# Case # 30466-3

## Statement of Additional Grounds For Review

## State of Washington
## v.

## Joe Anthony Mata

# COPY

NO. 30466-3-III

Court of Appeals

State of Washington

Division III

STATE OF WASHINGTON
Plaintiff/Respondent
v.
Joe Anthony Mata
Defendant/Appellant

# Appelants Additional Grounds

Joe A. Mata #845894

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )
)
Respondent, )
)
v. )
)
Joe A. Mata )
(your name) )
)
Appellant. )

Yakima County No. 09-1-01475-8

No. 30466-3-III

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

I, Joe A. Mata, have received 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

State Failed to establish Sufficient Foundation For admission of the recorded Phone calls. tapes authenticity was not established. and all speakers were not identified. Material Facts relevant to Robbery case. Requirements For admission admission of such a tape/recording are set Forth in State v. Williams 49 Wn. 2d 354, 360, 301 P.2d 769 (1956), quoting and adopting the rule set down by the Georgia Court in Solomon, Inc. V. Edgar, 92 Ga. App. 207, 88 S.E.2d 167 (1955)
(PLEASE SEE ATTACHED PAGE Additional Ground 1.)

Additional Ground 2

With respect to the "recent released" aggravator, the language proposed by the legislature Fails to provide any intelligent guidance to the Finder of Fact and as a result is vague, and can lead to Cruel and unusual punishment. When the legislature enacted the amendments to RCW 9.94A.535, imposing the Following Specific limitation on its action: The legislature does not intend the Codification of Common Law aggravating Factors to expand or restrict Currently available Statutory or common law Circumstances. (See attached Pages Additional grounds 2)

If there are additional grounds, a brief summary is attached to this statement.

Date: 7/27/12

Signature:

Form 23

## Additional Ground 1

(1) It must be shown that the mechanical transcription device was capable of taking testimony. (2) It must be shown that the operator of the device was competent to operate it. (3) The authenticity and correctness of the recording must be established. (4) It must be shown that changes, additions, or deletions have not been made. (5) The manner of preservation of the record must be shown. (6) Speakers must be identified. (7) It must be shown that the testimony elicited was freely and voluntarily made without any kind of duress.

Their was no operator of the actual device to give his or her testimony to the operation of the full recording device. There were no eyewitnessess to the material portion except myself. State failed to meet several of the Williams criteria and has failed to establish authenticity and correctness. The material in the recording of the phone call is emotive. There was no expert testimony that the mechanical devices were capable of recording; there should have been an expert to testify that both microphone and recording equipment were in operating condition. The only speaker identified in phone calls were myself. All speakers were not identified. The admission of the Phone calls violated my Sixth Amendment right to confront the witnessess against me; the issues of authenticity of the Recorded calls are inextricably intertwined with the confrontation right, and the State should have produced "a confrontable witness" who can verify and identify both callers and the accuracy of the material aspects of mechanical reproduction.

The exact requirements of the confrontation clause have not been delineated by the United States Supreme Court. See J. Cook, Constitutional Rights of the Accused, trial Rights 37 (1974); Graham, The right of confrontation

and the hearsay rule: Sir Walter Raleigh loses another one, 8 Crim. L. Bull. 99 (1972); Ashley, the uncertain relationship between the hearsay rule and the Confrontation Clause, 52 Texas L. Rev. 1167 (1974). However, the guidlines chiefly relied on by the Court in its recent decisions appear to be; (1) reliability of the testimony sought to be admitted, and (2) availability of the source. (The out of court declarant) to appear, swear, and be cross-examined. Dutton V. - Evans, 400 U.S. 74, 27 L.Ed. 2d 213, 91 S.Ct. 210 (1970); California V. Green, 399 U.S. 149, 26 L.Ed. 2d 489, 90 S.Ct. 1930 (1970)

Additional Grounds 2

(Chapter 68, Laws of 2005, Senate bill 5477, http://apps.leg.Wa.gov/documents/billdocs/2005-06/Pdf/Bills/Session%20Law%202005/5477.SL.Pdf) Prior to the enactment of RCW 9.94A.535 to include item "(t) The defendant committed the current offense shortly after being released from incarseration", this aggravating Factor was called recent recidivism. The Concepts involved in enhancing sentences for this Factor involved cases where individuals convicted of an offense were sentenced and almost immediately committed the same offense, thus clearly demonstrating their disrespect for the law, its courts and and enforcement officials. In such cases, the Court felt itself justified in imposing additional time in custody to make the point that this behavior was not acceptable.

In State V. Williams, 159 Wn. App. 298, 244 P.3d 1018 (2011), the Court noted that "During the second phase of the bifurcated trial, a King County Jail Captain testified that Williams had been released at 8:58 a.m. on September 13, 2008, and then been booked back into Jail later that same night."

His original sentence had been For assault 3°; he had just been convicted For committing the same offense less than 16 hours later. This is the same vein that the court in State V. Butler, 75 Wn. App. 47, 876 P.2d 48, (1994) Found that being released less than twelve hours earlier on a conviction For robbery indicated that a standard sentence was not an adequate punishment For a subsequent robbery. The Court concludes as Follows: Here, Butler's immediate reoffense, within hours of his release, reflects a disdain For the law so flagrant as to render him particularly culpable in the commission of the current offense.

Thus we hold that the commission of a crime shortly after release From incarceration on another offense may properly be used to distinguish that crime From others in the same category. Hence, under circumstances such as these in the present case, rapid recidivism constitutes a sufficiently substantial and compelling reason to justify the imposition of an exceptional sentence.

The legislative intent was not to change the common law that had developed around aggravated exceptional sentences. The Fact that the chose wording that was vague and standardless can only be explained in light of this intention. The cases speak about rapid recidivism and talk about very short periods of time. This case involved 44 days between release on a probation violation For not reporting and the current offenses. It was not rapid and it was nor recidivism as those words were intended by the legislature.

With all due respect to Division I of the court of appeals, the case of State v. Williams, 159 Wash. App. 298, 312-13, 244 P.3d 1018 (2011) was decided wrongly. The court sought to distinguish the Williams case From State V. Gordon 153 Wash. App. 516, 223 P.3d 519 (2009), review granted, 169 Wash. 2d 1011, 236 P.3d 896 (2010), a case in which Division I

Found that the Failure to instruct the Jury on the definition of the terms used For sentence aggravators required a reversal of the verdicts against the defendant. (The Washington Supreme Court has [redacted] since reversed the Court of Appeals, but only on the basis that the error was not Constitutional or manifest, and Counsel's Failure to bring the issue to the Court's attention precluded review. See State V. Gordon, NO. 84240-0, September 15, 2011). In My Case, the issues were litigated and the court prohibited testimony that would have Mitigated and explained the Facts behind the "recently released" language.

In addition, the Jury was not provided any guidance in their Consideration of the aggravating Circumstance. Guide discretion is Critical in the process of instructing a Jury. Without Some guidance their is no justification For a distinction between the decisions in Williams and State V. Combs, 156. Wn. App 502, 232 P.3d 1179 (2010). The Jury was provided on no legal, Factual or logical distinction between one day, one month, three months or Six months. While the appellate Court may divine Some distinction, Failure to provide the Jury with [redacted] The tools to use in Considering the relevent evidence presented (including evidence on the issue of whether or not the defendant has recently Committed the Same offense, or if the actions of defendant Constitute a Clear Statement that there is particular disregard of the law) that deserves the extra punishment). The Courts rulings during the bifurcated portion of the trial precluded the admission of this testimony. As a result, there was no evidence on which the Jury could Find anything but the Fact that I was released From Jail on June 16 and that these offenses occurred on July 28, 2009. An exceptional sentence is clearly not authorized For all [redacted] Crimes Committed when the defendant has been [redacted] In Jail in the past. Nor is it authorized For all [redacted] Crimes

when the defendant has been released from incarceration over a month from the current offense. In death penalty litigation, the 8th amendment requires that the trial court draw meaningful distinctions between crimes which deserve punishment and those for which death is an appropriate penalty. Death is the exception to the rule that a conviction for murder requires incarceration. In this case the state is seeking a sentence of 578 months, twice the standard range, accounting for enhancements.
The lesson of Blakely V. Washington, (02-1632), 542 U.S. 296, 124 S.ct. 2531; 159 L.Ed. 2d 403 (2004) (111 Wash. App. 851, 47 P.3d 149, reversed and remanded) is most concisely set forth in the court's Syllabus of it's opinion. The following bears this courts attention:
Because the facts supporting petitioner's exceptional sentence were neither admitted by petitioner nor found by a jury, the sentence violated his Sixth Amendment right to trial by jury.
(A) This case requires the court to apply the rule Apprendi V. New Jersey, 530 U.S. 466, 490, that, "[Other than the fact of a prior conviction, any] fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and ~~proved~~ proved beyond a reasonable doubt. The relevant statutory maximum for Apprendi purposes is the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by defendant. Here, the judge could not have imposed the 90-month sentence based solely on the facts admitted in the guilty plea, because Washington law requires an exceptional sentence to be based on factors other than those used in computing the standard-range sentence. Petitioner's sentence is not analogous to those upheld in McMillan V. Pennsylvania, 477 U.S. 79, and William V.

New York, 337 U.S. 241, which were not greater than what State law authorized based on the verdict alone. Regardless of whether the Judge's authority to impose the enhanced sentence depends on a Judge's Finding a Specified Fact, one of several Specific Facts, or any aggravating Fact, it remains the case that the Jury's verdict alone does not authorize the sentence.

(B) This Court's commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the Fundamental Constitutional right of Jury trial.

(C) This case is not about the constitutionality of determinate Sentencing, but only about how it can be implemented in a way that respects the Sixth Amendment. The Framers' paradigm for Criminal Justice is the Common-law ideal of limited State Power accomplished by strict division of authority between Judge and Jury. That can be preserved without abandoning determinate Sentencing and at no Sacrifice of Fairness to the defendant.

In This 8th and 6th amendment context, a bifurcated proceeding is as much a trial as any other portion of the case. It Should be the Jury's decision to permit the Court to impose an exceptional Sentence that must be protected so that the defendant's right to a Fair trial is preserved. Rubberstamping, deciding with any awareness of the parameters, and authorizing Punishment without guidance have all been Found to be unconstitutional. Furman V. Georgia, 408 U.S. 238 (1972), Gregg V. Georgia, 428 U.S. 153 (1976), Walton V. Arizona, 497 U.S. 639 and California V. Brown, 479 U.S. 538. The need to narrow the class of individuals For whom exceptional Sentences are appropriate is well established in Zant V. Stephens, 462 —

U.S. [redacted] 862 at 877 (1983). By definition and in practice aggravating circumstances considered in a bifurcated proceeding must permit the jury to make a "principled distinction between those who deserve an enhanced penalty and those who do not." Lewis V. Jeffers, 497 U.S. 764, 774 (1990). In death penalty context the holdings in Richmond V. Lewis, 506 U.S. 40, 46 (1992) ("a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty"); Clemens V. Mississippi, 494 U.S. 738, 758 (1990) ("invalid aggravating circumstance provided "no principled way to distinguish the case in which the death penalty is imposed, from the many cases in which it was not"); Maynard V. Cartwright, 486 U.S. 356 (1988) ("The construction or application of an aggravating circumstance is unconstitutionally broad or vague if it does not channel or limit the sentencer's discretion in imposing the death penalty") are relevant to the issues before this Court.

Additional Ground 3

The State chose the Assault conviction entered in Yakima County Juvenile Court in Cause # 99-8-00857-1 as the underlying felony that they would rely on to prove that I had notice of the prohibition against firearm possession. The State is well aware of the deficiencies in Juvenile Court procedure in such cases. See State V. Jorge Ruiz, Div. III Case 28265-1-III, review denied State V. Ruiz, 170 Wn. 2d 1024, 245 P.3d 775 (2011) tried before court in Yakima County Cause # 08-1-01119-0.

Subsequent to the decision in Ruiz, The Court went on record reversing many years of precedent holding

that proof of notice was not required. In State V. Breitung, 155 Wn. App. 606, at 623-24, 230 P.3d 614 (2010). There the court acknowledged the following;
that every published opinion that has addressed RCW 9.94.047(1) has observed (or relied on another case that has observed) that knowledge of the illegality of Firearms possession is not an element of the crime. That observation holds true here as well. Breitung was charged with second degree unlawful possession of a Firearm in violation of Former RCW 9.41.040(2005), which contains no such mens rea. See Former RCW 9.41.040(2)(A)(i). It is equally the case, however, that by enacting RCW 9.41.047(1), the legislature is requiring trial courts to impart such knowledge of illegality to defendants. For what would be the purpose of a mandatory provision that the convicting court give both oral and written notice of the Firearm prohibition to the defendant, if not to impart to him knowledge of the illegality?
Here, the predicate offense court's violation of RCW 9.41.047(1)'s mandate is clear. The question is what remedy is appropriate. The legislature's failure to specify a remedy permits sentencing courts (and the State) to ignore the statute's mandatory directives with impunity. Were we to turn a blind eye to the predicate offense court's failure to give RCW 9.41.047(1)'s mandatory notice, such result would render the entire statute meaningless. This we cannot do; "An appellate court 'may not interpret any part of a statute as meaningless or superfluous' " State V. Allen 150 Wash. App. 300, 322, 207 P.3d 483 (2009) (quoting State V. Lilyblad, 163 Wash. 2d 1, 11, 177 P.3d 686 (2008)). I accord with Miner's directive that " relief consistent with the purpose of the statutory requirement must be available where the statute has been violated," We hold that where a convicting court has failed to give the

mandatory notice directed in RCW 9.41.047(1) and there is no evidence that the defendant has otherwise acquired actual knowledge of the firearm possession prohibition that RCW 9.41.047(1) is designed to impart, the defendant's subsequent conviction for unlawful possession of a firearm is invalid and must be reversed. 162 Wash. 2d at 803-04, 174 P.3d 1162 (emphasis added in original footnotes removed).

Additional Ground 4

The court permitted the jury to use a single definition of the term firearm for the substantive charge, the enhancement and the unlawful possession of a firearm charge.

Additional Ground 5

The court ignored the fact that the alleged weapon had never been tested or shown to be able to fire a projectile by an explosive.

Additional Ground 6

I was denied effective assistance of counsel; experts were not hired on the issue of identification and mistakes made during trial in pre-trial motions.

Additional Ground 7

The prosecutor committed misconduct in opening and during trial by violating the court's pretrial order about "Crime Spree" evidence.

8/12/12

Case # 304663
Court of Appeals Division III

Ive Filed an additional grounds. And have sent them to My attorney who will intern send them to you. There is an issue I have about this. My attorney sent me the transcripts to my case, but they are not all there. My transcripts start From my pre-trial hearing and Trial. I Fought this case For one year and a half. I Filed Many Motions through out all this in omnibus' and other hearings. Me and My attorney had issues. I Filed ~~to~~ Motion to have him relieved From My case and was denied by a Judge. She simply Stated that we were grown men and needed to get along. even though their was trust issues. None of this is in My transcripts. and IF Yakima County did not send all transcripts, I Feel that My attorney Mr. Morgan could have not possibly been able to write a proper brief. Please Contact me soon. This is a big issue I have. Another thing in regards to My attorneys brief. I Feel that the weapon was a major Factor in the Jury's eyes. And by the prosecuter and Judge subjecting me to Double Jeopardy with this weapon. the Jury's outcome would have been entirely different if I was allowed to tell the Jury that I was acquited and Found Not guilty For possession of ~~that~~ Firearm. which was used in photos and in court as Evidence. This being said, I Feel that I ~~SH~~ deserve a new trial ~~For~~ that alone. Sincerely Respectfully Joe Meiber
#845894