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I. INTRODUCTION

On June 24, 2004, the United States Supreme Court declared in Blakely v. Washington¹ that a jury, not a judge, must make all factual findings² that form the basis for any punishment imposed on a defendant.³ Blakely clarified the principle announced in Apprendi v. New Jersey⁴ that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.⁵

The Blakely case examined Washington State’s procedures for imposing an “exceptional sentence.” Washington allows a judge to impose an exceptional sentence when a defendant’s conduct involves an “aggravating factor” and that conduct provides a substantial and compelling

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5. Id. at 490.

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basis to increase the defendant's punishment.\footnote{6} The Court ruled that, contrary to Washington's practice of allowing a sentencing judge to determine whether a defendant's conduct satisfies an aggravating factor,\footnote{7} a jury must make all factual findings that increase a defendant's punishment.\footnote{8} Accordingly, the Court ruled that Washington's existing system was unconstitutional.\footnote{9}

The Blakely decision sent Washington legislators, judges, prosecutors, and defense attorneys scrambling to find a solution that would address the Court's concerns.\footnote{10} Although Justice Breyer's dissent identified four possible solutions for Washington and other states affected by the Blakely decision,\footnote{11} the discussion in Washington focused on two possible solutions: a "judicial advisory" model and a "bifurcated trial" model.\footnote{12} During the 2005 Washington legislative session, the former was embodied in Substitute Senate Bill 5476 ("S.S.B. 5476") and the latter was embodied in Senate Bill 5477 ("S.B. 5477").\footnote{13} S.S.B. 5476 was referred to the Senate Ways and Means Committee and was not passed during the 2005 legislative session.\footnote{14} S.B. 5477, on the other hand, was passed by

\footnote{6} § 9.94A.535. Before the 2005 legislative session, the statute listed approximately twenty-seven "illustrative" aggravating factors that a court may consider when deciding whether or not to impose an exceptional sentence. The list includes deliberate cruelty, particular vulnerability, conduct that was a violent offense and the defendant knew the victim was pregnant, a major economic offense or series of offenses, a major violation of the Uniform Controlled Substances Act, sexual motivation, an ongoing pattern of sexual abuse against a minor, significant domestic violence, a presumptive sentence that is too lenient, the offense resulted "in the pregnancy of a child victim rape," the defendant took advantage of the victim's lack of a legal custodian, the offense was intended to "obstruct or impair human or animal health care or agricultural or forestry research or commercial production," or the offense was first-degree or second-degree trafficking and the victim was a minor at the time. Id. Because the list was illustrative before the 2005 legislative session, rather than exhaustive, additional aggravating factors were established through common law. Interview with Scott O'Toole, King County Senior Deputy Prosecutor, in Seattle, Wash. (Dec. 18, 2004) [hereinafter O'Toole Interview].

\footnote{7} § 9.94A.535.

\footnote{8} Blakely, 124 S. Ct. at 2538.

\footnote{9} Id. at 2543.

\footnote{10} Maureen O'Hagan, Lawyers try to sort out effects of court ruling on sentencing: Washington's system in jeopardy; Effect on current inmates remains uncertain; some fear state might return to old practices, SEATTLE TIMES, June 26, 2004, at B1; Tracy Johnson, Serious Crimes, Less-Severe Sentences; Judges Try to Discern How Badly the System Has Been Upended, SEATTLE POST-INTELLIGENCER, July 12, 2004, at A1.

\footnote{11} Blakely, 124 S. Ct. at 2552–58 (Breyer, J., dissenting).

\footnote{12} Interviews with Professor David Boerner, Seattle University School of Law, and Mr. Aldo Melchiori, Senior Counsel for the Washington State Senate Judiciary Committee, in Seattle, Wash. (Oct. 1, 2004) (on file with the authors) [hereinafter Boerner Interview and Melchiori Interview].


the legislature on April 14, 2005, and was signed into law by Governor Christine Gregoire on April 15, 2005.\textsuperscript{15}

This Note reviews the \textit{Blakely} decision and the Washington Legislature's response in S.B. 5477. Part II discusses the problem that \textit{Blakely} created for Washington’s sentencing guidelines system. Part III analyzes the judicial advisory and bifurcated trial proposals and explains why Washington wisely adopted the bifurcated trial approach. Part IV identifies key issues that are raised by using a bifurcated trial and analyzes how S.B. 5477 addresses, or fails to address, those issues. Finally, Part V concludes by suggesting that the legislature should have provided for the following in its bill responding to the \textit{Blakely} decision: a provision allowing bifurcation for all trials with an aggravating factor; a provision allowing the prosecution to amend the initial charge with additional factors if the majority of evidence that supports a new aggravating factor emerges at trial; a provision allowing judges to order bifurcation when the evidence would not have been admissible pre-\textit{Blakely} and when justice so requires; and, a provision that requires courts to apply the Washington Rules of Evidence to both phases of a bifurcated trial.

II. THE CURRENT FACE OF ENHANCED CRIMINAL SENTENCING IN WASHINGTON

\textit{A. Sentencing Enhancements Beyond the Statutory Maximum: Apprendi v. New Jersey}

Much of the Supreme Court’s analysis in \textit{Blakely} rested on the Court’s holding in \textit{Apprendi v. New Jersey},\textsuperscript{16} in which the Court first addressed the constitutional role of the jury in determining facts that enhance a defendant’s punishment. The defendant in \textit{Apprendi} pled guilty to second-degree possession of a firearm for an unlawful purpose, an offense punishable by five to ten years in prison.\textsuperscript{17} Following the guilty plea, the prosecution filed a motion to enhance the charge based on New Jersey’s hate-crime statute.\textsuperscript{18} That statute allowed a trial judge to impose an extended sentence if the judge found by a preponderance of the evidence that "the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color,

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\textsuperscript{16} 530 U.S. 466, 490 (2000).

\textsuperscript{17} \textit{id.} at 468–70.

\textsuperscript{18} \textit{id.} at 470–71.
gender, handicap, religion, sexual orientation or ethnicity.”\textsuperscript{19} The amended filing was based on a retracted statement made by the defendant\textsuperscript{20} that was not used to prove an element of the crime and was not admitted to by the defendant.\textsuperscript{21}

The judge found that the defendant had acted with a purpose to intimidate and applied the hate crime enhancement, sentencing him to twelve years in prison.\textsuperscript{22} The defendant appealed, arguing that the “Due Process Clause of the United States Constitution requires that the finding of bias upon which his hate crime sentence was based must be proved to a jury beyond a reasonable doubt,” and not left to the trial judge to make a determination based upon a preponderance of the evidence.\textsuperscript{23} The Appellate Division of the Superior Court of New Jersey affirmed, holding that the legislature had made the hate crime enhancement a sentencing factor rather than an element of the crime.\textsuperscript{24} The New Jersey Supreme Court also affirmed the trial court’s decision, deferring to the state legislature and holding that the enhancement served as a legitimate balance between the efforts of hate-crime statutes to avoid punishing mere thought and the “State’s compelling interest in vindicating the right to be free of invidious discrimination.”\textsuperscript{25} As a result, the New Jersey Supreme Court did not address the defendant’s claim that the trial court created a new element of the crime with a different standard of proof.

A year before \textit{Apprendi}, in \textit{Jones v. United States},\textsuperscript{26} the United States Supreme Court had framed a question similar to the issue raised by \textit{Apprendi}: “[W]hen a jury determination has not been waived, may judicial fact-finding by a preponderance support the application of a provision that increases the potential severity of the penalty for a variant of a given crime?”\textsuperscript{27} Although the Court felt that \textit{Jones} was not the proper case in which to answer that question,\textsuperscript{28} the facts in \textit{Apprendi} provided the Court with the opportunity to do so.

The Court answered with the following constitutional rule: Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum, whether the statute calls it an element or a sentencing factor, must be submitted to a jury and

\begin{enumerate}
\item[19.] Id. at 468–69 (citing N.J. Stat. Ann. § 2C:44-3(e) (West 1999–2000)).
\item[20.] Id. at 471.
\item[21.] Id. at 470–73.
\item[22.] Id. at 471.
\item[23.] Id.
\item[24.] Id.
\item[25.] Id. at 472–73.
\item[26.] 526 U.S. 227 (1999).
\item[27.] Id. at 242.
\item[28.] See id. at 251–52.
\end{enumerate}
proved beyond a reasonable doubt. Moreover, the Court held that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."30

Under the Apprendi rule, if a statute

links specific facts to specific maximum sentences, the facts necessary for each such maximum sentence are elements of the offense. In this way, the court determines the "prescribed statutory maximum" sentence and whether the sentence has been unconstitutionally "increased" above that level by a finding of fact not made as an element of the offense.31

Accordingly, the conviction of a defendant is based upon the jury's application of fact to the pertinent law and its determination that each element has been proven beyond a reasonable doubt.32

The Apprendi rule equates a finding of fact with an element of the crime if that fact "extend[s] the defendant's sentence beyond the maximum authorized by the jury's verdict."33 But it does not do so if that fact fails to increase the defendant's sentence beyond the statutory maximum.34 In other words, "[s]entencing factors that regulate the sentence imposed, but do not produce a sentence exceeding the maximum authorized by the offense elements established by the jury's verdict, are consistent with the Apprendi rule."35

A question that arose from the Apprendi decision, and the question that was answered in Blakely, is whether a jury must make the factual findings that support an aggravating factor that increases a defendant's sentence within the prescribed statutory guidelines.

30. Id. (quoting Jones v. United States, 526 U.S. 227, 252–53 (1992)).
32. See id. at 874–75.
33. Harris v. United States, 536 U.S. 545, 550, 557 (2002) ("Apprendi said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime . . . by those who framed the Bill of Rights.").
34. Apprendi, 530 U.S. at 483, n.10 (noting that the trial judge's "role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury") (emphasis added).
35. Priester, supra note 31, at 876.
B. Sentencing Enhancements Within the Statutory Guidelines:
Blakely v. Washington

The Supreme Court revisited Apprendi and a jury’s constitutional role in determining facts that increase a defendant’s punishment when it delivered its recent decision in Blakely v. Washington. In Blakely, the defendant pled guilty to kidnapping his estranged wife. The defendant admitted to the elements of second-degree kidnapping involving domestic violence and the use of a firearm, but he did not admit to any other relevant facts. Those admitted facts, when considered alone, would have justified a sentence of no more than fifty-three months under the Washington State Sentencing Guidelines. Instead, the trial judge sentenced the defendant to an exceptional sentence of ninety months in prison based on the judge’s finding that the defendant had acted with “deliberate cruelty,” a statutorily permissible ground for imposing an exceptional sentence above the sentencing guidelines but within the statutory maximum.

The trial judge apparently followed the direction of State v. Gore, which held that any “reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.” However, the facts used to justify the sentencing enhancement for the defendant were neither asserted by the prosecution to convict the defendant of kidnapping in the second degree, nor were they admitted to by the defendant. Although statutorily permitted, the increase in the defendant’s sentence was based on facts and evidence neither admitted to by him, nor determined by a jury beyond a reasonable doubt.

For these reasons, and faced with an unforeseen increase of more than three years in his sentence, the defendant appealed the trial court’s application of the sentencing enhancement. He argued that the facts considered for the enhancement were outside the scope of his guilty plea.

37. Id. at 2534.
38. Id. at 2534–35.
39. Id. at 2534.
40. Id. at 2535.
41. Id. See generally WASH. REV. CODE § 9.94A.535(2)(h)(iii) (2004) (identifying “deliberate cruelty” as an aggravating factor that may be considered for the imposition of an exceptional sentence if the trial judge finds that there are “substantial and compelling reasons justifying an exceptional sentence”).
42. Blakely, 124 S. Ct. at 2537–38.
44. Id. at 315–16, 21 P.3d at 277–78.
45. Blakely, 124 S. Ct. at 2535.
46. Id. at 2537–38.
because they were not legally essential for a determination of guilt on the underlying crime. The Washington Court of Appeals affirmed the trial court’s decision and the Washington Supreme Court denied discretionary review.\textsuperscript{47} The United States Supreme Court then granted certiorari.\textsuperscript{48}

In a five-to-four decision written by Justice Scalia, the United States Supreme Court reversed the trial court.\textsuperscript{49} In doing so, the Court reaffirmed the holding in \textit{Apprendi}, stating that “every defendant has the \textit{right} to insist that the prosecutor prove to a jury all the facts legally essential to the punishment.”\textsuperscript{50} Justice Scalia rejected the State’s argument that “there was no \textit{Apprendi} violation because the relevant ‘statutory maximum’ is not 53 months, but the 10-year maximum for class B felonies,” and he made clear that “the ‘statutory maximum’ for \textit{Apprendi} purposes is the maximum sentence a judge may impose \textit{solely on the basis of the facts reflected in the jury verdict or admitted by the defendant}.”\textsuperscript{51} Therefore, “[w]hen a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment . . . and the judge exceeds his proper authority.’”\textsuperscript{52}

Justice Thomas’s concurrence in \textit{Apprendi}\textsuperscript{53} predicted the results of \textit{Blakely}. In that concurrence, he focused upon the distinctions, or lack thereof, between an element of the crime and a sentencing factor.\textsuperscript{54} Placing weight upon an 1872 criminal law treatise to illustrate the long history of courts separating elements from sentencing factors, Justice Thomas reasoned that the traditional interpretation of the indictment was to inform the defendant of the elements of the crime charged against him, that “the indictment must allege whatever is in law essential to the punishment sought to be inflicted.”\textsuperscript{55} According to the \textit{Blakely} decision, the factual findings that match those legal “essentials” must be found by a jury.\textsuperscript{56}

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\textsuperscript{47} \textit{Id.} at 2536.
\textsuperscript{49} \textit{Blakely}, 124 S. Ct. at 2543.
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.} at 2537.
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} 530 U.S. 466, 499 (2000).
\textsuperscript{54} \textit{Id.} at 499–501.
\textsuperscript{55} \textit{Id.} at 510 (quoting J. \textsc{Bishop}, \textsc{Law of Criminal Procedure} 50 (2d ed. 1872) (“The indictment must allege whatever is in law essential to the punishment sought to be inflicted.”) and J. \textsc{Bishop}, \textsc{Commentaries on Criminal Law} 564–65 (5th ed. 1872) (“If it is sought to make the sentence heavier by reason of its being [a second or third offence], the fact thus relied on must be averred in the indictment; because the rules of criminal procedure require the indictment, in all cases, to contain an averment of every fact essential to the punishment sought to be inflicted.”)).
\textsuperscript{56} 124 S. Ct. at 2537.
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At least one well-known judge has commented on the Blakely decision. In a July 6, 2004 opinion, Judge Posner of the Seventh Circuit Court of Appeals suggested that the scope of the Blakely decision placed a grip upon the "authority of the sentencing judge to find the facts that determine how that discretion shall be implemented and to do so on the basis of only the civil burden of proof. The vices of the guidelines are thus that they require the sentencing judge to make findings of fact . . . ." 57 This was similar to Justice Scalia's contention in Blakely, 58 as well as to Justice Thomas's concurrence in Apprendi, 59 that when facts supporting a defendant's exceptional sentence are neither admitted to by the defendant nor tried by a jury, the imposed exceptional sentence will violate that defendant's Sixth Amendment right to a trial by jury. In other words, in a sentencing hearing or in a trial setting, the facts that the government must prove to impose a sentence must be alleged in the indictment and proven to the factfinder or admitted to by the defendant; it is not for the trial court to determine the facts to be considered or to decide if those facts exist.

Addressing the implications that the majority's opinion would have for the sentencing procedures of numerous states and the federal government, Justice Breyer's Blakely dissent enumerates four possible options that state legislatures can adopt. 60 First, legislatures are welcome to create a "simple, pure or nearly pure 'charge offense' or 'determinate' sentencing system." 61 Second, Justice Breyer suggests that legislatures can implement an indeterminate sentencing scheme that existed in most states prior to recent sentencing reform acts. 62 Third, the structured sentencing schemes now in place could remain with the addition of new crimes that match the enhancements previously imposed by trial judges. 63 Finally, Justice Breyer postulates that Congress and state legislatures could rewrite the criminal codes, fastening lengthy and extreme sentences to each crime followed by exhaustive lists of mitigating factors. 64

57. United States v. Booker, 375 F.3d 508, 511 (7th Cir. 2004).
58. 124 S. Ct. at 2537.
60. Blakely, 124 S. Ct. at 2552–58 (Breyer, J., dissenting).
61. Id. at 2552.
62. Id. at 2553.
63. Id. at 2554.
64. Id. at 2558.
III. POST-BLAKELY OPTIONS CONSIDERED BY THE WASHINGTON LEGISLATURE

As a result of the Blakely decision, the Washington Legislature faced the unenviable task of creating new legislation that respects the Blakely decision, but protects the policy considerations that underlie the current sentencing guidelines system. Interviews with two individuals involved with that process, Professor David Boerner and Mr. Aldo Melchiori, shed light on the two proposals that received the most attention.

Before discussing those two proposals, it is important to acknowledge the option that the Washington Legislature did not consider. The legislature did not consider a system of “statutory maximums” where the severity of the sentencing guidelines would be increased to the statutory maximum, offset by a significant increase in the list of mitigating factors. For example, the legislature could have revised the standard range for second-degree kidnapping with a firearm, both charges to which the defendant in Blakely pled guilty, from forty-nine to fifty-three months to 120 months (the current statutory maximum for class B felonies in Washington). Such a system would conform with Blakely because a jury would make factual findings on all the elements of the underlying crimes and then a judge could impose a sentence lower than the statutory maximum based on mitigating circumstances. Because a finding of mitigating circumstances results in a reduction of the defendant’s sentence, those circumstances need not be found by a jury.

A “statutory maximum” system was not seriously considered by the legislature because it would have provided judges with a tremendous amount of sentencing discretion without any framework to review that sentencing for abuse of discretion. Given the severity of possible punishment under such a system, the lack of meaningful review is fatal.

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65. See Boerner Interview and Melchiori Interview, supra note 12. Professor Boerner is the current Chair of the Washington State Sentencing Guidelines Commission.

66. Such a system would be in line with the fourth option articulated by Justice Breyer in his Blakely dissent. Blakely, 124 S. Ct. at 2558 (Breyer, J., dissenting).

67. Id. at 2534–35.


69. Only facts that increase, not decrease, a defendant’s sentence must be submitted to a jury. Blakely, 124 S. Ct. at 2536; see also Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

70. RCW 9.94A.585(1) provides that “[a] sentence within the standard range, under RCW 9.94A.510 or 9.94A.517, for an offense shall not be appealed.” § 9.94A.585(1). Even if defendants were allowed to appeal sentences within the standard range, which seems unlikely due to fiscal concerns, a defendant would need to show that there was no basis for the exercise of discretion and that “no reasonable man would take the view adopted by the trial court.” State v. Hurst, 5 Wash. App. 146, 148, 486 P.2d 1136, 1137–38 (1971).

Additionally, the cost of requiring a hearing of mitigating circumstances in every case would likely be cost-prohibitive and would likely conflict with the stated purpose of ensuring that the defendant’s punishment is proportionate to both the seriousness of the offense and the defendant’s criminal history.

We now turn to a discussion of the two proposals that the Washington Legislature considered for adoption: a judicial advisory model and a bifurcated trial model. As discussed above, the judicial advisory proposal was embodied in S.S.B. 5476, which did not pass the legislature, and the bifurcated trial proposal was embodied in S.B. 5477, which did pass the legislature and was signed into law by Governor Gregoire.

A. The Judicial Advisory Model

The Washington judiciary was the leading proponent of the judicial advisory model that was embodied in S.S.B. 5476. Under that model, the upper limit of the standard sentencing range in the current guidelines would have become merely advisory for violent offenses. A judge could then choose to follow the guidelines or abandon them in favor of a more lenient or a more severe sentence. Although the guidelines would have continued to exist for violent offenses, the discretion afforded by a judicial advisory model is more similar to the indeterminate system that existed before the current guidelines were established. Such a model would be similar to the second option described by Justice Breyer in his

The purpose, and the promise, of substantive appellate review of [exceptional] sentences is threefold. First, because a record to review is required, it will insure that the reasons for which sentences are imposed are articulated; thus it informs the defendant why he or she received that particular sentence. Second, it provides a means to correct the truly aberrational sentence. Third, and in the long run most importantly, it provides the opportunity for the development of a body of principled decisions to guide sentencing judges in construing and applying the Sentencing Reform Act; a common law of sentencing to fill the interstices in the legislative declaration of sentencing policy.

Id.

72. A purpose of the Sentencing Reform Act is to “[m]ake frugal use of the state’s resources.” § 9.94A.010(6).

73. § 9.94A.010(1); see also BOERNER, supra note 71, at 2-31, 32 (discussing how the goal of proportionality gives rise to the need for classifications of crimes with different maximum sentences).

74. See supra Part I.


76. S.S.B. 5476 § 2(1).

77. But see Blakely v. Washington, 124 S. Ct. 2531, 2539 (2004). Justice Scalia argued that Apprendi supports and effectuates the purpose of keeping the control of judgments in the hands of the jury by “ensuring that the judge’s authority to sentence derives wholly from the jury’s verdict. Without that restriction, the jury would not exercise the control that the Framers [of the Constitution] intended.” Id.
Blakely dissent\textsuperscript{78} and would comport with Blakely because a defendant's sentence stays within the standard range suggested by the guidelines.\textsuperscript{79}

The benefit of S.S.B. 5476's judicial advisory model is that judges could have imposed personalized sentences on defendants. While the sentencing guidelines were developed to eliminate disparity among judges and across racial or socioeconomic lines, their rigidity means that some defendants receive punishments that do not reflect the severity of their crimes. For example, according to Judge Sperline, the trial judge who accepted Blakely's guilty plea, Blakely deserved more punishment than the forty-nine to fifty-three months provided by the sentencing guidelines for his guilty plea.\textsuperscript{80} Judge Sperline testified that given the egregious nature of the facts, a sentence of forty-nine to fifty-three months did not fit the retributive effects of the penal system.\textsuperscript{81} Moreover, such restrictions on sentencing significantly dampen the power given to elected judges by the community that expects them to uphold justice.\textsuperscript{82} Ultimately, Judge Sperline stated his belief that justice requires that someone independent of the rough and tumble plea bargaining process have the authority and power to insist that compelling facts, such as the ones in Blakely, are responded to with an exceptional sentence.\textsuperscript{83}

Furthermore, unlike juries who are selected for one particular case, a trial judge has a reservoir of experience by which to fashion an appropriate sentence. For example, most jurors would find that any rape constitutes "deliberate cruelty," an aggravating factor under the Sentencing Reform Act ("SRA"). Accordingly, a jury may be more prone to find that a rape defendant acted with deliberate cruelty, and under a bifurcated trial system, such a situation is inevitable. But under the judicial advisory model, a judge could have determined an appropriate sentence based on the judge's experience and the defendant's conduct.

More personalized sentencing may seem tempting in the most violent of cases, but a return to an indeterminate system poses a number of significant problems. First and foremost, by turning back the clock to a pre-guidelines system, the legislature would have returned Washington

\textsuperscript{78} Id. at 2553 (Breyer, J., dissenting).
\textsuperscript{79} See United States v. Booker, 125 S. Ct. 738, 750 (2005) (noting that advisory guidelines comport with Blakely because "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant").
\textsuperscript{80} Testimony of Grant City Judge Evan Sperline before the House Criminal Justice and Corrections Committee (Mar. 29, 2005), available at http://www.tvw.org/MediaPlayer/Archived/WME.cfm?EVNum=2005031203&TYPE=A.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
to a system that was rejected by the legislature because of disparity in sentencing among different judges. The legislature adopted the guidelines in the early 1980s in order to address substantial bias and inconsistency in the pre-guidelines system. Although it can be argued that society continues to improve its awareness of racial bias, including subconscious bias, it is far from clear that removal of the guidelines would not result in a return to a disparity in sentencing. For example, Professor Boerner points out that significant racial disparity still exists when a court is free to use alternatives to the presumptive sentence range, such as a first-time offender waiver. "In 1998, 37 percent of eligible white offenders received first-time offender sentences, while only 25 percent of eligible black offenders and 22.5 percent of eligible members of other minority groups received such sentences." Data from 2000 reflects roughly the same concerns, particularly the dramatic difference between Caucasians (32 percent) and Hispanics (19 percent). Such statistics demonstrate that while increased discretion might provide judges with an opportunity to ensure that justice is given to both victims and defendants, such a noble cause would fail miserably if that discretion were abused due to intentional or subconscious bias. Furthermore, when discretion is limited, the sentencing

84. Professor Boerner has noted that the SRA, which gave rise to the current system, was a reflection that "[m]any of the assumptions upon which the indeterminate system was based have been rejected or substantially limited." BOERNER, supra note 71, at 1-1.

85. One of the stated purposes for the SRA is to ensure that sentences "[are] commensurate with the punishment imposed on others committing similar offenses." WASH. REV. CODE § 9.94A.010(3) (2004).


87. Id. at 72, 123. See also Dan Kilpatrick & Jack Brummel, Sentencing Study, 52 WASH. L. REV. 103, 119 (1976) ("The extensive disparity documented by this study indicates that the present sentencing system in King County is inequitable, because the sentence received in many instances depends on which judge is doing the sentencing . . .").

88. Boerner & Lieb, supra note 86, at 126-27 (noting that, under the guidelines, disparity in sentencing by race is "accounted for by differences in legally relevant variables—the offense of conviction and prior criminal record" and that "there are no significant differences in sentences imposed under the guidelines for those convicted of the same crime with the same offender score").

89. See id. at 126-27.

90. Id. at 127.

91. Id. at 128.

92. In 2000, the rates for first-time offender waivers were as follows: Caucasians, 32 percent; Asian/Pacific Islander, 29 percent; Native American, 27 percent; African American, 25 percent; and Hispanic, 19 percent. STATE OF WASHINGTON SENTENCING GUIDELINES COMMISSION, REPRESENTATION AND EQUITY IN WASHINGTON STATE: AN ASSESSMENT OF DISPROPORTIONALITY AND DISPARITY IN ADULT FELONY SENTENCING, FISCAL YEAR 2000 64 [hereinafter ASSESSMENT OF DISPARITY].

93. See Boerner & Lieb, supra note 86, at 128 (noting that "[t]he lesson is powerful: racial disparity is correlated with unstructured and unreviewed discretion").
guidelines appear to address these historical concerns, however, the current disparity in exceptional sentences for Native Americans illustrates that the problem has not disappeared.

Even if the legislature were convinced that concerns for uniformity across racial and socioeconomic lines were no longer paramount, and that individual judges would impose sentences consistent with one another, a judicial advisory model would have granted trial judges a substantial amount of discretion that is essentially free from judicial review. Although the legislature must respect the ability of judges to wisely exercise their discretion, such unchecked power is troubling in light of the apparently infrequent number of successful appeals in the years prior to the implementation of the Washington sentencing guidelines. The lack of reversals during a period when judges had the discretion sought by the judicial advisory model suggests that the legislature should be particularly wary of such discretion if racial and socioeconomic bias remain valid concerns—without the structure provided by the

94. "[F]or all standard range sentences for ranked offenses, the SRA is functioning in accord with its intent/purpose regarding proportionate treatment of offenders." ASSESSMENT OF DISPARITY, supra note 92 at 78. "While the sentencing grid is apparently successful in eliminating disparate treatment in standard range sentencing . . . disparate treatment is present in sentencing alternatives, exceptional sentences, and especially 'Three-Strike life sentences."' Id. at 87.

95. In 2000, the rate of exceptional sentences per thousand felony sentences among each racial group was as follows: Asian/Pacific Islander, 2.6 percent; African American, 4.4 percent; Caucasian, 4.7 percent; Hispanic, 5.1 percent; and Native Americans, 7.4 percent. Id. at 71.

96. The legislature appears unconvinced. RCW 9.94A.850(2)(h)(i) requires that the Sentencing Guidelines Commission produce a bi-annual report to the Governor and the legislature on "[r]acial disproportionality in juvenile and adult sentencing, and, if available, the impact that diversions, such as youth courts, have on racial disproportionality in juvenile prosecution, adjudication, and sentencing." WASH. REV. CODE § 9.94A.850(2)(h)(i) (2004).

97. At least one commentator has noted that disparity was the natural result of judicial discretion in sentencing:

The underlying thesis of this grant of discretion [before the implementation of the sentencing guidelines] is that it allowed judges to consider all the circumstances of each individual case and craft a sentence appropriate to those circumstances. But inevitably this individualization encompassed both the circumstances of the individual case and the individuality of the sentencing judge . . . . Judges differ in their views as to the purposes of sentencing, both generally and in the individual case, and they differ in the degree of relevance they assign particular factors bearing on those purposes. The result, inevitably, was disparity.

BOERNER, supra note 71, at 2-27.


99. Professor Boerner, a member of the original Sentencing Guidelines Commission and its current Chair, believes there had been only one successful appeal under the abuse of discretion standard in the eighty years leading up to implementation of the guidelines in Washington. See Boerner Interview, supra note 12. Professor Boerner suggests that the reason for so few successful appeals was the lack of applicable standards and the lack of a reporting mechanism for a judge’s rationale by which an appellate court could make the abuse of discretion determination. BOERNER, supra note 71, at 3-16.
existing guidelines, appellate review would likely return to a rubber-stamp of a trial judge’s discretion. Regardless of the deference that judges might give to “advisory guidelines,” there is no way to place a meaningful check on a judge’s discretion under such a system.

Finally, the unpredictable nature of returning to a purely discretionary system is problematic for two additional reasons. First, the prosecution and the defense would lose the amount of certainty that the guidelines currently provide. A prosecutor’s ability to reach an equitable plea bargain is potentially diminished by the “unknown” factors that might influence a judge’s decision, and an unsophisticated defendant could agree to an unjust plea bargain without understanding the most likely sentence for his criminal behavior. These concerns are important given the substantial role that plea bargains play in the Washington criminal justice system.

Second, returning to a discretionary system would create uncertainty with regard to our prison population and its fiscal impact. Although fiscal concerns may seem secondary given that a defendant has engaged in criminal behavior, those fiscal concerns were a significant force behind the implementation of the sentencing guidelines. Given

100. According to Mr. Melchiori, judges were surveyed at a recent Superior Court Judges Association meeting. See Melchiori Interview, supra note 12. The judges indicated that they would follow the guidelines in roughly ninety-five percent of cases. Id. However, there was significant disagreement by the judges as to whether the survey was properly done. Id. Although the survey was informal, it is at least anecdotal evidence that the judges who were present at the meeting believed that the guidelines are appropriate in the vast majority of cases. Id.

101. A valid plea of guilty is one “entered [by a defendant] fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel. . . .” Brady v. United States, 397 U.S. 742, 755 (1970) (citing Shelton v. United States, 246 F.2d 571, 572, n.2 (5th Cir. 1957)).


103. For example, in 1974, 17.5 percent of convicted felons in King County were committed to prison; 32 percent of convicted felons in Pierce County were committed to prison; and 14 percent of convicted felons in Snohomish County were committed to prison. Christopher Bayley, Good Intentions Gone Awy—A Proposal for Fundamental Change in Criminal Sentencing, 51 WASH. L. REV. 529, 536, n.22 (1976); see also Boerner, supra note 71, at 2-37 (“The Sentencing Reform Act was a vehicle by which the Legislature reasserted its authority to set sentencing policy, and thus to make the fundamental policy decision as to what level of incarceration is in the public interest.”).

104. A purpose of the SRA is to “[m]ake frugal use of the state’s resources.” WASH. REV. CODE § 9.94A.010(6) (2004).

105. Boerner, supra note 71, at 2-37 (noting “the rising cost of incarceration was a major factor in the legislative consensus that resulted in the passage of the Sentencing Reform Act”).
the current economic downturn, the legislature would have been hard-pressed to pass a system that might have increased the resources required by the criminal justice system. Without guidelines that can estimate the sentencing that is likely to occur each year, the legislature would essentially be gambling that the renewed discretion would not result in a significant increase in the prison population. Such a gamble would conflict with the statutory directive that the Sentencing Guidelines Commission include alternatives to proposed guideline revisions or modifications that would exceed the capacity of correctional facilities, and would also be troubling considering the success that the guidelines have had in reducing the inmate population.

Judicial discretion is important because the citizens of Washington expect that their elected judges will use that discretion to impose appropriate punishments. But judicial discretion, especially in cases where the punishment will be most severe, fails its purpose of seeking justice if wielded in a disparate manner. The ability to punish a handful of defendants more severely does not outweigh the risk that similarly situated defendants may be punished quite differently based on their geographic location, their socioeconomic status, or the color of their skin.

B. The Bifurcated Trial Model

The second proposed solution to Blakely, and the one that was passed by the Washington Legislature and signed into law by Governor Gregoire, is the bifurcated trial model. Under that model, a judge may divide a trial into two phases based on the evidence that will be presented to prove the existence of an aggravating factor. During the first phase of the trial, each side presents its case and the jury renders a verdict on the underlying crimes for which the defendant was charged. During the second phase of the trial, the prosecution presents its evidence of aggravating circumstances and the defense may rebut that evidence. The jury then makes factual findings that support, or refute, those aggravating circumstances.


107. Boerner & Lieb, supra note 86, at 71 (noting that “[g]uidelines allow a state to set sentences with advance knowledge of the consequences to prison and jail populations”).

108. See § 9.94A.850(b).

109. Boerner & Lieb, supra note 86, at 94–95 (“The consequences for the prison population was dramatic . . . this [post-guidelines] shift reduced the state’s overall imprisonment rate from 20 percent in 1982 to 17 percent in 1988 and significantly reduced prison commitments.”).

110. See supra Part I.
Because *Blakely* requires that the jury be exposed to evidence of aggravating circumstances that might otherwise be deemed too prejudicial for the jury to consider during the prosecution's case in chief, the bifurcated model requires that the judge hold a pre-trial "prejudice hearing" and make a determination as to whether bifurcation is needed to protect the defendant's right to a fair trial.\(^{111}\) If bifurcation is unnecessary, there is no second phase and each side presents all of its evidence, including evidence of aggravating and mitigating circumstances, during the first and only phase of the trial. The jury then determines whether the defendant is guilty of the charged crimes and any aggravating factors.

If bifurcation is ordered, the jury can first focus on evidence that supports the elements of the underlying crimes and can then review, in a separate trial, evidence that supports the alleged aggravating factors. When a factor that might aggravate the charges would be unfairly prejudicial to the defendant, bifurcation eliminates the source of potential prejudice and allows the jury to concentrate upon the actual elements of the crime.

Unlike the judicial advisory model, the bifurcated trial model provides a procedural post-*Blakely* fix that allows much of Washington's current system to remain intact, including the sentencing guidelines. Although a bifurcated model necessarily restricts a judge's ability to engage in nearly any sort of factfinding, such restrictions are the inevitable result of the *Blakely* decision. The jury must make all factual findings that are used to increase a defendant's sentence, and the bifurcated model accomplishes just that.

Providing the option of a bifurcated model poses a minimal fiscal burden to Washington because relatively few cases require bifurcation. In 2003, approximately 100 out of 27,213 criminal cases in Washington involved a contested exceptional sentence.\(^ {112}\) Furthermore, as discussed in more detail below, the legislature limited the availability of bifurcated trials to only four of the forty-plus aggravating factors listed in S.B. 5477. Although bifurcated trials for this small portion of cases will un-

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111. The determination of "prejudice" is not analogous to a prejudicial determination under Washington Rule of Evidence 403 because highly prejudicial evidence will be at its probative peak when it is used to prove the existence of an aggravating factor. Therefore, the need to bifurcate arises from the goal of ensuring a trial that comports with the spirit of due process and the right to a fair trial. For example, Kansas, which has adopted a bifurcated trial approach, allows a judge to order bifurcation if it is "in the interest of justice." *Kan. Stat. Ann.* § 21-4718(b)(4) (2003). See also *infra* Part IV.D.

112. An exact number of contested exceptional sentences is not available; however, Professor Boerner indicated that this was an approximate number that was used during the deliberations that led to S.S.B. 5476 and S.B. 5477. Boerner Interview, *supra* note 12. We do know that out of 27,213 felony sentences in 2003, exceptional sentences based on aggravating factors were imposed only 751 times. STATISTICAL SUMMARY OF ADULT FELONY SENTENCING, *supra* note 102, at iv, 21.
doubtedly have a fiscal impact, such costs are necessary for Washington to comport with the Blakely decision while protecting a defendant's constitutional right to a fair trial.

The success of the bifurcated model in Kansas suggests that it should work well in Washington. After the Kansas sentencing guidelines scheme was declared unconstitutional by the Kansas Supreme Court, the Kansas Legislature responded with a bifurcated trial model. Under the Kansas model, a jury that returns a guilty verdict is provided with instructions on the aggravating circumstances and is sent back for further deliberation.

A bifurcated approach has also worked well in at least one post-Blakely case in Washington. In a recent conversation with King County Prosecutor Scott O'Toole, we discussed the impact of Blakely on how he charged and tried the case of State v. Dunn. That case was the first post-Blakely case in Washington to use a bifurcated model when an aggravating factor was alleged.

In 2001, the defendant in Dunn allegedly kidnapped a six-year-old boy and subjected the child to extreme sexual abuse. The child was recovered alive twenty-four hours after having been abducted. Because of the recovery of the child, as well as a concern for public values and sentiment, the King County Prosecutor's Office felt it was appropriate to charge the defendant with aggravating factors.

Following the Blakely opinion, Mr. O'Toole decided to pursue three aggravating factors: 1) the offense was done with sexual motivation; 2) the offense was one of deliberate cruelty; and 3) the offense was committed against a vulnerable victim. Mr. O'Toole originally intended to pursue two additional aggravating factors, the random nature of the act and the effect the crime had upon the community, but he chose to eliminate those factors because of the uncertainty that surrounded the Blakely decision. One reason for Mr. O'Toole's decision was to limit

113. Brief of Kansas Appellate Defender Office as Amicus Curiae in Support of Petitioner at *7–8, Blakely v. Washington, 125 S. Ct. 21 (2003) (No. 02-1632) (praising the Kansas Legislature for adopting a bifurcated model and noting that it allowed "the legislative intent to promote uniformity and standardize sentences, while allowing for exceptional cases, [to] remain intact").
116. See § 21-4716(b).
117. O'Toole Interview, supra note 6.
118. Id.
119. Id.
120. Id.
121. Id.
122. Id.
123. Id.
the aggravating factors to those that could be proven based on evidence that was relevant to the elements of the underlying crime.\textsuperscript{124} Prior to trial, Mr. O'Toole informed the defense attorney what aggravating factors would be pursued.\textsuperscript{125} This provided the defendant with notice and an opportunity to prepare an adequate defense.

In discussing the process, Mr. O'Toole indicated that although the limitations imposed by \textit{Blakely} create more work for prosecutors, he feels those limitations were correctly imposed.\textsuperscript{126} He insisted that sacrificing due process for increased efficiency was not an option he cared to consider.\textsuperscript{127} He also acknowledged that \textit{Blakely} placed a strain on the limited judicial discretion provided by the SRA.\textsuperscript{128} However, the efficiency with which \textit{State v. Dunn} was handled assured him that the bifurcated model will work to maintain the purpose of the SRA—to avoid disparity in charging and sentencing.\textsuperscript{129} Mr. O'Toole also noted that Judge Hayden, the trial judge in \textit{State v. Dunn}, did not read the charging document of aggravating factors to the jury.\textsuperscript{130} Even though the evidence that would prove the aggravating factors was the same evidence that would be presented to prove the underlying crime, Judge Hayden determined that reading the charging document to the jury would have been far too prejudicial to the outcome of the trial.\textsuperscript{131}

The bifurcated model, and the version adopted by Washington, does raise a number of issues. First, the legislature had to decide if a bifurcated trial should be available for all aggravating factors.\textsuperscript{132} Second, the legislature had to determine whether the list of aggravating factors should have remained illustrative rather than exclusive.\textsuperscript{133} Third, because the prosecutor must identify which aggravating factors to pursue, an issue arose as to when notice of those aggravating factors should be required.\textsuperscript{134} Fourth, the legislature had to dictate what standard judges

\textsuperscript{124} \textit{id.}
\textsuperscript{125} \textit{id.}
\textsuperscript{126} \textit{id.}
\textsuperscript{127} \textit{id.}
\textsuperscript{128} \textit{id.}
\textsuperscript{129} \textit{id.}
\textsuperscript{130} \textit{id.}
\textsuperscript{131} \textit{id.}
\textsuperscript{132} S.B. 5477 restricts a bifurcated trial to only four of the more than forty aggravating factors that are included in S.B. 5477. S.B. 5477 § 4(3), 59th Leg., Reg. Sess. (Wash. 2005). See also infra Part IV.A.
\textsuperscript{133} S.B. 5477 makes the list of aggravating factors exclusive. S.B. 5477 § 3(3). See also infra Part IV.B.
\textsuperscript{134} S.B. 5477 requires that “[a]t 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.” S.B. 5477 § 4(1). See also infra Part IV.C.
would use to determine whether bifurcation is warranted.135 Fifth, the legislature had to determine whether the second phase of a bifurcated trial is a hearing or a trial and whether all of the Washington Rules of Evidence apply.136 Finally, although a jury will now decide whether facts exist to support a finding of an aggravating circumstance, those facts must be "substantial and compelling" to warrant an exceptional sentence. Accordingly, the legislature had to decide whether judges, based on their considerable experience, or the jury, based on its common knowledge and possibly expert testimony, should make that determination.137 The remainder of this article analyzes the legislature’s response to those issues and whether the legislature or the courts may need to reevaluate that response.

IV. WASHINGTON CORRECTLY ADOPTED THE BIFURCATED TRIAL MODEL BUT FAILED TO INCLUDE PROTECTIONS THAT ENSURE THE SYSTEM IS FAIR TO PROSECUTORS, VICTIMS, AND THE ACCUSED.

In order to comport with the requirements of Blakely and to protect the policy considerations addressed by the existing sentencing guidelines, the Washington Legislature correctly adopted the bifurcated trial model. Although this legislative response successfully solves some of the issues outlined above, it creates significant constitutional concerns regarding the rights to a fair and speedy trial that must be addressed by the legislature.138

Section A suggests that the legislature failed to protect the constitutional right of defendants to a fair trial because it allows bifurcation for only four of the more than forty aggravating factors that are recognized by S.B. 5477. Despite the legislature’s short-sighted recognition of aggravating factors that may warrant bifurcation, section B recognizes that the legislature appropriately made the list of aggravating factors exclusive rather than illustrative. Section C asserts that although the legislature correctly required that all aggravating factors be alleged prior to trial or a guilty plea, it did not address how a court should handle new evidence of

135. S.B. 5477 allows bifurcation "if the evidence supporting the aggravating fact is not part of the res gestae 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." S.B. 5477 § 4(3). See also infra Part IV.D.

136. S.B. 5477 is silent on this issue. See also infra Part IV.E.

137. S.B. 5477 requires that the judge determine whether substantial and compelling reasons justify an exceptional sentence. S.B. 5477 § 3. See also infra Part IV.F.

138. The Washington Supreme Court recently held that the SRA was facially constitutional in the wake of Blakely. State v. Hughes, Nos. 74147-6, 75053-0, 75063-7, 2005 WL 851137, at *5 (Wash. Apr. 14, 2005). The court held that "because there is at least one way in which RCW 9.94A.535 can be applied constitutionally, it cannot be declared facially unconstitutional." Id.
an aggravating factor that emerges during trial and the implications that such a process may have on a defendant’s right to a speedy trial. Section D argues that, at the discretion of the judge, bifurcated trials should be available in all trials that involve an aggravating factor if evidence to support the aggravating factor is not part of the res gestae of the underlying crime, would not be otherwise admissible, and would be unfairly prejudicial to the defendant. Section E asserts that the legislature should have required that the Washington Rules of Evidence be applied to the second phase of a bifurcated trial. Finally, Section F argues that the legislature should have required that both the judge and jury determine whether the aggravating circumstances are sufficiently substantial and compelling to warrant an exceptional sentence.

A. The Legislature Failed to Protect the Constitutional Rights of Defendants by Arbitrarily Limiting the Availability of Bifurcated Trials To Four of the Forty-Plus Aggravating Factors.

The purpose of having a bifurcated trial is to protect a defendant’s constitutional right to a fair trial because Blakely requires that a jury now hear evidence of aggravating factors. The problem is that such evidence is, without question, very inflammatory and will often evoke the jury’s passion and prejudice—after all, it is evidence showing the egregious nature of the underlying crime. Before Blakely, a jury did not hear this evidence because evidence of aggravating factors is not usually relevant to the elements of the charged crime and is very prejudicial. For example, the fact that a defendant knew his assault victim was pregnant, an aggravating factor, is not relevant to the elements of assault. However, such evidence would undoubtedly prejudice the jury. Not many jurors can be fair when told that a defendant is accused of attacking a woman whom he knew was pregnant. Unless such evidence is admissible to prove elements of the underlying crime, it should not be admitted during the guilt phase of the trial.

Accordingly, subject to a judge’s discretion, bifurcation should be available for all aggravating factors. However, S.B. 5477 arbitrarily limits the availability of bifurcation to only four of the forty-plus aggra-

139. Washington Rule of Evidence 403 provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” WASH. R. EVID. 403.


141. S.B. 5477 section 4(3) states the following:

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 state alleges the aggravating circumstances listed in RCW 9.94A.535(3)
vating factors listed in that bill. In other words, evidence of aggravating factors will be admissible during the guilt phase of most trials. This arbitrary limitation applies even if a trial judge feels that bifurcation is necessary to protect a defendant’s constitutional right to a fair trial. The legislature may have been concerned about the fiscal impact of providing bifurcated trials, but that concern seems disingenuous given the very small number of exceptional sentences that are contested in Washington each year.

It is easy to foresee the unfairness of this limitation, namely, that it will result in the conviction of innocent defendants. For example, the following aggravating factors are not eligible for bifurcated trials: the crime involved multiple victims; the crime was committed against a Good Samaritan; the crime was committed against a woman who the defendant knew was pregnant; or the crime was a rape that resulted in pregnancy.

A rape that results in pregnancy illustrates the significant problem created by S.B. 5477’s arbitrary limitation of bifurcated trials. If a defendant is falsely accused of such a crime, S.B. 5477 requires that the jury hear facts regarding the pregnancy when deciding whether that defendant was guilty of rape. Pre-Blakely, such evidence was inadmissible during the guilt phase of the trial because it is irrelevant to the elements of rape and highly prejudicial. But now, as a result of Blakely and S.B. 5477’s arbitrary limitation, such evidence must be shown to the jury when it determines guilt. Bifurcation would eliminate the potential prejudice created by that evidence, but S.B. 5477 precludes bifurcated trials for crimes that involve that aggravating factor.

(e)(v), (h)(i), (e), 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 gestae 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.

142. S.B. 5477 § 3(3).
143. S.B. 5477 section 3(3) restricts a judge’s ability to order a “separate proceeding” (that is, bifurcation) to “one of these aggravating circumstances.” However, “these aggravating circumstances” refers to only the four factors listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (e), and (t).
144. See supra note 112 and accompanying text.
145. S.B. 5477 § 3(3)(d)(i).
146. S.B. 5477 § 3(3)(w).
147. S.B. 5477 § 3(3)(c).
148. S.B. 5477 § 3(3)(i).
149. S.B. 5477 section 4(3) states the following: “Evidence regarding any facts supporting aggravating circumstances . . . shall be presented to the jury during the trial of the alleged crime . . . .”
150. S.B. 5477 limits a judge’s ability to order a bifurcated trial to only four of the more than forty aggravating factors. See S.B. 5477 § 4(3); supra note 143.
The purpose of a bifurcated trial is to protect a defendant’s constitutional right to a fair trial because *Blakely* requires that a jury hear evidence of aggravating factors that may be unfairly prejudicial. Accordingly, bifurcation should be available in all cases where a judge determines it is needed to protect a defendant’s constitutional rights.

**B. The Legislature Correctly Made the List of Aggravating Factors Exclusive Rather Than Illustrative.**

Justice Scalia noted that making a list of aggravating factors illustrative rather than exclusive was “immaterial” to the Court’s holding in *Blakely*. As the Washington Supreme Court has interpreted the Washington Constitution to provide the same protection as the Sixth Amendment, the *Blakely* decision offered little guidance to the Washington Legislature as to whether the list of aggravating factors must be illustrative or exclusive. However, because prosecutors are now solely responsible for charging a defendant with aggravating factors, their discretion is critically important and must be sufficiently restrained.

History provides a good starting point for the legislature’s analysis. During May 14–15, 1982, the original Sentencing Guidelines Commission discussed whether “any further direction [should] be provided to the judge and the Court of Appeals regarding departure from the range?” The Commission discussed two options: 1) whether it should create an advisory list of aggravating factors to guide the discretion of judges or 2) whether it should merely note “the need to reserve departure for the truly exceptional case” and “[a]fter a year, analyze the justifications used for departures” to determine whether it was necessary to “adopt a list of appropriate and/or inappropriate factors at that time.” The Commission ultimately chose the first option, as evidenced by the illustrative list in the SRA.

However, the Commission’s discussion that day sheds light on the important issue of whether the list of aggravating factors should be exclusive or illustrative. While both the King County Prosecuting Attorney

151. 124 S. Ct. 2531, 2538 (2004) (“The State tries to distinguish *Apprendi* and *Ring* by pointing out that the enumerated grounds for departure in its regime are illustrative rather than exhaustive. This distinction is immaterial.”).
153. S.B. 5477 converts the illustrative list of aggravating factors in RCW 9.94A.535 to an exclusive list. S.B. 5477 § 3(3) (“The following circumstances are an exclusive list of [aggravating] factors that can support a sentence above the standard range.”).
154. SENTENCING GUIDELINES COMMISSION, OFFICIAL MEETING MINUTES 38 (May 14–15, 1982) (a bound copy of these minutes is available at the law library of the Seattle University School of Law) [hereinafter SENTENCING GUIDELINES COMMISSION MINUTES].
155. Id.
Norm Maleng and King County Superior Court Judge Joseph Coleman stressed their belief that the list should be advisory and non-exclusive, each agreed that the list would “help restrain the judges from going outside the guidelines on inappropriate factors” and would “help focus judicial discretion.”157 Snohomish County Superior Court Judge Paul Hansen agreed that a list was needed and that relying on the courts of appeal to generate a list “will take a long time and in the meantime, create a great deal of uncertainty.”158 Justice Charles Johnson “said that if a list is used, it will invite appeals” but indicated his belief that there would not be any problems in the appellate review if the judges merely followed the language in the statute.159

The need for discretionary restraint on prosecutors is arguably greater after Blakely because a prosecutor’s initial charging decision will determine what aggravating factors are alleged at trial.160 Some of the factors used to justify exceptional sentences in 2003 illustrate why limits on that discretion is needed. For example, the “[s]entence will promote respect for the law” and the “[d]efendant is a threat to the community” were cited as justifications for sentence enhancements in 2003.161

Furthermore, more than twenty years after the SRA was adopted,162 the legislature was likely satisfied that the statutory list of factors was broad enough to eliminate the original concern that the list be sufficiently comprehensive. To ensure that this concern was addressed,163 the legislature identified many of the common law factors that have emerged164

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157. SENTENCING GUIDELINES COMMISSION MINUTES, supra note 154, at 38–39.
158. Id. at 39.
159. Id. at 40.
160. See supra Part III.B (discussing Mr. O'Toole's charging decision in State v. Dunn).
161. STATISTICAL SUMMARY OF ADULT FELONY SENTENCING, supra note 102, at 43–44.
162. Informal guidelines have been used by Washington courts and prosecutors since the late 1970s and those guidelines were considered by the Sentencing Guidelines Commission when it developed its original proposals. BOERNER, supra note 71, at 2-25.
163. An exclusive list could pose a significant problem in cases where the facts do not meet one of the statutory factors, but create a level of severity that public policy would recognize as sufficient to impose an exceptional sentence. See O'Toole Interview, supra note 6. Additional factors were created by common law to address conduct overlooked by the previously illustrative list. Id.
164. For example, in 2003 the following non-statutory aggravating factors were cited by judges as reasons for imposing an exceptional sentence: “[s]eriousness of the offense/more egregious than the typical”; “[m]ajor economic offense substantially greater than typical for the offense”; “[r]apid recidivism”; “[d]rug offense - quantity substantially larger than personal use (dealing)”; “[c]riminal history score greater than 9 points”; “[s]ophisticated and well planned methods (not an economic or drug offense)”; “[l]injuries were greater than necessary for the crime”; “[d]efendant violated zone of privacy”; “[c]ontinuing criminal activity after arrest or while on probation or parole”; “[d]efendant showed no remorse”; “[w]eapons were present”; “[e]xcessive alcohol or drug use”; “[i]nability to conform conduct to requirements of the law”; “[t]he crime caused extreme emotional damage to the victim”; “[t]he defendant committed the offense to cover up other criminal behavior”; “[d]efendant is a threat to the community”; and “[s]entence will promote respect for the law.” STATISTICAL SUMMARY OF ADULT FELONY SENTENCING, supra note 102, at 43–44.
since the passing of the SRA and incorporated those factors into the revised statutory list. 165

An exclusive list also provides for greater accountability among prosecutors 166 and will reduce the chance of "new" aggravating factors running afoul of the real facts doctrine. 167 Additionally, an exclusive list will serve the purpose of providing citizens with advance notice of conduct that may trigger an exceptional sentence and will reduce the possibility of a defendant receiving such a sentence for conduct that the legislature did not believe provided sufficient grounds for an exceptional sentence. 168

C. The Legislature Correctly Required That All Aggravating Factors Be Alleged Prior to Trial or the Entering of a Guilty Plea But Did Not Address How Courts Should Handle New Evidence That Emerges at Trial.

All the facts and circumstances which constitute the offense . . . stated with such certainty and precision, that the defendant . . . may be enabled to determine the species of offence they constitute, in order that he may prepare his defense accordingly . . . and that there may be no doubt as to the judgment which should be given, if the defendant be convicted. 169

Because of the Blakely decision, a prosecutor must now persuade a jury, not a judge, that an aggravating factor exists. As such, the prosecutor’s charging decision will have a substantial impact on what aggravat-

166. See generally BOERNER, supra note 71, at 2-29 (discussing the increased accountability in plea bargaining that resulted from adoption of the sentencing guidelines).
167. RCW 9.94A.530 codifies the real facts doctrine and makes it clear that "[f]acts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided for in RCW 9.94A.535(2)(d), (e), (g), and (h)." WASH. REV. CODE § 9.94A.530 (2004). In other words, the prosecutor may not seek an exceptional sentence for conduct that could be punished under a more serious crime or a different crime. See also State v. Wakefield, 130 Wash. 2d 464, 475-76, 925 P.2d 183, 189 (1996) ("A trial court may not impose a sentence based on the elements of a more serious crime that the State did not charge or prove."); State v. Coffey, No. 29129-1-II, 2003 WL 21916384, at *2 (Wash. App. Apr. 12, 2003) ("Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the presumptive sentence range."); review denied, 151 Wash. 2d 1014, 89 P.3d 712 (2004). But see State v. Tierney, 74 Wash. App. 346, 351, 872 P.2d 1145, 1148 (1994) ("[A]t sentencing, the trial court is not prohibited from considering those facts closely connected to the circumstances underlying the charged offense simply because they also establish elements of additional uncharged crimes."); cert. denied, 513 U.S. 1172 (1995).
168. An exclusive list may create a political problem for prosecutors. Because a longer list has been created, prosecutors may face the prospect of having to address the concerns of victims and law enforcement officers who believe a defendant's conduct satisfies one of the new factors but the prosecutor has decided not to pursue the aggravating factor due to considerations other than the desire for a harsher sentence (that is, plea bargaining, requisite resources, and so on).
169. J. ARCHIBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES 44 (15th ed. 1862).
ing factors are pursued. 170 Given the Court’s recognition in Blakely of the immaterial and merely semantic distinction between aggravating factors and elements, and given Washington’s protection of the right to timely notice, 171 the legislature correctly required that all aggravating factors be alleged prior to trial or prior to the entering of a guilty plea. 172

Early notice will ensure that defendants are sufficiently aware of the full punishment that they may face if they choose not to plea bargain and go to trial. 173 Additionally, early notice serves the interests of the State by providing defendants an additional incentive to enter into a plea agreement and by ensuring that prosecutors give thought and reflection to whether an exceptional sentence is appropriate. 174 These benefits are particularly important given the role of plea bargaining in cases where an exceptional sentence is imposed. 175 Furthermore, because the second

170. See O’Toole Interview, supra notes 117–124 and accompanying text (discussing Mr. O’Toole’s charging decision in State v. Dunn).

171. “Any analysis of the reach of the Sixth Amendment and Washington Const[itution] art. 1, § 22 (amend. 10) should begin with the minimum requirement that all essential elements of a crime, statutory and nonstatutory, must be included in the charging document so as to apprise the defendant of the charges against him and to allow him to prepare his defense.” State v. Hopper, 118 Wash. 2d 151, 155, 822 P.2d 775 (1992); see also WASH. CONST. art. 1, § 22 (“In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him . . . .”).

172. S.B. 5477 states that “[a]t 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.” S.B. 5477 § 4, 59th Leg., Reg. Sess. (Wash. 2005).

173. Prior to the enactment of the SRA, the decision to seek enhancements was at the discretion of the prosecuting attorney. Under the SRA, the discretion to impose an exceptional sentence is vested solely in the sentencing judge. BOERNER, supra note 71, at 9-58. Although Professor Boerner argues that “the possibility of an exceptional sentence always exists, and notice of that fact is inherent in the statutory provisions which create the possibility,” this argument rejects the contention that such unchecked discretion is in fact sufficient notice under a due process analysis. Id. Moreover, as Professor Boerner notes:

There is no reason, however, why a prosecutor who intends to advocate the existence of substantial and compelling circumstances should not inform the defendant of that fact. . . . Providing notice of that decision to the defense attorney and the defendant will avoid the need to litigate the constitutionality of not providing notice and will assist in insuring that all parties are fully prepared to present their positions at sentencing hearing.

Id. at 9-58.

174. “Hopefully prosecutors will seek exceptional sentences only after consideration and reflection, and thus their decision will occur before the time of the sentencing hearing.” BOERNER, supra note 71, at 9-59.

175. Out of 490 cases in which a court mitigated the defendant’s sentence in 2003, the following reasons were given: “[a]ll parties agreed to mitigated sentence” (318 times); and “[p]art of a mitigated plea agreement” (118 times). STATISTICAL SUMMARY OF ADULT FELONY SENTENCING, supra note 102, at 41-42. Assuming no overlap in these reasons, plea bargaining appears to have played a role in 89 percent of cases where an exceptional sentence was mitigated. Out of 628 cases in which a court imposed an exceptional sentence for an aggravating factor in 2003, the following plea-bargain initiated reasons were given: “[d]efendant agreed to prison, greater sentence, or treatment” (527 times); “[t]he sentence was the result of a plea” (92 times); and the sentence was “[p]art
phase of a bifurcated trial will require additional time and resources of the court, early notice allows the judge to begin the second phase of the trial immediately after a guilty verdict.

It is unclear whether changing the current statutory list of factors from illustrative to exclusive will provide defendants with sufficient notice so that a prosecutor could choose to delay notice until after the first phase of the trial. In other words, does an exclusive list of aggravating factors provide sufficient notice\(^{176}\) of the factors that might apply in the defendant’s case? It would seem that fairness (and possibly due process) mandates that the second phase be suspended until the defendant has had sufficient time to prepare a defense to those factors alleged by the prosecutor.\(^{177}\) And given that a prosecutor must allege the material elements of the crime that a defendant has allegedly committed,\(^{178}\) it seems that the prosecutor must also allege the particular aggravating factors that a defendant’s conduct has allegedly fulfilled.

Although a reviewing court liberally construes the charging document, finding sufficient notice if the necessary elements are found by “fair construction” of that document,\(^ {179}\) the nature of aggravating factors (they are factual reasons for imposing a harsher punishment) suggests that the mere factual description of the defendant’s conduct, combined with an exclusive list of factors, does not give the defendant sufficient notice of the aggravating factors that will be pursued in his case.\(^ {180}\) Although the aggravating factor must address conduct that is separate from the underlying crime, a defendant may have a difficult time preparing a

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\(^{176}\) Washington requires that a defendant be clearly notified of the charges, including the material elements and the essential supporting facts, so that the defendant “will be able to prepare and mount a defense at trial.” State v. McCarty, 140 Wash. 2d 420, 425, 998 P.2d 296, 299 (2000); see also State v. Hopper, 118 Wash. 2d 151, 155, 822 P.2d 777 (1992).

\(^{177}\) See McCarty, 140 Wash. 2d at 425, 998 P.2d at 299.

\(^{178}\) Id.

\(^{179}\) Id.; Hopper, 118 Wash. 2d at 156, 822 P.2d at 778 (noting that courts should be guided by “common sense and practicality” in construing such language and that “[e]ven missing elements may be implied if the language supports such a result”).

\(^{180}\) For example, in Hopper, the Washington Supreme Court noted that dismissal is proper when the charging instrument “fail[s] to set forth the essential elements of a crime in such a way that the defendant is notified of both the illegal conduct and the crime with which he is charged.” 118 Wash. 2d at 155, 822 P.2d at 778.
defense by essentially guessing which aspects of her conduct might give rise to an aggravating factor. Notice of the specific aggravating factors to be pursued may appear redundant to the prosecutor, but such notice would undoubtedly assist the defendant in preparing an adequate defense.

The most significant problem with requiring that all aggravating factors be alleged prior to trial will be the emergence of evidence at trial that would support a non-alleged aggravating factor. If the prosecutor attempts to amend the charge to include a new aggravating factor, the defendant could claim that she did not have sufficient notice to prepare a defense or that she has been deprived of her right to a speedy trial. S.B. 5477 does address this situation.

Two exceptions could solve this problem. First, as the Court mentioned in Blakely, if the new evidence is separate from the underlying crime, such as evidence of perjury, the prosecutor would be free to bring a new and separate charge against the defendant for that crime. Although the policy in favor of judicial economy might militate against this approach, the limited number of exceptional sentences in Washington suggests that the impact would be minimal.

Second, if new evidence arose in a bifurcated trial, the prosecutor could simply provide notice to the defendant during the first phase of the trial so that the defendant has sufficient time to prepare a defense to the newly charged factor. Given that the list of aggravating factors is fairly short and fairly definitive, and that a defendant will usually know whether evidence of a new aggravating factor may emerge at trial, it seems that justice would not require a significant delay. For example, if it emerged at trial that the defendant knew the victim of a violent offense was pregnant, an aggravating factor under the existing guidelines, the defendant would need little time to prepare a sufficient defense. In those cases where new evidence emerges that is of sufficient surprise or com-

181. This concern may be of less importance in Washington because S.B. 5477 limits the availability of bifurcation to only four of the more than forty aggravating factors. See supra notes 141 and 142 and accompanying text.
182. "The reason that a notice requirement was not included is that an exceptional sentence is a possibility in every sentencing under the SRA. To require that each defendant be given notice of that ever-existent potentiality would be redundant." Boerner, supra note 71, at 9-58.
183. Whether the addition of aggravating factors at trial will raise speedy trial concerns must be addressed by the legislature. If aggravating factors are now viewed as analogous to elements of the underlying crime, then the right to a speedy trial should apply; however, if they are not viewed as analogous to elements of the underlying crime, but merely sentencing factors, then the right to a speedy trial should not apply.
185. Boerner Interview, supra notes 12, 112.
plexity, a delay in the second phase may merely be a cost of complying with Blakely.

New evidence of an aggravating factor during a non-bifurcated trial raises an interesting dilemma that is not addressed by S.B. 5477. Although a judge might suspend the trial so the defendant could adjust his defense to account for the new aggravating factor, and a prosecutor would be free to amend the charging document to reflect the new factor,\(^{187}\) that solution seems unworkable because the defendant might be constantly faced with dodging aggravating factors. Additionally, a defendant could be given the incentive to disclose aggravating evidence at trial in the hope of winning some delay. Although the defendant would expose herself to a higher sentence, in some cases the delay may be sufficiently advantageous to the defense.\(^{188}\)

In order to protect the State's interest in reaching a punishment that matches the defendant's conduct, and in order to protect the defendant's right to timely notice and an adequate defense, the legislature should have allowed prosecutors to plead all aggravating factors for which they have a good faith basis to believe can be demonstrated at trial.\(^{189}\) If the prosecutor sits on evidence that is eventually used to add an aggravating factor, the legislature should have provided discretion for a judge to prevent such an amendment to the charges.\(^{190}\) However, in cases where the majority of evidence that supports an aggravating factor emerges for the first time at trial, the legislature should have provided a provision that allows the prosecutor to amend the charge against the defendant, but also allows the defendant sufficient time to prepare a defense to the amended charge.\(^{191}\)

\(^{187}\) Assuming the amendment would not violate the defendant's right to a speedy trial. See U.S. CONST. amend. VI.

\(^{188}\) For example, a defendant might be willing to expose herself to a harsher sentence if the subsequent delay provided an opportunity to develop a defense to damaging or unsuspected testimony that emerged at trial.

\(^{189}\) Shortly after the SRA was adopted, Professor Boerner indicated that "[i]n a series of interrelated standards, the Act instructs prosecutors to file charges which are realistic and which they intend to pursue to conviction . . . . The practice of filing charges with the intent that they be routinely reduced in return for a plea of guilty is expressly disapproved." BOERNER, supra note 71, at 1-3.

\(^{190}\) S.B. 5477 appears to acknowledge such judicial discretion by providing that "[a]t 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." S.B. 5477 § 4(1), 59th Leg., Reg. Sess. (Wash. 2005).

\(^{191}\) S.B. 5477 appears to preclude such an amendment by restricting the prosecutor to aggravating factors that are alleged "[a]t any time prior to trial or entry of the guilty plea." S.B. 5477 § 4(1).

In order to ensure that judges have the discretion to order bifurcated trials when needed to protect a defendant's constitutional right to a fair trial, the legislature should have allowed judges to order bifurcation when evidence to support the aggravating factors (1) is not part of the res gestae of the underlying crime, (2) would not otherwise be admissible, and (3) would be unfairly prejudicial to the defendant during the guilt phase of his trial. The first two elements are fairly straightforward: If evidence was relevant and admissible during the guilt phase of a trial before Blakely, bifurcation is unnecessary. But the third element, whether that evidence is unfairly prejudicial, is a more difficult question.

The determination of "unfair prejudice" should not be analogous to a prejudicial determination under Rule of Evidence 403 because highly prejudicial evidence will be at its probative peak when used to prove the existence of an aggravating factor. Unfortunately, this is exactly the approach used by S.B. 5477.192

For example, if a defendant is accused of violently assaulting a woman that he knows is pregnant (an aggravating factor193) evidence that the defendant knew the victim was pregnant is very probative of that aggravating factor. But that same evidence is highly inflammatory. However, if a judge must determine whether that evidence is "unfairly prejudicial" under Washington Rule of Evidence 403, many judges would deny the defendant's motion for a bifurcated trial because the evidence is highly probative of the aggravating factor, and that probative value is not substantially outweighed by the potential prejudice of that evidence to the defendant. Although Rule 403 works well when eliminating cumulative prejudicial evidence or restricting the way a party proves an element, it is not appropriate for determining whether a prosecutor can bootstrap evidence that is only relevant to an aggravating factor and not to an actual element of the underlying crime.

192. S.B. 5477 states the following: "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 gest[a]e of the charged crime, if the evidence is not otherwise admissible in [the] 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." S.B. 5477 § 4(3).

193. This example is truly a hypothetical because S.B. 5477 does not allow a judge to order a bifurcated trial if the defendant is charged with this aggravating factor. See S.B. 5477 §§ 3(3)(e), 4(3).
Rather than rely on an analogy to Rule 403, the legislature should have allowed a judge to order a bifurcated trial if it is necessary to protect the defendant’s constitutional right to a fair trial that is implicit in our notions of due process.194 Although the “too prejudicial” standard may be too ambiguous, at least judges would have the discretion to order bifurcation when they feel justice so requires.

E. The Legislature Should Have Required That the Rules of Evidence Apply to the Second Phase of a Bifurcated Trial.

Although the Washington Rules of Evidence do not currently apply to evidence presented during a sentencing hearing,195 the legislature should have required that the Rules apply to the second phase of a bifurcated trial.196 The Blakely decision represents an acknowledgement by the United States Supreme Court that any increase in a defendant’s punishment deserves procedural protections, regardless of the forum that gave rise to that punishment. The fact that Washington’s pre-Blakely system allowed a sentencing judge to decide disputed facts by a preponderance of the evidence,197 rather than beyond a reasonable doubt as required by Blakely,198 illustrates the outdated rationale that has likely led to the rejection of the Rules of Evidence during sentencing hearings. The legislature had an opportunity, similar to the opportunity it grasped199

194. For example, Kansas, which has adopted a bifurcated trial approach, allows a judge to order bifurcation if it is “in the interest of justice.” KAN. STAT. ANN. § 21-4718(b)(4) (2003).
196. S.B. 5477 does not specifically address whether the Washington Rules of Evidence apply to the second phase of a bifurcated trial. The language of S.B. 5477 does not refer to the second phase as a “trial” but as a “separate proceeding.” See S.B. 5477 § 4(3)(4).
197. RCW 9.94A.530 limits the information that may be considered for the imposition of an exceptional sentence to the following: [N]o more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence.
198. Blakely v. Washington, 124 S. Ct. 2531, 2543 (2004) (holding that “every defendant has the right to insist that the prosecutor prove to a jury all the facts legally essential to the punishment”).
199. See BOERNER, supra note 71, at 3-15 (comparing the sentencing process before the SRA, where an administrative body determined sentencing, there was no right to an attorney for indigents, there was no evidentiary standard, and defendants were required to receive only part of the information used for sentencing, with the requirements of the SRA, which replaced the administrative body with a superior court judge, provided a right to an attorney during sentencing for indigents, required
with the enactment of the SRA, to improve the procedural and evidentiary protections afforded to criminal defendants when they are charged with an aggravating factor. Ensuring that the Rules of Evidence apply to the second phase of a bifurcated trial would help provide such protection.

Introduction of the Rules of Evidence is justified for a variety of reasons. First, the Rules ensure that a jury makes its determination on the most reliable evidence and not on passion or prejudice. Because a judge has already determined that a concern for prejudice required a bifurcated trial, and because these cases involve conduct that the legislature has identified as sufficiently egregious to warrant an exceptional sentence, the protections afforded by the Rules of Evidence are needed to ensure fairness and neutrality. At a minimum, the legislature should have required that evidence during the second phase be both reliable and relevant.

Second, applying the Rules of Evidence to both phases would ensure that a prosecutor does not attempt to withhold evidence from the first phase of the trial, hoping that the evidence will be admitted during the potentially less-restrictive second phase. Similarly, if the Rules of Evidence do not apply to the second phase, a prosecutor might be encouraged to seek a bifurcated trial in order to avoid the Rules of Evidence that will apply in non-bifurcated trials.

Finally, as the Blakely case illustrates, the finding of an aggravating factor can dramatically increase a defendant’s sentence, and sufficient protections should be afforded to ensure such sentences are justifiably imposed. It seems starkly unfair that the Rules of Evidence would govern the evidence in a case where no aggravating factors are alleged, but would not apply to cases where such factors are alleged and the defendant faces more severe punishment. Given that the defendant’s liberty

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200. However, as discussed supra note 111, a defendant who attempts to exclude evidence pursuant to Rule 403 faces a difficult task considering that prejudicial evidence will be at its probative peak when it is used to prove the existence of an aggravating factor during the second phase of a bifurcated trial.

201. State v. Bell, 116 Wash. App. 678, 684, 67 P.3d 527, 530 (2003) ("The rules of evidence do not apply to sentencing proceedings."), see also WASH. R. EVID. 1101(c)(3). But see State v. Pollard, 66 Wash. App. 777, 784–85, 834 P.2d 51, 54 (1992) ("Evidence admitted at a sentencing hearing must nevertheless meet due process requirements, such as providing the defendant an opportunity to refute the evidence presented, and requiring that the evidence be reliable.").

202. For example, at the initial "prejudice hearing" the prosecutor could dramatize minimally prejudicial evidence in order to convince the judge that bifurcation was needed.

203. Blakely, 124 S. Ct. at 2535 (noting that the underlying crime carried a maximum punishment of fifty-three months, but the judge imposed an additional thirty-seven months based on the aggravating factors).
interest is equally substantial during both phases of a bifurcated trial, there is no reason the same protections should not apply to both.

F. The Legislature Should Have Required That Both the Judge and the Jury Determine Whether the Aggravating Circumstances Are Sufficiently Substantial and Compelling to Deserve an Exceptional Sentence.

A question remains as to whether the judge or the jury should decide if a particular aggravating circumstance deserves an exceptional sentence.204 The SRA requires that a court generally impose a sentence within the standard sentence range.205 However, a court may impose an exceptional sentence for reasons that are substantial and compelling206 and that are separate from those used to compute a standard range sentence under the guidelines.207 The SRA provides a list of aggravating and mitigating factors “which the court may consider in the exercise of its discretion to impose an exceptional sentence.”208 Historically, any reasons given by the court for enhancing a crime must relate to the crime and make it more, or less, egregious.209 In other words, although Blakely requires that the jury find facts that establish the existence of an aggravating factor, the question remains as to whether that circumstance is exceptional—whether it is sufficiently substantial and compelling to justify an exceptional sentence.210 Although Washington’s pre-Blakely system allowed the judge to make that determination, the Blakely court did not address whether the judge can still make that determination.211

History provides another starting point for this analysis. The official minutes from meetings of the first Sentencing Guidelines Commission

204. S.B. 5477 leaves this decision with the court. S.B. 5477 § 3, 59th Leg., Reg. Sess. (Wash. 2005) (“The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.”).
206. § 9.94A.535.
208. § 9.94A.535.
210. RCW 9.94A.535 provides that a judge may impose an exceptional sentence if, considering the aggravating factors, the judge believes that “there are substantial and compelling reasons justifying an exceptional sentence.” § 9.94A.535. As such, although there may be evidence that a defendant’s conduct meets one or more of the aggravating factors, the judge may decide that the conduct is not sufficiently “substantial and compelling” to warrant an exceptional sentence. See id.
211. Justice Scalia noted in the Blakely decision the following:
Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts require a sentence enhancement or merely allow it, the verdict alone does not authorize the sentence.
provide a glimpse into the reasoning for the substantial and compelling language. The Commission meeting minutes of December 6, 1982 provided the following:

George Finkle recommended that the phrase "for substantial and compelling reasons" be added to the first paragraph so it would read, "if the court finds for substantial and compelling reasons that sentencing within the standard range . . . ." Mr. Finkle explained that this phrase would send a clear and serious message to the judges of the expected standard and a direction that the normal practice would be to sentence within the range.212

Although Mr. Finkle's motion failed,213 the minutes from a subsequent Commission meeting on January 3, 1983, indicate that Norm Maleng proposed the "substantial and compelling" language again because "the present language is silent on the burden of proof, an omission which the term 'substantial and compelling' would solve. In addition, he believes the present language is adequate for going below the range but the language for departing upwards may be too restrictive." 214 The previous standard was apparently whether the defendant was a “risk to public safety," which Donna Schram believed was too broad and focused on future behavior, not the defendant's criminal act.215 Pete Clarke disagreed, indicating that he believed the language would narrow judicial discretion and make clear that a judge "should be very careful when departing."216 The new "substantial and compelling" language was passed unanimously by the Commission.217

As a final check on the new post-Blakely power of the jury and the prosecution, the legislature was apparently tempted to empower judges to solely determine whether a defendant's conduct was substantial and compelling,218 however, the Committee's deliberations suggest that the substantial and compelling language was included as an evidentiary

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212. SENTENCING GUIDELINES COMMISSION MINUTES, supra note 154, at 7.
213. Id.
214. Norm Maleng proposed language that "[t]he court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purposes of this act, that there are substantial and compelling reasons justifying an exceptional sentence." SENTENCING GUIDELINES COMMISSION MINUTES, supra note 154, at 4.
215. Id.
216. Id. at 4–5.
217. Id.
218. And the legislature has done so with S.B. 5477: "The legislature intends that the sentencing court will then decide whether or not the aggravating fact is a substantial and compelling reason to impose greater punishment." S.B. 5477 § 1, 59th Leg., Reg. Sess. (Wash. 2005); see also S.B. 5477 § 3 ("The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.").
standard, not as a purely legal standard. Furthermore, although Justice Scalia did not address whether the judge or jury must make the substantial and compelling determination, the question of whether a defendant’s conduct meets that standard is arguably a factual question whose answer is used to increase a defendant’s sentence. In other words, Blakely may very well require that the jury make that determination, too.\(^\text{219}\)

Despite the foregoing legislative history and the uncertainty surrounding the dictates of Blakely, the legislature should ensure that the trial judge keeps a check on the newfound power of the jury and the prosecution by requiring that both the judge and the jury make findings that the defendant’s conduct was sufficiently substantial and compelling to warrant an exceptional sentence. The judge can find, as a matter of law,\(^\text{220}\) that the evidence was not sufficient to justify the imposition of an exceptional sentence. A judge can rely upon his or her own experience, as well as comparing facts from other cases, to determine whether a given crime was truly substantial and compelling. The legislature could have also required that an appellate court provide a certain amount of deference to the trial judge’s determination that a defendant’s conduct was not sufficiently compelling. Given the extremely prejudicial information that will be revealed to the jury during cases where aggravating factors are alleged, it seems only fair that a judge, who has likely been exposed to the types of unpleasant facts that give rise to the pursuit of an exceptional sentence, plays a role in determining whether a particular crime is truly exceptional. Providing judges with the authority to make a final check on the “exceptional” finding will ensure that judges are not fully excluded from the sentencing process and that the system continues to benefit from their experience and perspective.

\(^{219}\) The prospect of such a determination raises yet another issue. In theory, the legislature could require that the prosecutor present an expert witness, perhaps a retired judge or prosecutor, who declares that the robbery committed by the defendant was the worst out of a thousand robberies of which that expert is aware. The defense would then be obliged to present its own expert who would testify that the defendant’s robbery was bad, but not so “substantial and compelling” as to warrant an exceptional sentence. But requiring expert witnesses would be costly to the State, which must bear the cost of the prosecutor’s unlimited budget, may be unfairly cost-prohibitive to defendants with private counsel, and would likely be prejudicial to indigent defendants who are represented by a public defender, given their limited resources for experts. And in those cases that involve indigent defendants, the State would bear the cost of the expert for both the prosecution and the defense.

\(^{220}\) See State v. Nordby, 106 Wash. 2d 514, 518, 723 P.2d 1117, 1119 (1986) (recognizing that RCW 9.94A.210(4)(a) “requires the appellate court to independently determine, as a matter of law, if the sentencing judge’s reasons justify the imposition of a sentence outside the presumptive range . . . ”) (emphasis added); see also State v. Gore, 143 Wash. 2d 288, 315, 21 P.3d 262, 277 (2001) (recognizing that, under RCW 9.94A.210(4), an appellate court may reverse an exceptional sentence if “as a matter of law an exceptional sentence is not justified by the reasons . . . ”).
V. CONCLUSION

Faced with the substantial dilemma that *Blakely v. Washington* created for its sentencing system, the Washington Legislature faced the task of adopting new procedures that address *Blakely* but respect the policy considerations that gave rise to the existing sentencing guidelines system. Although the judicial advisory model may have provided judges more discretion within sentencing, it would have taken illusory steps to address the racial and socioeconomic sentencing disparity that the current system alleviated, it would have removed any predictability in plea bargaining, and it would have rendered sentencing determinations nearly unreviewable. The bifurcated trial model suggested by this article, on the other hand, retains the structure of the current guidelines and comports with *Blakely* by ensuring that a jury determines all of the facts that form the basis for a defendant’s punishment. By providing for bifurcation, the prosecution is able to present all of its evidence to the jury, and the defendant is guaranteed that prejudicial evidence is barred from the trial of the underlying crime.

In order to protect the constitutional right of all defendants to a fair trial, the legislature should have made bifurcation an option for all trials that involve an aggravating factor; however, the legislature failed to do so. To control the discretion exercised by the prosecutor in determining what facts justify the imposition of an exceptional sentence, the legislature properly updated the list of aggravating factors and made the new list exclusive. In order to comply with the notice requirement of due process and to expedite the possibility of a plea bargain, the legislature correctly required that the prosecution allege all aggravating factors before trial or before entering a guilty plea, but should have allowed the prosecution to amend the initial charge with additional factors if the majority of evidence that supports a new factor emerged at trial. Because the probative value of evidence that supports an aggravating factor is now substantial, but still highly prejudicial, the legislature should have allowed judges to order bifurcation when the evidence would not have been admissible pre-*Blakely* and when justice so requires. The Washington Legislature failed to do so. To ensure fairness and neutrality, the legislature also should have required that the Washington Rules of Evidence apply to both phases of a bifurcated trial. And to ensure that not all judicial discretion is eliminated from the sentencing process, the legislature should have required that both the judge and the jury determine whether a defendant’s conduct is so substantial and compelling that it deserves an exceptional sentence. Such a system would comport with the mandates of *Blakely* while ensuring that the evolved system is fair to victims, to prosecutors, and to the accused.