

CERTIFICATION OF ENROLLMENT

SENATE BILL 5477

59th Legislature
2005 Regular Session

Passed by the Senate April 14, 2005
YEAS 46 NAYS 0

President of the Senate

Passed by the House April 12, 2005
YEAS 96 NAYS 1

Speaker of the House of Representatives

Approved

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SENATE BILL 5477** as passed by the Senate and the House of Representatives on the dates hereon set forth.

Secretary

FILED

**Secretary of State
State of Washington**

SENATE BILL 5477

AS AMENDED BY THE HOUSE

Passed Legislature - 2005 Regular Session

State of Washington 59th Legislature 2005 Regular Session

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

Read first time 01/26/2005. Referred to Committee on Judiciary.

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 new sections; 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 While the legislature intends to bring the sentencing reform act
9 into compliance as previously indicated, the legislature recognizes the
10 need to restore the judicial discretion that has been limited as a
11 result of the *Blakely* decision.

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

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

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

34 (3) In determining any sentence above the standard sentence range,
35 the court shall follow the procedures set forth in section 4 of this
36 act. Facts that establish the elements of a more serious crime or

1 additional crimes may not be used to go outside the standard sentence
2 range except upon stipulation or when specifically provided for in RCW
3 9.94A.535(2) (d), (e), (g), and (h).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 (d) The failure to consider the defendant's prior criminal history
2 which was omitted from the offender score calculation pursuant to RCW
3 9.94A.525 results in a presumptive sentence that is clearly too
4 lenient.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

36 (5) If the jury finds, unanimously and beyond a reasonable doubt,
37 one or more of the facts alleged by the state in support of an

1 aggravated sentence, the court may sentence the offender pursuant to
2 RCW 9.94A.535 to a term of confinement up to the maximum allowed under
3 RCW 9A.20.021 for the underlying conviction if it finds, considering
4 the purposes of this chapter, that the facts found are substantial and
5 compelling reasons justifying an exceptional sentence.

6 NEW SECTION. **Sec. 5.** (1) The sentencing guidelines commission
7 shall review the sentencing reform act as it relates to the sentencing
8 grid, all provisions providing for exceptional sentences both above and
9 below the standard sentencing ranges, and judicial discretion in
10 sentencing. As part of its review, the commission shall:

11 (a) Study the relevant provisions of the sentencing reform act,
12 including the provisions in this act;

13 (b) Consider how to restore the judicial discretion which has been
14 limited as a result of the *Blakely* decision;

15 (c) Consider the use of advisory sentencing guidelines for all or
16 any group of crimes;

17 (d) Draft proposed legislation that seeks to address the
18 limitations placed on judicial discretion in sentencing as a result of
19 the *Blakely* decision; and

20 (e) Determine the fiscal impact of any proposed legislation.

21 (2) The commission shall submit its findings and proposed
22 legislation to the legislature no later than December 1, 2005.

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

27 NEW SECTION. **Sec. 7.** This act is necessary for the immediate
28 preservation of the public peace, health, or safety, or support of the
29 state government and its existing public institutions, and takes effect
30 immediately.

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