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SENATE BILL 5477

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By Senators Kline, Brandland, Hargrove, Esser, Fairley, Kastama, Shin, Pridemore, Weinstein, Haugen, Berkey, Prentice and Rockefeller

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1 AN ACT Relating to sentencing outside the standard sentence range;  
2 amending RCW 9.94A.530 and 9.94A.535; adding a new section to chapter  
3 9.94A RCW; creating a new section; and declaring an emergency.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** The legislature intends to conform the  
6 sentencing reform act, chapter 9.94A RCW, to comply with the ruling in  
7 *Blakely v. Washington*, 542 U.S. ... (2004). In that case, the United  
8 States supreme court held that a criminal defendant has a Sixth  
9 Amendment right to have a jury determine beyond a reasonable doubt any  
10 aggravating fact, other than the fact of a prior conviction, that is  
11 used to impose greater punishment than the standard range or standard  
12 conditions. The legislature intends that aggravating facts, other than  
13 the fact of a prior conviction, will be placed before the jury. The  
14 legislature intends that the sentencing court will then decide whether  
15 or not the aggravating fact is a substantial and compelling reason to  
16 impose greater punishment. The legislature intends to create a new  
17 criminal procedure for imposing greater punishment than the standard  
18 range or conditions and to codify existing common law aggravating  
19 factors, without expanding or restricting existing statutory or common

1 law aggravating circumstances. The legislature does not intend the  
2 codification of common law aggravating factors to expand or restrict  
3 currently available statutory or common law aggravating circumstances.  
4 The legislature does not intend to alter how mitigating facts are to be  
5 determined under the sentencing reform act, and thus intends that  
6 mitigating facts will be found by the sentencing court by a  
7 preponderance of the evidence.

8 **Sec. 2.** RCW 9.94A.530 and 2002 c 290 s 18 are each amended to read  
9 as follows:

10 (1) The intersection of the column defined by the offender score  
11 and the row defined by the offense seriousness score determines the  
12 standard sentence range (see RCW 9.94A.510, (Table 1) and RCW  
13 9.94A.517, (Table 3)). The additional time for deadly weapon findings  
14 or for (~~those offenses enumerated~~) other adjustments as specified in  
15 RCW 9.94A.533(~~(4) that were committed in a state correctional facility~~  
16 ~~or county jail~~) shall be added to the entire standard sentence range.  
17 The court may impose any sentence within the range that it deems  
18 appropriate. All standard sentence ranges are expressed in terms of  
19 total confinement.

20 (2) In determining any sentence other than a sentence above the  
21 standard range, the trial court may rely on no more information than is  
22 admitted by the plea agreement, or admitted, acknowledged, or proved in  
23 a trial or at the time of sentencing, or proven pursuant to section 4  
24 of this act. Acknowledgement includes not objecting to information  
25 stated in the presentence reports. Where the defendant disputes  
26 material facts, the court must either not consider the fact or grant an  
27 evidentiary hearing on the point. The facts shall be deemed proved at  
28 the hearing by a preponderance of the evidence, except as otherwise  
29 specified in section 4 of this act.

30 (3) In determining any sentence above the standard sentence range,  
31 the court shall follow the procedures set forth in section 4 of this  
32 act. Facts that establish the elements of a more serious crime or  
33 additional crimes may not be used to go outside the standard sentence  
34 range except upon stipulation or when specifically provided for in RCW  
35 9.94A.535(2) (d), (e), (g), and (h).

1       **Sec. 3.** RCW 9.94A.535 and 2003 c 267 s 4 are each amended to read  
2 as follows:

3       The court may impose a sentence outside the standard sentence range  
4 for an offense if it finds, considering the purpose of this chapter,  
5 that there are substantial and compelling reasons justifying an  
6 exceptional sentence. Facts supporting aggravated sentences, other  
7 than the fact of a prior conviction, shall be determined pursuant to  
8 the provisions of section 4 of this act.

9       Whenever a sentence outside the standard sentence range is imposed,  
10 the court shall set forth the reasons for its decision in written  
11 findings of fact and conclusions of law. A sentence outside the  
12 standard sentence range shall be a determinate sentence (~~((unless it is~~  
13 ~~imposed on an offender sentenced under RCW 9.94A.712. An exceptional~~  
14 ~~sentence imposed on an offender sentenced under RCW 9.94A.712 shall be~~  
15 ~~to a minimum term set by the court and a maximum term equal to the~~  
16 ~~statutory maximum sentence for the offense of conviction under chapter~~  
17 ~~9A.20 RCW))~~).

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

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

26       (~~The following are illustrative factors which the court may~~  
27 ~~consider in the exercise of its discretion to impose an exceptional~~  
28 ~~sentence. The following are illustrative only and are not intended to~~  
29 ~~be exclusive reasons for exceptional sentences.))~~

30       (1) Mitigating Circumstances - Court to Consider  
31 The court may impose an exceptional sentence below the standard range  
32 if it finds that mitigating circumstances are established by a  
33 preponderance of the evidence. The following are illustrative only and  
34 are not intended to be exclusive reasons for exceptional sentences.

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

37       (b) Before detection, the defendant compensated, or made a good

1 faith effort to compensate, the victim of the criminal conduct for any  
2 damage or injury sustained.

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

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

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

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

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

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

21 (2) Aggravating Circumstances - Considered and Imposed by the Court  
22 The trial court may impose an aggravated exceptional sentence  
23 without a finding of fact by a jury under the following circumstances:

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

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

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

36 (d) The failure to consider the defendant's prior criminal history  
37 which was omitted from the offender score calculation pursuant to RCW

1 9.94A.525 results in a presumptive sentence that is clearly too  
2 lenient.

3 (3) Aggravating Circumstances - Considered By A Jury - Imposed by  
4 the Court

5 Except for circumstances listed in subsection (2) of this section,  
6 the following circumstances are an exclusive list of factors that can  
7 support a sentence above the standard range. Such facts should be  
8 determined by procedures specified in section 4 of this act.

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

11 (b) The defendant knew or should have known that the victim of the  
12 current offense was particularly vulnerable or incapable of resistance  
13 (~~due to extreme youth, advanced age, disability, or ill health~~).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 (h) The current offense involved domestic violence, as defined in  
18 RCW 10.99.020, and one or more of the following was present:

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

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

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

26 ~~(i) ((The operation of the multiple offense policy of RCW 9.94A.589  
27 results in a presumptive sentence that is clearly too lenient in light  
28 of the purpose of this chapter, as expressed in RCW 9.94A.010.~~

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

33 ~~(k))~~ The offense resulted in the pregnancy of a child victim of  
34 rape.

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

1        ~~((m))~~ (k) The offense was committed with the intent to obstruct  
2 or impair human or animal health care or agricultural or forestry  
3 research or commercial production.

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

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

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

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

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

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

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

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

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

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

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

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

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

37        (y) The victim's injuries substantially exceed the level of bodily

1 harm necessary to satisfy the elements of the offense. This aggravator  
2 is not an exception to RCW 9.94A.530(2).

3 NEW SECTION. **Sec. 4.** A new section is added to chapter 9.94A RCW  
4 to read as follows:

5 (1) At any time prior to trial or entry of the guilty plea if  
6 substantial rights of the defendant are not prejudiced, the state may  
7 give notice that it is seeking a sentence above the standard sentencing  
8 range. The notice shall state aggravating circumstances upon which the  
9 requested sentence will be based.

10 (2) The facts supporting aggravating circumstances shall be proved  
11 to a jury beyond a reasonable doubt. The jury's verdict on the  
12 aggravating factor must be unanimous, and by special interrogatory. If  
13 a jury is waived, proof shall be to the court beyond a reasonable  
14 doubt, unless the defendant stipulates to the aggravating facts.

15 (3) Evidence regarding any facts supporting aggravating  
16 circumstances under RCW 9.94A.535(3) (a) through (y), shall be  
17 presented to the jury during the trial of the alleged crime, unless the  
18 state alleges the aggravating circumstances listed in RCW 9.94A.535(3)  
19 (e)(iv), (h)(i), (o), or (t). If one of these aggravating  
20 circumstances is alleged, the trial court may conduct a separate  
21 proceeding if the evidence supporting the aggravating fact is not part  
22 of the res geste of the charged crime, if the evidence is not otherwise  
23 admissible in trial of the charged crime, and if the court finds that  
24 the probative value of the evidence to the aggravated fact is  
25 substantially outweighed by its prejudicial effect on the jury's  
26 ability to determine guilt or innocence for the underlying crime.

27 (4) If the court conducts a separate proceeding to determine the  
28 existence of aggravating circumstances, the proceeding shall  
29 immediately follow the trial on the underlying conviction, if possible.  
30 If any person who served on the jury is unable to continue, the court  
31 shall substitute an alternate juror.

32 (5) If the jury finds, unanimously and beyond a reasonable doubt,  
33 one or more of the facts alleged by the state in support of an  
34 aggravated sentence, the court may sentence the offender pursuant to  
35 RCW 9.94A.535 to a term of confinement up to the maximum allowed under  
36 RCW 9A.20.021 for the underlying conviction if it finds, considering



1 the purposes of this chapter, that the facts found are substantial and  
2 compelling reasons justifying an exceptional sentence.

3 NEW SECTION. **Sec. 5.** If any provision of this act or its  
4 application to any person or circumstance is held invalid, the  
5 remainder of the act or the application of the provision to other  
6 persons or circumstances is not affected.

7 NEW SECTION. **Sec. 6.** This act is necessary for the immediate  
8 preservation of the public peace, health, or safety, or support of the  
9 state government and its existing public institutions, and takes effect  
10 immediately.

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