. The Court of Appeals decision is contrary to Mutch.

The Court of Appeals also misapplied its own case law. For example, it relied upon State v. Hayes, 81 Wn. App. 425, 914 P.2d 788 (1996), to claim its role is to look at the evidence's sufficiency for the multiple convictions. Slip op. at 9 n.25, 12 n.38. But in Hayes, the jury was instructed to find an act occurred "on an occasion separate and distinct from that charged" in other counts. 81 Wn. App. at 431 n.9. Thus, Hayes does not support the Washington State Court of Appeals' claim that it should affirm convictions without critical instructions on the separate and distinct nature of the acts found to support each overlapping conviction.

This published decision sets a confusing precedent. It is contrary to a host of other decisions. Carter, 156 Wn. App. at 568; Berg, 147 Wn. App. at 934-37; Borsheim, 140 Wn. App. at 370-71; State v. Holland, 77 Wn. App. 420,425, 891 P.2d 49 (1995). It encourages other courts to dilute or ignore Washington State's Supreme Court's case law and discourages courts and prosecutors to provide the critical separate and distinct instructions. It creates a risk of encouraging double jeopardy violations by muddling the law for the jury, rather than according jurors respect and ensuring convictions are based on critical proof of separate and distinct acts by making the law manifestly apparent. This Court should accept review.

2. **I was denied a fair trial due to the court's admission of unduly prejudicial uncharged allegations while simultaneously prohibiting me from presenting evidence key to my defense and denying a mistrail following a witness's emotional outburst.**

a. The right to a fair trial includes the right to be tried for only the charged offense.

An accused person's right to a fair trial is a fundamental part of due process of law. United States v. Salerno, 481 U.S. 739,750, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); U.S. Const. amend. 14; Const. art. I, §§ 3, 22. It includes the right to be tried for only the offense charged. State v. Mack, 80 Wn.2d 19,21, 490 P.2d 1303 (1971).

ER 404(b) categorically bars admission of evidence of uncharged wrongful conduct used to show a person acted in conformity with their character. State v. Gresham, 173 Wn.2d 405,420, 269 P.3d 207 (2012) (citing State v. Saltarelli, 98 Wn.2d 358,362, 655 P.2d 697 (1982)). Uncharged allegations in sex offense prosecutions have a heightened prejudicial effect. State v. Gunderson, 181 Wn.2d 916,924, 337 P.3d 1090 (2014). Courts must be particularly "careful and methodical in weighing the probative value against the prejudicial effect" in a sexual abuse prosecution. Id.

b. The prosecution elicited a range of highly inflammatory uncharged allegations that were far more prejudicial than probative, most of which it never fairly warned the defense it would offer.

ER 404(b) requires advance notice by the prosecution of ER 404(b) evidence to permit the court's mandatory admissibility analysis. Gunderson, 181 Wn.2d at 923. Here, the State gave little advance notice of its intent to paint my character as a repeat offender, belatedly filing an ER 404(b) motion as trial was starting. CP 193.

Among the evidence it elicited, it contended I encrypted my computers to hide child pornography of EM, even though the police found no evidence of such videos. CP 196; RP 558, 560, 654. It contended I encouraged deviant sexual behavior between EM and my dog, asserting it was res gestae evidence even though EM did not describe such conduct until the prosecution pressed him to add it. RP 611-14; CP 152-53.

It offered evidence I kept a gun accessible to EM, which EM claimed he thought about using. RP 517,539,652. But there was no evidence I had ever threatened anyone or even touched the gun at any time. Firearm evidence is particularly prejudicial and should not be offered when it has no material bearing on the charged offenses. State v. Rupe, 101 Wn.2d 664,707-08, 683 P.2d 571 (1984); State v. Freeburg, 105 Wn. App. 492,501, 20 P.3d 984 (2001).

After the discrete charging periods ended, the State claimed I and the complainants engaged in further illegal sexual acts. RP 7-8, 895; CP 165-66. Because this conduct was alleged after the charged incidents, it was far more likely

to constitute propensity evidence or show bad character than to demonstrate any intent or motive at an earlier point in time.

The inflammatory nature of these many allegations painted me as irredeemably deviant and deprived me of a fair trial. State v. Walker, 182 Wn.2d 463,477, 341 P.3d 976 (2015). This Court should grant review due to the court's failure to apply case law strickly curtailing its authority to admit evidence that will encourage jurors to convict a person for reasons other than the charged offenses.

c. The pubulished Court of Appeals decision manufactures a novel and improper standard for issue preservation when an accused person confronts a testifying witness.

In assessing whether I was denied my right to meaningfully present a defense by placing limits on my cross-examination about bias and credibility as guaranteed by the Sixth and Fourteenth Amendments, the Court of Appeals created a novel standard for issue preservation and used it to turn my clear objection into an unpreserved complaint. Slip op. at 16-17.

I objected to restrictions on cross-examination of my accuser. RP 39-40 (pretrial discussion of limitations on cross-examination of complainant); RP 662-65,668-70,672-74 (defense request to question EM about marijuana and firearms in response to prosecution's direct testimony and court

ruling).

But the Washington State Court of Appeals relied on law it applies for an absent witness's testimony. Slip op. at 16-17 (quoting inter alia, State v. O'Cain, 169 Wn. App. 228,240, 279 P.3d 926 (2012); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). EM testified at my trial, unlike in O'Cain and Melendez-Diaz. 169 Wn. App. at 236-37. Here, the interplay between the confrontation clause and the compulsory process clause does not arise because EM testified.

The Court of Appeals also misapplied State v. Koepek, 47 Wn. App. 897,911, 738 P.2d 298 (1987) to deem the issue unreviewable. Slip op. at 17. Koepke states, when an "alleged error may have affected a constitutional right, Mr. Koepke may raise it for the first time on appeal." 47 Wn. App. at 911. It addressed the constitutional claims of confrontation even without a confrontation clause objection in the trial court. But the Court of Appeals cited Koepke for the opposite proposition and refused to consider an objected-to restriction on my right to cross-examine witnesses.

I was unfairly limited in the additional cross-examination of my accuser which I had properly sought. The right to due process, the "integrity of the fact-finding process," and right to meaningfully present a defense are just as critical to the underlying cross-examination as is

the Confrontation Clause. State v. Jones, 168 Wn.2d 713,720, 230 P.3d 576 (2010).

The Court of Appeals created unacceptable and novel hurdles to a person raising fundamental constitutional rights on appeal. Substantial public interest favors review of this published opinion.

d. I was denied my right to appear and defend at trial.

A person accused of a crime has a constitutional right to appear and defend at trial and confront his accusers face to face. State v. Martin, 171 Wn.2d 521,528,533, 252 P.3d 872 (2011); U.S. Const. amend 6; Const. art. I, § 22. The jury may not draw negative inferences from the defendant's exercise of this fundamental right and mandatory obligation to appear and defend. State v. Wallin, 166 Wn. App. 364,377, 269 P.3d 1072 (2012).

The courtroom setting must "preserve a defendant's presumption of innocence before a jury." State v. Jaime, 168 Wn.2d 857,861, 233 P.3d 554 (2010). This bedrock requirement of a fair trial includes "the physical indicia of innocence before a jury" and a courtroom setting according the accused person "the appearance, dignity, and self-respect of a free and innocent man." Id. at 861-62, quoting inter alia, Estelle v. Williams, 425 U.S. 501,503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). Courtroom conduct that signals out a defendant as

particularly dangerous or guilty threatens his or her right to a fair trial. Id. at 826.

When EM entered the courtroom, he stopped and faced me, making "an agressive stare," bending into a fighting stance, and hissing. RP 573,574,576. The jurors appeared horrified. RP 574.

The defense immediately objected and the prosecutor asked to talk to his witness. RP 573. The court ordered a recess. Id. The court reporter noted EM's unusual conduct. Id.

The defense moved for a mistrial because the jurors "horrified" reactions showed they could not put it out of thier minds. Id. Counsel did not believe I could get a fair trial or be presumed innocent. Id.

The judge admitted he was not looking at the jurors and did not see their reactions. RP 576. He denied the mistrial motion and told the jurors to "only consider the evidence produced in Court" when deciding the case. RP 577.

When courtroom conduct prejudices the defendant, the court must decide whether there is an unacceptable threat to the defendant's right to a fair trial. State v. Lord, 161 Wn.2d 276,285, 165 P.3d 1251 (2007). Some misbehavior taints the proceedings and cannot be removed by an instruction to disregard. State v. Holmes, 122 Wn. App. 438,446, 93 P.3d 212, 217 (2004); see also Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 276 (1968) (recognizing

court cannot always assume jury will follow court instruction to disregard prejudicial evidence, as "the practical and human limitations of the jury system cannot be ignored").

The jurors demonstrably reacted to the young complainant's display of aggression and outrage toward me. Defense counsel's description of the jurors' horrified faces and her impression that they would not be able to forget what they saw was unrebutted. The case hinged on the credibility of the accusers. Viewed in isolation or with the other evidentiary errors, I was denied a fair trial and this Court should grant review.

3. **The judge's factual determination that the aggravating factors were substantial and compelling reasons for imposing an exceptional sentence violated my right to trial by jury.**

The constitutional rights to due process and trial by jury guarantee a jury finding beyond a reasonable doubt for every fact essential to punishment, regardless of whether the fact is labeled an element or a sentencing factor. Hurst v. Florida, 577 U.S. _, 136 S. Ct. 616,621, 193 L. Ed. 2d 504 (2016); U.S. Const. amend. 6, 14; Wash. Const. art. I §§ 21, 22.

Although the jury must find an aggravating factor for a court to impose an exceptional sentence, the jury's finding alone is insufficient and advisory. RCW 9.94A.535; RCW

9.94A.537. The court must also "consider[] the purpose" of the Washington State Sentencing Reform Act (SRA) and find that the aggravating factor constitutes "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535; RCW 9.94A.537(6).

The trial court's finding that substantial and compelling reasons justify an exceptional sentence must be based on "factors other than those which are necessarily considered in computing the presumptive range for the offense." State v. Fisher, 108 Wn.2d 419,423, 739 P.2d 683 (1987). It is based on reviewing the purposes of the SRA and deeming the increased sentence consistent with its purpose, and also assessing the State's case to decide whether an exceptional sentence is in the interest of justice. See State v. Hyder, 159 Wn. App. 234,263, 244 P.3d 454 (2011).

In Hurst, this Court ruled that Florida's death penalty procedure violated the Sixth Amendment because, although the jury had to find aggravating factors, this was advisory and the judge had to weigh the jury's findings before imposing the death penalty. 136 S. Ct. at 620-21. The judge could impose the death penalty only with its own additional fact-based determination. Id. at 621-22.

Likewise, the jury's verdict in Washington State is advisory to impose a sentence above the standard range. The court must also find substantial and compelling reasons to

impose an exceptional sentence, under RCW 9.94A.535 and .537, which is a mandatory fact-based judicial determination in addition to the jury's verdict.

Previous decisions have labeled the court's role as addressing a legal question of whether substantial and compelling reasons justify an exceptional sentence. See e.g., State v. Sulieman, 158 Wn.2d 280,290-91, 143 P.3d 795 (2006); State v. Hughes, 154 Wn.2d 118, 137 P.3d 192 (2005). But this characterization is arguably incorrect. The court weighs factual issues and no legal standard controls. Such reasons may be "liberally fashion[ed]" by the judge "in an unstructured ad-hoc fashion." Darren Wu, Exceptional Discretion in Exceptional Criminal Sentences in Washington, 29 Gonz. L. Rev. 599, 603 (1994). Under Hurst, this is judicial findings, required after an advisory jury finding, and it violates the Sixth Amendment to increase a sentence based on this judicial determination.

4. The trial court's inadequate findings of fact conflict with the requirements in Friedlund.

"When a trial court imposes an exceptional sentence, Washington State's Sentencing Reform Act (SRA) requires the court to 'set forth the reasons for its decision in written findings of fact and conclusions of law.'" Friedlund, 182 Wn.2d at 394, quoting RCW 9.94A.535.

Here, the court entered the barest of written findings of

fact and conclusions of law. It listed the factors found by the jury and summarily stated, "These are substantial and compelling reasons to impose an exceptional sentence pursuant to RCW 9.94A.535." CP 26. The reference to the statute does not demonstrate the basis of the court's finding, because RCW 9.94A.535 merely states the court must find substantial and compelling reasons to impose an exceptional sentence. It does not explain what this finding means.

In Hyder, the court's written order identified each aggravating circumstance to be a substantial and compelling reason for justifying an exceptional sentence; said an exceptional sentence "is in the interest of justice and consistent with the purposes" of the SRA; and found this sentence "is appropriate to ensure that punishment is proportionate to the seriousness of the offense." 159 Wn.App. at 263. Washington State's appellate court ruled this explanation satisfied the court's obligation. Id.

Unlike Hyder, the court's findings do not explain its reasoning. CP 25-26. They do not discuss the purpose of the SRA. CP 26. They do not state the court considered those purposes. Id. They do not say that an exceptional sentence was appropriately proportionate as required by the SRA. Id. They parrot the bald conclusion that substantial and compelling reasons existed without explanation.

Friedlund mandated written findings because they enabled

meaningful appellate review and public oversight. 182 Wn.2d at 394-95. The court's summary findings and conclusions do not satisfy their necessary purpose. CP 26. The Washington State Court of Appeals misapplied Friedlund by affirming conclusory findings that do not provide for appellate review or enable public oversight. Review should be granted.

5. **The exceptional sentence must be reversed due to the insufficiency of the aggravating factors.**

"An accused person's constitutional rights to a jury trial and due process of law require the government to charge and prove to a jury beyond a reasonable doubt any "fact" upon which it seeks to rely to increase punishment above the maximum sentence otherwise available for the charged crime. Blakely v. Washington, 542 U.S. 296,301-02, 124 S.Ct. 2531, 159 L. Ed. 2d 403 (2004); In re Winship, 397 U.S. 358,364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amends. 6, 14; Wash. Const. art. I §§ 3, 21, 22.

An accused person is constitutionally entitled to "adequate notice of the nature and cause of the accusations" to prepare a defense. State v. Siers, 174 Wn.2d 269,277, 274 P.3d 358 (2012); U.S. Const. amends. 6, 14; Wash. Const. art. I § 22. To "mount an adequate defense" for an aggravating circumstance, the prosecution must plainly notify the accused of the factual and legal basis of aggravating factors. Siers, 174 Wn.2d at 277; RCW 9.94A.537(1).

The court is authorized to impose an increased sentence only for the aggravating circumstance that has been properly charged and for which the jury has been instructed. State v. Williams-Walker, 167 Wn.2d 887, 895-96, 225 P.3d 913 (2010); Wash. Const. art. I §§ 21, 22.

The State notified me it would seek additional punishment based on three aggravating factors; multiple incidents against the same victim occurred over a prolonged period of time; abuse of the position of trust; and for E.M. alone, the victim was a youth not residing with a legal custodian and I established or promoted the relationship for the primary purpose of victimization. CP 83-87.

The charging document limited these allegations to a specific time period: for J.M., "between the 1st day of September, 2011 and through the 30th day of June, 2012," and for E.M., "between December 19, 2011 through December 19, 2012." CP 83-85, 87.

Yet the jury was not instructed it must base its verdict on conduct within the charging period. CP 61-64 (Instructions 18,19,20,21). The jury was told simply to "determine if any of the following aggravating circumstances exist." Id. None of the aggravating circumstances instructions mentioned anything about the time period when these circumstances occurred. CP 61-64.

Due to the court's broad ER 404(b) ruling, the jury heard

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allegations of behavior long after the charging period ended and after the boys turned 14. The State characterized the allegations against me as a "cascade" of sexual abuse far beyond the charging period. RP 761. The instructions did not limit the jury to the charging time period and the evidence before the jury was a cascade of conduct long after the nine or 12 months in the charging periods. CP 61-64; 83-87. No limiting instruction was given for the ER 404(b) evidence that would curtail its application.

The jury's verdict must reflect unanimous findings of the charged sentencing enhancement. Williams-Walker, 167 Wn.2d at 898. Uncharged allegations may not be the basis of a conviction or sentencing enhancement. State v. Severns, 13 Wn.2d 542,548, 125 P.2d 659 (1942); State v. Recuenco, 163 Wn.2d 428,440, 180 P.3d 1276 (2008). This Court should grant review and address whether the jury must limit its verdict for aggravating factors to the allegations charged and for which the accused person received notice.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED this 5th day of December, 2018.

Respectfully submitted,

Jonathan Sage, DOC# 390306
The Coyote Ridge Corrections Center
Connell, Washington 99326

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