NO. 42509-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

V.

Michael Smith

Appellant.

FILED
COURT OF APPEALS
DIVISION II
2012 JUL 23 AM 9:26
STATE OF WASHINGTON
BY DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PEIRCE COUNTY

STATEMENT OF ADDITIONAL GROUNDS

Michael Smith

Clallam Bay Correction Center
1830 Eagle Crest Way apt # B-G-11 c 992874
Clallam Bay, Wa, 98326

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COURT OF APPEALS
DIVISION Two
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. M. Smith (your name) Appellant.	)	No. 42509-2-II STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

I, Michael Smith, have recieved and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional grounds for Review when my appeal is considered on the merits.

Additional Ground 1

"See Attached Briefing"

A. ASSIGNMENTS OF ERROR

1 1. The imposition of a sentence of life without the possibility of parole based upon the
2 trial court's determination by a preponderance of the evidence that Mr. Smith had two
3 prior convictions that qualify as "most serious offenses" violated his right to due process
4 and a jury determination of every element of the crime beyond a reasonable doubt.
5 U.S. Const. amends. VI, XIV.
6 2. The imposition of a sentence of life without the possibility of parole based upon the
7 trial court's determination by a preponderance of the evidence that Mr. Smith had two
8 prior convictions that qualify as "most serious offenses" violated his right to equal protection
9 of the law. U.S. Const. amend. XIV.
10
11
12
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR
13
14
15 1. A defendant has a Sixth Amendment right to a jury trial and a Fourteenth Amendment
16 right to proof beyond a reasonable doubt of every fact that authorizes an increase
17 in punishment. Did the sentencing court violate Mr. Smith's constitutional rights by
18 imposing a sentence of life without the possibility of parole based on the courts own
19 finding, by a preponderance of the evidence, that Mr. Smith had twice before been
20 convicted of most serious offenses?
21 2. A statute implicating a fundamental liberty interest violates the Equal Protection Clause of
22 the Fourteenth Amendment if it creates classifications that are not necessary to futher a
23 compelling government interest. The government has an interest in punishing repeat offenders
24 more harshly than first-time offenders, but for some crimes, the existence of prior convictions
25 used to enhance the sentence must be proved to a jury beyond a reasonable doubt, and for others
26 - like those at issue in the Persistent Offender Accountability Act - the existence of prior convictions
27 used to inhance the sentence need only be proved to a judge by the preponderance of the evidence.
28 Does the Persistent Offender Accoutability Act violate the Equal Protection Clause by providing
29 lesser procedural protections than other statutes whose purpose is the same?

ARGUMENT

1. The court violated Mr. Smith's Sixth Amendment right to a jury trial and the Fourteenth Amendment right to proof beyond a reasonable doubt by imposing a life sentence based on the courts finding, by a preponderance of the evidence, that Mr. Smith had twice previously been convicted of "strike" offenses.

(a.) Under the Sixth and Fourteenth Amendments, a defendant has a right to a jury determination and proof beyond a reasonable doubt of any fact that increases his maximum sentence. The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of a crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The Sixth Amendment provides the right to a jury in a criminal trial. U.S. Const. amend VI; Blakely V. Washington, 542 U.S. 296, 298, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In combination, these constitutional clauses guarantee the right to have a jury find, beyond a reasonable doubt, every fact essential to punishment-whether or not the fact is labeled an "element." Apprendi V. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

> It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the perscribed 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.

Id.

> Any possible distinction between an "element" of a felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgement by court as it existed during the years surrounding our nation's founding. Accordingly, we have treated sentencing factors, like elements, as facts have to be tried to the jury and proved beyond a reasonable doubt.

Washington V. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L.Ed 2d 466 (2006).

Here, the prior convictions found by the court increased Mr. Smith's sentence to life without the possibility of parole and were thus elements of the offence which were required to be proved to a jury beyond a reasonable doubt.

(b.) Mr. Smith had the constitutional right to have a jury determine beyond a reasonable doubt that he committed the two prior "strike" offenses because they increased his maximum sentence. Absent the court's finding, by a preponderance of the evidence, that he committed "strike" offenses on two prior occasions, Mr Smith would not have been subject to a sentence of life without the possibility of parole. The jury verdict alone does not support a life sentence. Because the facts used to impose the sentence were not found by a jury beyond a reasonable doubt, Mr. Smith's Sixth and Fourteenth Amendment rights were violated.

The state may argue that the facts that increased Mr. Smith's sentence fall within a "prior conviction exception." See Apprendi, 530 U.S. at 489. This argument overlooks important distinctions and developments in United States Supreme Court jurisprudence.

First, the Supreme Court has implicitly overruled the case on which this supposed exception was based, Almendarez-Torres V. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).[1] In Apprendi, the Court recognized that there was no need to explicitly overrule Almendares-Torres in order to resolve the issue before it, but stated, "it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested. 530 U.S. at 489. The Apprendi Court described Almendares-Torres as "at best an exceptional departure" from the historic practice of requiring the State to prove to a jury beyond a reasonable doubt. each fact that exposes the defendant to an increased penalty. Apprendi, 530 U.S. at 487-

-1- Mr. Smith understands that the Washington Supreme Court has declined to apply Apprendi in the context of prior conviction enhancements until the United States Supreme Court explicitly overrules Almendarez-Torres. State V. Smith, 150 Wn. 2d 135, 143, 75 P.3d 934 (2003); State V. Wheeler, 145 Wn.2d 116, 117, 34 P.3d 799 (2001). Mr. Smith respectfully contends the time to do so has arrived and urges this Court to take the first step. See, eg., State V. Anderson,

1 112 Wn. App. 828, 839, 51 P.3d 179 (2002). (Court of Appeals need not follow Washington
2 Supreme Court decisions that are inconsistent with cited United States Supreme Court
3 opinions.
4 - Justice Thomas, a member of the 5-justice majority in <u>Almendarez-Torres</u>, later changed
5 his mind. His <u>Apprendi</u> concurrence was a dissertation on the historical practice of requiring
6 the State to prove every fact, "of whatever sort, including the fact of a prior conviction," to
7 a jury beyond a reasonable doubt. <u>Apprendi</u>, 530 U.S. at 501 (Thomas. J., concurring).
8 As Justice Thomas noted, "a majority of the Court now recognizes that <u>Almendarez-</u>
9 <u>Torres</u> was wrongly decided." <u>Shepard V. United States</u>, 544 U.S. 13, 27, 125 S.Ct. 1254,
10 161 L.Ed.2d 205 (2005). (Thomas. J.. concurring).
11 Even if <u>Almendarez-Torres</u> has precedential value, it is distinguishable on several grounds
12 First, in <u>Almendarez-Torres</u>, the defendant had admitted the prior convictions. 530 U.S. at
13 488. Mr. Smith did not admit his prior convictions. Second, the issue in <u>Almendarez-Torres</u>
14 was the sufficiency of the charging document, not the right to a jury trial or proof beyond a
15 reasonable doubt. <u>See Apprendi</u>, 530 U.S. at 488; <u>Almendarez-Torres</u>, 523 U.S. at 247-48.
16 Third, <u>Almendarez-Torres</u> dealt with the "fact of a prior conviction." <u>Apprendi</u>, 530 U.S. at
17 490. But it was not the simple "fact" of the prior convictions that increased Mr. Smith's punish-
18 ment; it was the "types" of prior convictions that mattered. In order to impose a life sentence
19 under the POAA, the State must prove the defendant has been convicted of "most serious"
20 offences on two prior occasions. R.C.W. 9.94A.030 (37); R.C.W. 9.94A.570. Fourth, the
21 <u>Almendarez-Torres</u> court noted the fact of prior convictions triggered an increase in the
22 maximum permissive sentence: "The statute's broad permissive sentencing range does not itself
23 create significantly greater unfairness" because judges traditionally exercise discretion within broad
24 statutory ranges. 523 U.S. at 245. Here, in contrast, the alleged prior convictions led to a
25 mandatory sentence of life without the possibility of parole, a sentence much higher than the
26 top of the permissive standard range. R.C.W. 9.94A.570. Accordinaly, even if <u>Almendarez-</u>
27 <u>Torres</u> were still good law, it would not apply here.
28 In a recent Division Two case Judge Quinn-Brintnall recognized that the U.S. Supreme

Court precedent requires the State to prove prior "strike" offenses to a jury beyond a reasonable doubt. State v. Mckague, 159 Wn. App. 489, 525-35, 246 P.3d 558 (Quinn-Brintnall. J., concurring in part and dissenting in part) review granted and affirmed on other grounds, 172 Wn.2d 802 (2011). Although the Washington Supreme Court has rejected the argument Mr. Smith makes here, Judge Quinn-Brintnall noted that subsequent U.S. Supreme Court cases clarified the meaning of the Sixth and Fourteenth Amendment rights set forth in Apprendi and invalidated our state's intervening caselaw. Mckague, 159 Wn. App. at 530 (Quinn-Brintnall, J., dissenting) (citing Blakely, 542 U.S. at 303-04, and Cunningham V. California. 549 U.S. 270, 281-88, 127 S.Ct. 856, 166 L.Ed 2d 856 (2007).

Under recent U.S. Supreme Court cases, the "prior conviction exception does not apply in cases where the trial court wishes to impose a sentence in excess of the statutory maximum without a supporting jury verdict." Id. at 535. This Court, like Judge Quinn-Brintnall, should follow U.S. Supreme Court presedent and hold that prior "strike" offenses must be proved to a jury beyond a reasonable doubt.

(c) Because the life sentence was not authorized by the jury's verdict, the case should be remanded for resentencing within the standard range. The jury did not find beyond a reasonable doubt the facts necessary to support the sentence of life without the possibility of parole imposed upon Mr. Smith. The imposition of a sentence not authorized by the jury's verdict requires reversal. State V. Williams-Walker, 167 Wn. 2d 889, 900, 225 P.3d 913 (2010) (reversing sentence enhancement where jury not asked to find facts supporting it, even though overwhelming evidence of firearm use was presented). Mr. Smith's sentence must be reversed and remanded for the imposition of a standard-range sentence.

2. The classification of the persistent offender finding as a "sentencing factor" that need not be proved to a jury beyond a reasonable doubt violates the Equal Protection Clause of the Fourteenth Amendment.

(a) Because a fundamental liberty interest is at stake, strict scrutiny applies to the classification at issue. The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated alike with respect to the law. U.S. Const. amend. XIV; Plyler V.

1 Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). When analyzing
2 equal protection claims, courts apply strict scrutiny to laws implicating fundamental liberty
3 interests. Skinner V. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).
4 Strict scrutiny means the classification at issue must be necessary to serve a compelling
5 government interest. Plyler, 457 U.S. at 217.
6 The liberty interest at issue here - physical liberty - is the prototypical fundamental right;
7 indeed it is the one embodied in the text of the Fourteenth Amendment. "The most elemental of
8 liberty interests [is] in being free from physical detention by one's own government." Hamdi V.
9 Rumsfeld, 542 U.S. 507, 529, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004).
10 Thus, strict scrutiny applies to the classification at issue. Skinner, 316 U.S. at 541; Cf.
11 In re the Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002) (applying strict
12 scrutiny to civil-commitment statute in face of due process challenge, because civil commitment
13 constitutes "a massive curtailment of liberty").
14 (b.) Under either strict scrutiny or rational bases review, the classification at issue here violates the
15 Equal Protection Clause. Notwithstanding the above rules, Washington courts have applied
16 rational basis scrutiny to equal protection claims in the sentencing context. Manussier, 129 Wn.
17 2d at 672-73. Under this standard, a law violates equal protection if it is not rationally related
18 to a legitimate government interest. City of Cleburne V. Cleburne Living Center, 473 U.S. 432,
19 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).
20 Although the proper standard of review is strict scrutiny, the result of the inquiry is the same
21 regardless of the lens through which the Court evaluates the issue. Under strict scrutiny or
22 rational bases review, the classification at issue here violates the Equal Protection Clause because
23 it is neither necessary to serve a compelling government interest nor rationally related to a
24 ligitimate government interest. Our legislature has determined that the government has an interest
25 in punishing repeat criminal offenders more severeley than first-time offenders. For example.
26 defendants who have twice previously violated no-contact orders are subiect to significant increase in
27 punishment for a third violation. R.C.W. 26.50.110(5); State V. Oster, 147 Wn.2d 141, 146,
28 52 P.3d 26 (2002). And defendants who have twice previously been convicted of "most serious"

(strike) offenses are subject to a significant increase in punishment (life without parole) for a third violation. R.C.W. 9.94A.030(37); R.C.W. 9.94A.570. However, courts treat prior offenses that cause the significant increase in punishment differently simply by labeling some "elements" and others "sentencing factors". Where prior convictions which increase the maximum sentence available are classified as "elements" of a crime, they must be proved to a jury beyond a reasonable doubt. For example, a prior conviction for a felonu sex offense must be proved to a jury beyond a reasonable doubt in order to punish a current conviction for communicating with a minor for immoral purposes as a felony. State V. Roswell, 165 Wn. 2d 186, 192, 196 P.3d 705 (2008). Similarly, two prior convictions for violation of a no-contact order must be proved to a jury beyond a reasonable doubt in order to punish a current conviction for violation of a no-contact order as a felony. Oster, 147 Wn.2d at 146, And the State must prove to a jury beyond a reasonable doubt that a defendant has four prior DUI convictions in the last ten years in order to punish a current DUI conviction as a felony. State V. Chambers, 157 Wn. App. 465, 475, 237 P.3d 352 (2010). In none of these examples has the legislature labeled these facts as elements; the courts have simple treated them as such. But where, as here, prior convictions which increase the maximum sentence available are classified as "sentencing factors", they need only be proved to the judge by by a preponderance of the evidence. State V. Smith, 150 Wn. 2d 135, 143, 75 P.3d 934 (2003) (two prior strike offenses need only be proved to a judge by a preponderance of the evidence in order to punish current strike as third strike), cert. denied. 541 U.S. 909 (2004).

Just as the legislature has never labeled the facts at issue in Oster, Roswell, or Chambers "elements", the legislature has never labeled the fact at issue here a "sentencing factor". Instead in each instance it is an arbitrary judicial construct. This classification violates equal protection because the government interest in either case is exactly the same: to punish repeat offenders more severely. See R.C.W. 9.68.090 (elevating "penalty" for communication with a minor for immoral purposes based on prior offense); R.C.W. 46.61.5055 (person with four prior DUI convictions in last ten years "shall be punished under R.C.W. ch. 9.94A"); Thorne, 129 Wn.2d at 772 (purpose of POAA is to "reduce the number of serious, repeat offenders by tougher sentencing").

If anything, there might be a rational basis for requiring proof of prior conviction to a jury beyond a reasonable doubt in the "three strikes" context but not in other context, because the punishment in the "three strikes" context is the maximum possible (short of death). Thus it might be reasonable for the Legislature to determine that the greatest procedural protections apply in that context but not in others. However, it makes no sense to say that the greater procedural protections apply where the necessary facts only marginally increase punishment, but need not apply where the necessary facts result in the most extreme increase possible. As an example, if a person is alleged to have a prior conviction for first-degree rape, the State must prove that conviction to a jury beyond a reasonable doubt in order to use the conviction to increase the punishment for a current conviction for communicating with a minor for immoral purposes - even if the prior conviction increases the sentence by only a few months. Roswell, 165 Wn.2d at 192. But if the same person with the same alleged prior conviction for first-degree rape is instead convicted of rape of a child in the first degree, the state need only prove the prior conviction to a judge by a preponderance of the evidence in order to increase the punishment for the current conviction to life without the possibility of parole. R.C.W. 9.94A.030(37)(b)(two strikes for sex offenses); R.C.W. 9.94A.570; Smith, 150 Wn.2d at 143. This is so despite the fact that the defendant is the same person, the alleged prior conviction is the same, and the alleged prior conviction is being used for precisely the same purpose in either instance: to punish the person more harshly based on his recidivism.

A similar problem of arbitrary classifications caused the Supreme Court to invalidate a persistant offender statute for violating the Equal Protection Clause in Skinner, 316 U.S. at 541. Like the statute at issue here, the Oklahoma statute at issue in Skinner mandated extreme punishment upon a third conviction for an offence of a particular type. Id. at 536. While under Washington's act the extreme punishment mandated is life without the possibility of parole, under Oklahoma's act the extreme punishment was sterilization. Id. The Court applied strict scrutiny to the law, finding sterilization implicates a "liberty" interest even though it did not involve imprisonment. The statute did not pass strict scrutiny because three convictions for crimes such as embezzlement did not result in sterilization while three strikes for crimes such as larceny did. Id. at 541-42. Acknowledging that a legislature's classification of crimes is normally due to a certian level of

1 of deference, the court Court declined to defer in this case because:

2 We are dealing here with legislation which involves one of the basic civil
3 rights of man. ... There is no redemption for the individual whom the law
4 touches. ... He is forever deprived of a basic liberty.

5 Id. at 540-41. The same is true here. Being free from physical detention by one's own government
6 is one of the basic civil rights of man. Hamdi. 542 U.S. at 529. The legislation at issue here forever
7 deprived Mr. Smith of this basic liberty; it subjected him to life in prison without the possibility
8 of parole. It did so based on proof by only a preponderance of the evidence, to a judge and not a jury-even
9 though proof of prior convictions to enhance sentences in other cases must be proved to a jury beyond a
10 reasonable doubt. As the Supreme Court explained in Apprendi: "merely using the label 'sentence-
11 enhancement' to describe [one fact] surely does not provide a principled basis for treating [two facts]
12 differently." Apprendi. 530 U.S. at 476. But Washington treats prior convictions used to enhance
13 current sentences differently based only on such labels. See Roswell. 165 Wn.2d at 192. "The equal
14 protection clause would indeed be a formula of empty words if such conspicuously artificial lines
15 could be drawn." Skinner. 316 U.S. at 542. This court should hold that the trial judge's imposition
16 of a sentence of life without the possibility of parole, based on the court's finding of the necessary
17 facts by a preponderance of the evidence, violated the equal protection clause. The case should be
18 remanded.

19

20 Grounds Three

21 The only issue on appeal is whether the defence counsel's vacation
22 leave may constitute adequate grounds under CrR 3.3(f)(1) for
23 continuance, see

24

25 Speedy Rights.

State V Sauders, 220 P. 3d 1238, 153 Wash. App 209 (Wash.
26 App. Div 2 (11-17-2009)
27 State V Kenyon 216 P. 3d 1024, 167 Wash. 2d 130 (Wash
28 (10-01-2009)

Grounds four

1. The jury instruction to be complete as to consequences of,
2. a defendant's not testifing, it should include the compulsion
3. aspect, i.e, the "not compelled compulsion
4. "not compelled to testify) element U.S.C.A. aspect, i.e, the
5. Const Amendment "5")
6. Criminal law 854 (4)
7. That instruction given orally by the court with respect to,
8. a defendants not testifying wasn't included at written
9. instructions, which went to jury room.
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<Additional Grounds {5

Come's now, Michael Smith #[illegible] /now/ under the Washington State Court Appeal's rule, review start at ⊛

① Now since defendant was impose with violation of ineffectewce assistance under Strickland V Washington 104 S. Ct 2052 because when reviewing this ruling of Strickland 104 S. Ct 2052 it's well seen that my Attorney impose defendant under a major US constitution 6th Amendment violation, by allowing this to go without being corrected.

② under Giglio V united State 405 U.S 150 31 L Ed. 2d 104, 92 under the due Process Clause, a new trial is required in criminal case if false testimony introduced by the State and allowed to go uncorrected, when it appeared, could in any reasonable likelihood have affected the judgment of the Jury.

③ under U.S. V. Estrella 567 F 2d 1151 the 9th cir. The interest of the Party seeking disclosure tends to be strongest when information in question is highly relevant, helpful, and unavailable from other sources so when the defendant Attorney did'nt object (or) make objection for the record's wee's again a violation under ineffectewce assistance US constitution (and)

④ a defendant is entitled to have his guilt determined on the evidence against him without being Prejudiged by what happen to other's US constitution 14th Amendment.

(5)

the deprivedment of a fundamental right to a fair trial and the defendant Attorney didn't make a (or) any Objection on the records it was a major Violation under < Attorney (and) client Relationship.

1.4 6.4. / 6.22 / 6.23 / 6.25 / 7.1 / 7.2 / 7.14
7.18 / 7.19 / 7.20 / 7.51 / 7.53 / 8.3 / 5.6 / 5.9

4/8

(7) The court explained in < US. V Agrus 427 U.S. 97 104) a fair analysis the of holding indicates that implicit in the requirement of materiality is a concern that the suppressed evidence would have affected the outcome of the trial)

< Equal Protection Due Process of law >

(8) since the defendant was deprived of constitutional right fundamental under Rule 7.1 Procedures before sentencing was violated & 3.2 was violated US Constitution) 5th 14th Amendment

(9) since the defendant was impose unto such violation under US constitution 8th / 14th Amendment, due to Rule 7.5 Grounds for reversed and vacated of sentence, was violated supported by < STRICKLAND -V- WASHINGTON 104 S. Ct. 2050 when co-defendant was place on the stand to testify against his co-defendant for a lesser sentence inwhich was a major violation of a fundamentally to fairness and equal Protection of law and due Process of law, under US constitution 14th Amendment rights

(10) defendant was impose unto a major violation of Equal Protection discrimination (Schweike v Wilson 450 U.S. 221, 230

(14)

The defendant has been impose unto violation since i defendant was'nt given fairness under Equal Protection and discrimination under Schweike v Wilson 450 U.S. 221, 230

(15)

The defendant was the impose unto the violation under U.S. V. Agurs 427 U.S 97 104 (1976) a fair analysis of the holding indicate that implicit in the requirement of materiality is a concern that the suppressed evidence would have affected the outcome of the trial

(13)

the defendant has been imposed to major violation recieved

and suppored by Brady V Maryland 373 US 83, 87 (1963)

the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment.

the issue in the present case concerns the standard of materiality to be applied in determining whether a conviction should be reversed because the prosecutor failed to disclose requested evidence that could have been use to impeach Gov. witness.

< VERBATI TRANSCRIPT of Proceedings >

< violation >

(1) the defendant has been impose with a violation under criminal rule 4.7 a to fairness under US Constitution 14th Amendment due process & equal protection of law

(2)

the defendant was refeusing to recognize an exception for clear constitutional violation

(3) defendant was impose unto violation criminal 3-6 Suppression hearing Proof issue authorized of Proof of Proving ever element's beyond a reasonable doubt us constiti

(4) defendant was impose unto a violation under doe v us 51 F 3d 693 7th cir, defendant seeking to vacate sentence is entitled to evidentiary hearing on his claims if he alleges fact that if Proven would entitled him to relief,

Page 1

Grounds Six

Verbatim transcript of proceedings

Agre

Examinations
7-25-2011

Witness Cody A Davis "credibility" is "inevitably suspect and unreliable!"

Let it, be shown on, Page 440, lines 7 to 10 (Checreter) not trusted by, brother

Page 441, Showing drugs has aways been issue with witness. Lines 18 to 25

Page 442 Showing that he could have wanted to get even with Mr Handsem for asking him to leave. Lines 9 to 13

Page 443 Who was Cody Davis fighting, in Mr Handsome residence, one of the reasons, he took the stand. See lines, 21 to 25

Page 445, Make's claims, he was unclear about anything that happen, on that night but at the same time, he want the Jury to take his word. See: Lines 1 to 12

* Once again, he unclear about that night? see lines 18 to 19

Page 447, One must ~~a~~ ask themself how can Mr Davis, recall this matter Clearly ~~of~~ but page 445, he isn't at all.

Clearly sound like this person has perjury him self.

Grounds six

Page 451. Did Cody. D and D. Handsom plan to break into the house? see lines 8 to 18

Page 451. Cody claims that he and someone called "Jim" was at the same house the night th matter took place. as, he told Mr Jordan

Page 454. Cody tell the court that Mr Smith wasn't Part of any of his plans! See lines 1 to 5

Page 459. Mr Davis has no idea, why Mr Smith was in Mr Handsom car that night. See lines 21 to 25 and also Page 460. lines "1"

Page 462. Mr Davis make claim he got out of the car and went right to door to kick it, "In"! See lines 7 to 10

Page 454. Mr Davis claims that he knocked on the door and then, said hey Bill, let me, in. "but" also kick in door at the same time not? See lines 6 to 19?

Page 151. Mr Edmiston, tells the Jury that Mr Davis returne to trailer after leevin Pierce County City Building, what really happen? See lines 19 to 25

Page 153. Mr Edmiston, clearly only see one person get out of Car. See lines 24 to 25

Page 154. Mr Davis want the court to believe that, he kick in the "back door" to the trailer but, Mr Edmiston said, on page 154. See lines 9 to 14

Page 3

Page 462. Cody claims on page 462, line 7 [line 4 and], he got out of car first and was asked who got out next.

Answer. "He yell out, I kicked in the back door, and Michael Smith had came in house behind me." This go's beyound the scope of quetion.

Page 154. Once again please take time to read, lines 8 to 16
Q. Who was the individuel recognized, as the big guy? also see page 160. lines 21 to 25

Grounds Six

Q. Why would, Mr Handsom come thur front door
Page 462. if back door was open? See lines: 17 to 21

Page 462 Mr Davis, testimony is that Mr Smith and Mr Handsom enter the house but no, one else! See. lines 15 to 20

Q. Who came running down hall with Cody D?
Redirect Examination By Mr Olberrtz

Page 469. Cody D, says he pled guilty to second-degree burglary, not first-degree burglary. See lines 22 to 23. Also see lines 12 to 19.

We must examine whether the co-defendants credibility is an issue because he testified and whether his exculpatory story was plausible?

Pagell

Page 470. Once again Mr Davis is asked by, Ms Hauger or told, you pled to burglary 2 with the enhancement. See lines 11 to 16.

Page 469. Ask yourself, if Mr Davis did'nt get, a lighter sentence in exchange for his testimony. See lines 22 to 24

Page 471. Cody D, tells the Jury, he's being release in 13 days left as, of 7-25-2011. See lines 1 to 3

Q What enhancement are given to cases with firearms and do enhancements run together with sentence. See Page 469. lines 18 to 20

Arguments similar in case law!

"Fill in case law."

Q. If the state can tell us, why Mr Davis was offer, a plea agreement for the lesser of burglary 1, to burglary 2 and claims there was firearm enhancement but everyone can clearly see, that on, page 469 lines 22 to 25 now on page 471, see 1-3. from 8-8-2010 to 7-25-2011, what is the state and Mr Davis talking about see page 470, lines 11 to 17 ???

What

?° Q In this case, who was the state after?

If the state can please tell us, how, is it Mr Davis was offer, a burglary 2 without, any firearm enhancement with 15 months max, the first one offer, a plea agreement but at the same time never, offer; any plea like into the same to others, on same case?

* Grounds Six

Case Law

Federal Reporter 2d Series

United States V. Bernerd

Cite as 625 F. 2d. 854 (1980)

3. Criminal law 824 (7)

Where there are multiple reason justifying jury instruction regarding credibility of accomplice testimony, such as circumstances that accomplice was paid informant, was drug addict, and was not prosecuted in return for agreement to testify, it is better to give jury instruction on credibility of accomplice testimony combining such reasons.

[1] In United States V Davis, 9th Cir, 1971, 439 F. 2d 1105.

We held that refusal to give special instructions on the testimony of an accomplice when that testimony is important to the case can be prejudicial error. There the defendant's guilt rested almost entirely on the testimony of the accomplice, and the other evidence linking the defendant to the criminal activity was weak.

Here it is true that there was other evidence about the activities of Bernerd, but it dealt entirely with the methylamine, the can in which it was carried around, and the retrieval of the can by Bernard and another man.

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All of these activities were lawful.
They became relevant as being preliminary to the planned manufacture of methamphetamine only because of the testimony of "may," on the basis of which the jury could have found that these otherwise lawful activities were part of a scheme to commit unlawful acts.

Accomplice testimony is "inevitably" suspect and unreliable.

Bruton v. U.S., 1968, 391 US 123, 136, 88 S.ct. 1620, 1628, 20 L.Ed 2d 476,

See also On Lee v. United States, 1952 343 U.S. 747, 757, 72 S.ct. 967, 973, 96 L.Ed. 1270;

Crawford v. United States, 1909, 212 U.S. 183, 203-204, 29 S.Ct. 260, 267-268, 53 L.Ed. 465.

Failure to instruct the jury in the manner requested was prejudicial error and requires reversal in this case.

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2. constitutions violation of equal protection of the law of
3. due process and should be reversed and discharge with
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5. without. and impose for re sentence but vacated.
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7. DATED: 7/29/12
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9. Respectfully submitted,
10. Mr Michael Smith
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DECLARATION OF SERVICE BY MAIL
GR 3.1(c)

I, Michael Smith, declare that, on this 19th day of July, 2012 I deposited the forgoing documents:

Statement of Additional Grounds

or a copy thereof, in the internal legal mail system of

And made arrangements for postage, addressed to: (name & address of court or other party.)

	Melody Crick
Court of Appeals, Div II	Pierce County Prosecutor
950 Broadway, Suite 300	930 Tacoma Ave S. Rm 946
Tacoma, WA. 98402-4454	Tacoma, WA. 98402-2171

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Clallam Bay, WA. (City & State) on 7/19/12 (Date)

[signature]
Signature

Michael Smith
Type / Print Name