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05-1-04377-8 25688370 MTMD 08-23-06

STATE OF WASHINGTON, County of Pierce ss: I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office. IN WITNESS WHEREOF, I hereunto set my hand and the Seal of said Court this day of _____, 20__
Kevin Stock, Clerk
By _____ Deputy

FILED DEPT. 9 IN OPEN COURT JUN 16 2006 Pierce County Clerk By _____ DEPUTY

SUPERIOR COURT OF WASHINGTON

COUNTY OF PIERCE

35660-1

STATE OF WASHINGTON *Plaintiff* v. CORY LAMONT THOMAS Defendant	CAUSE NO. 05-1-04377-8 MOTION TO MODIFY OR CORRECT SENTENCE AND JUDGEMENT CrR. 7.8

1. That the defendant, CORY LAMONT THOMAS, in the above entitled case.

2. That the defendant, appeared before Judge, SERGIO ARMIJO, the State being represented by, JOHN MICHAEL SHEERAN of PIERCE County prosecutors office, and defense attorney, JAMES A SCHOENBERGER representing the Defendant.

PETITIONER MAY FILE THE PETITION WITHOUT PAYMENT OF A FILING FEE
COURT CLERK 2/8/07

CERTIFICATE OF SERVICE
I certify that I mailed copies of Motion to Modify & Pros Atty
8 Feb 07
Date Signed

GROUNDS

Imposition of exceptional sentence based on "PRIOR UNSCORED MISDEMEANOR CRIMINAL HISTORY RESULTS IN A PRESUMPTIVE SENTENCE THAT IS (CLEARLY TOO LENIENT)" is invalid pursuant to the holdings in STATE V. BLAKELY 124 s. ct. at 2536 (quoting APPRENDI V. NEW JERSEY 530 US 466, 490, 120, S. ct. 2348, 147, L. ED. 2d 435 and

1) STATE V HUGHES 154 Wn. 2d at 135-137. 140 (2005)
2) STATE V SCHWABLAND NO. 53301-1-i (2005)
3) STATE V HALL NO. 54615-5-ii (2005)
4) STATE V LUCERO NO. 30666-2-ii (2005)
5) STATE V DENO NO. 32797-0-ii (2006)

ARGUMENTS

STATE V SCHWABLAND NO 53301-1-i HOLDS:

HN28= In this case the trial court based its exceptional sentence on its findings of an 'ongoing pattern of abuse involving this victim' and the 'clearly too lenient' presumptive sentence, under hughes the court lacked the authority to make these findings, the error cannot be harmless, and the remedy is to vacate and remand for resentencing within the standard range, Hughes 154 Wn. 2d at 156

HN26= A prior conviction will not alone support an exceptional sentence

STATE V HALL 54615-5-ii (2005) HOLDS:

HN30= IN State V Hughes our supreme court held that the "clearly too lenient" conclusion is a factual determination it explained that prior convictions alone can never be the basis for an exceptional sentence in Washington because prior convictions are used in calculating the presumptive sentencing range, thus where a sentencing range is clearly too lenient because of prior convictions, it is a jury determination

HN31= Because a jury did not find, and hall did not stipulate, that the standard range was cleary too lenient, the court erred by basing Halls exceptional sentence on prior convictions alone.

STATE V LUCERO NO 30666-2-ii (2005) HOLDS:

(lucero had 5 grounds for an exceptional sentence)

HN22= ground #5 (lucero) has prior history of misdemeanor convictions for domestic violence assault which were not taken into consideration in calculating the defendants offender score

HN31= WE cannot agree " Finding #5 is based on RCW 9.94A.535(2J) which permits a trial court to exceed the standard range if the 'defendants prior unscored misdemeanors or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purposes of this chapter." the operative language 'clearly too lenient' is the same as that which Hughes construed accordingly finding #5 had to be made by a jury, not a judge, it cannot support Luceros exceptional sentence, and those sentences must be reversed.

STATE V DENO NO. 32797-0-ii (2006) HOLDS:

HN16= " the Blakely court held 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 beyond a reasonable doubt' 124 Wn 2d at 2536 (quoting Apprendi V. New Jersey 530 US 466, 490, 120 S. CT. 2348 147 L. ED. 2d 435) In State V Hughes our supreme court interpreted this rule to require a jury to make the " clearly too lenient" finding. 154 Wn 2d at 137 The court reasoned that because prior convictions are already taken into account when fixing the standard range, they alone can never

be enough to warrant an exceptional sentence, there must be an additional determination that the standard range sentence would be clearly too lenient because of free crimes, the egregious effects of multiple offenses, or the level of culpability arising from multiple offenses, the court held that those are factual determinations that cannot be made by the court, Hughes 154 Wn 2d at 135-37. 140 (2005) HN18= Denos exceptional sentence is invalid, we reverse and remand for resentencing within the standard range (2006)

RELIEF

for the above mentioned reasoning and the cases cited herein it is my position that the "clearly too lenient" "fact" is to be submitted to a jury and proved beyond a reasonable doubt, in the instant case before the court defendant / petitioner moves this court to vacate the exceptional sentence imposed based on "prior unscored misdeamenors resulting in a presumptive sentence that is (clearly too lenient).Hughes 154 Wn 2d at 135-37 (2005)

while many of the cases herein are unpublished Hughes is published and the cases cited all appealed "prior unscored misdemeanors" the latest case was handed down from division two approx. 3 months ago I declare under the penalty of perjury under the laws of washington state that the foregoing is true and correct

Respectfully Submitted,

CORY LAMONT THOMAS