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I. ASSIGNMENTS OF ERROR

- 1. THE TRIAL COURT ERRED IN MISCALCULATING LARRY BRUNER'S OFFENDER SCORE.**
- 2. THE TRIAL COURT ERRED IN INCLUDING AN OREGON CONVICTION AS CRIMINAL HISTORY IN CALCULATING BRUNER'S OFFENDER SCORE.**

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

- 1. DID THE TRIAL COURT ERR IN INCLUDING LARRY BRUNER'S OREGON CONVICTION FOR SEXUAL ABUSE IN THE FIRST DEGREE IN BRUNER'S CURRENT OFFENDER SCORE CALCULATION WHEN THE CONVICTION HAD WASHED OUT IN 1986 AND COULD NOT LEGALLY BE RESURRECTED?**

III. STATEMENT OF THE CASE

Defendant Larry Lee Bruner was charged by a July 14, 2000, information with one count each of rape of a child in the second degree and child molestation in the second degree, violations of RCW 9A.44.076 and 9A.44.086 respectively. CP 1. A Clark County jury found Bruner guilty of both charges in January 2001. CP 2. A pre-sentence investigation (PSI) was completed for sentencing purposes. See Supplemental Designation for Clerk's Papers. In the criminal history portion of the PSI it notes that Bruner has a 1981 Oregon conviction for sexual abuse in the first degree. See Supplemental Designation of Clerk's Papers. It also notes that Bruner's sentence was five years of probation. The

only other reference to any criminal history is a 1998 misdemeanor in Clark County with no disposition.

At that original sentencing, the trial court found the Oregon sex abuse conviction equivalent to a Washington indecent liberties conviction. CP 19. Bruner was sentenced to life without parole as a second strike sex offender under the Persistent Offender Accountability Act. CP 6. Bruner appealed both his convictions and the comparability and use of the Oregon conviction in his criminal history and his offender score calculation. CP 16-20. This court affirmed the convictions, but reversed the sentence finding that the Oregon conviction was not on the list of Washington's applicable two-strike offenses. CP 18.

On remand, the trial court again included the Oregon conviction as criminal history and included it in the calculation of Bruner's offender score. CP 22-23. The trial court imposed an exceptional sentence upward based upon an abuse of trust. CP 25, 35. Bruner appealed the sentence. CP 36-51. This court reversed and remanded for resentencing in light of Blakely's holding that a jury must determine the facts necessary to exceed the standard range sentence. CP 36-51.

The trial court's decision on remand created this appeal. At the April 13, 2006, resentencing, the State and defense counsel agreed that Bruner had a standard range on the rape of 102-136 months and 31-41 months on the molestation and the two charges arose from the same exact facts and were thus same criminal conduct. RP 3-7, 14-17. Over Bruner's objection, the court still used the 1991 Oregon conviction as criminal history and used it in calculating his offender score. CP 53. Bruner asserted that the Oregon conviction washed out. RP 15. The trial court refused to entertain Bruner's argument. RP 20-22.

This appeal followed on May 4, 2006. CP 67-68.

IV. ARGUMENT

LARRY BRUNER'S 1986 OREGON CONVICTION WASHED OUT AND CANNOT BE USED TO CALCULATE HIS OFFENDER SCORE.

The Sentencing Reform Act of 1981 (SRA), RCW 9.94A, creates a grid of standard sentencing ranges based on the defendant's offender score and the seriousness level of the current offense. State v. Wiley, 124 Wn.2d 679, 682, 880 P.2d 983 (1994). A trial court has an obligation to determine a defendant's offender score. The trial court calculates the offender score by totaling the defendant's prior convictions for felonies and certain juvenile

offenses. Id. at 683. In making this calculation, the court may not include offenses that have “washed out” for scoring purposes. RCW 9.94A.535. To wash out a prior conviction, the defendant must be conviction-free for a specified period of time since his release from incarceration. For example, for a class C felony to wash from criminal history, the defendant must have been conviction-free for at least five years since his release from confinement on the underlying class C offense. To count in calculating an offender score, out-of-state (“foreign”) convictions must be classified according to the comparable offense definition and sentence provided by Washington law. RCW 9.94A.525(3). Foreign convictions are subject to wash out provisions. Bruner’s 1981 Oregon conviction for sexual abuse in the first degree, the equivalent of a class C felony sex offense, washed out in 1986 and should not have been included in the calculation of Bruner’s offender score.

Washington courts are to apply the definition of criminal history in effect at the time the offense was committed when calculating the sentence for that offense. In Re Per. Restraint of LaChapelle, 153 Wn.2d 1, 12, 100 P.3d 805 (2004). Bruner’s current offense was committed on May 9-10, 2000. His Oregon

offense was committed in June-August 1980 and sentenced in June 1981. CP 3. Because the Oregon offense was a class C felony and Bruner received a probationary sentence, the five-year wash out period began with the sentencing date. Consequently, Bruner's Oregon conviction washed out in June 1986 for Washington's scoring purposes.

In 1990, the Washington legislature amended the SRA to prohibit sex offense from washing out. Laws of 1990, ch.3, section 706. In 1999, the state Supreme Court was called upon to determine if sex offenses that had washed out prior to the 1990 amendment were resurrected by the amendment. State v. Cruz, 139 Wn.2d 186, 985 P.2d 384 (1999). Cruz held that the legislature intended its 1990 SRA amendment to apply prospectively. Id. at 191. As such, sex offenses that washed out prior to the 1990 amendment were not to be used in offender score calculations. The use of Bruner's 1981 Oregon conviction to increase Bruner's offender score is squarely controlled by Cruz.

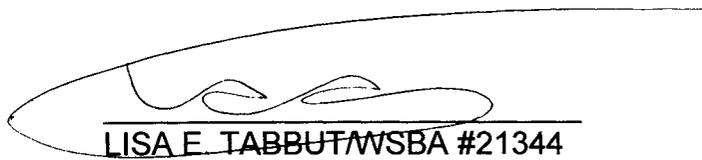
The legislature reacted to the Cruz decision in 2000 with an additional amendment to the SRA. Laws of 2000, ch. 26, sec. 2. The relevant 2000 SRA amendment stated: "any sentence imposed under this chapter shall be determined in accordance with

the law in effect when the current offense was committed." This amendment was effective June 8, 2000. Bruner's offenses occurred on May 9-10, 2000. As such, under Cruz, the Oregon conviction washed out. The trial court erred in using it in calculating Bruner's offender score.

V. CONCLUSION

Larry Bruner's sentence should be reversed and remanded for sentencing without the Oregon conviction included in the offender score.

Respectfully submitted this 13th day of December, 2006



LISA E. TABBUT/WSBA #21344
Attorney for Appellant

VI. APPENDIX OF STATUTES

RCW 9.94A.525

Offender score. (Effective until July 1, 2007.)

The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

(1) A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

(2) Class A and sex prior felony convictions shall always be included in the offender score. Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction. Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction. Serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently results in a conviction. This subsection applies to both adult and juvenile prior convictions.

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

(4) Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses.

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations;

(ii) In the case of multiple prior convictions for offenses committed before July 1, 1986, for the purpose of computing the offender score, count all adult convictions served concurrently as one offense, and count all juvenile convictions entered on the same date as one offense. Use the conviction for the offense that yields the highest offender score.

(b) As used in this subsection (5), "served concurrently" means that: (i) The latter sentence was imposed with specific reference to the former; (ii) the concurrent relationship of the sentences was judicially imposed; and (iii) the concurrent timing of the sentences was not the result of a probation or parole revocation on the former offense.

(6) If the present conviction is one of the anticipatory offenses of criminal attempt, solicitation, or conspiracy, count each prior conviction as if the present conviction were for a completed offense. When these convictions are used as criminal history, score them the same as a completed crime.

(7) If the present conviction is for a nonviolent offense and not covered by subsection (11) or (12) of this section, count one point for each adult prior felony conviction and one point for each juvenile prior violent felony conviction and 1/2 point for each juvenile prior nonviolent felony conviction.

(8) If the present conviction is for a violent offense and not covered in subsection (9), (10), (11), or (12) of this section, count two points for each prior adult and juvenile violent felony conviction, one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(9) If the present conviction is for a serious violent offense, count three points for prior adult and juvenile convictions for crimes in this category, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(10) If the present conviction is for Burglary 1, count prior convictions as in subsection (8) of this section; however count two points for each prior adult Burglary 2 or residential burglary conviction, and one point for each prior juvenile Burglary 2 or residential burglary conviction.

(11) If the present conviction is for a felony traffic offense count two points for each adult or juvenile prior conviction for Vehicular Homicide or Vehicular Assault; for each felony offense count one

point for each adult and 1/2 point for each juvenile prior conviction; for each serious traffic offense, other than those used for an enhancement pursuant to RCW 46.61.520(2), count one point for each adult and 1/2 point for each juvenile prior conviction.

(12) If the present conviction is for manufacture of methamphetamine count three points for each adult prior manufacture of methamphetamine conviction and two points for each juvenile manufacture of methamphetamine offense. If the present conviction is for a drug offense and the offender has a criminal history that includes a sex offense or serious violent offense, count three points for each adult prior felony drug offense conviction and two points for each juvenile drug offense. All other adult and juvenile felonies are scored as in subsection (8) of this section if the current drug offense is violent, or as in subsection (7) of this section if the current drug offense is nonviolent.

(13) If the present conviction is for Escape from Community Custody, RCW 72.09.310, count only prior escape convictions in the offender score. Count adult prior escape convictions as one point and juvenile prior escape convictions as 1/2 point.

(14) If the present conviction is for Escape 1, RCW 9A.76.110, or Escape 2, RCW 9A.76.120, count adult prior convictions as one point and juvenile prior convictions as 1/2 point.

(15) If the present conviction is for Burglary 2 or residential burglary, count priors as in subsection (7) of this section; however, count two points for each adult and juvenile prior Burglary 1 conviction, two points for each adult prior Burglary 2 or residential burglary conviction, and one point for each juvenile prior Burglary 2 or residential burglary conviction.

(16) If the present conviction is for a sex offense, count priors as in subsections (7) through (15) of this section; however count three points for each adult and juvenile prior sex offense conviction.

(17) If the present conviction is for failure to register as a sex offender under RCW 9A.44.130(10), count priors as in subsections (7) through (15) of this section; however count three points for each adult and juvenile prior sex offense conviction, excluding prior

convictions for failure to register as a sex offender under RCW 9A.44.130(10), which shall count as one point.

(18) If the present conviction is for an offense committed while the offender was under community placement, add one point.

(19) The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense. Accordingly, prior convictions that were not counted in the offender score or included in criminal history under repealed or previous versions of the sentencing reform act shall be included in criminal history and shall count in the offender score if the current version of the sentencing reform act requires including or counting those convictions.

[2006 c 128 § 6. Prior: 2002 c 290 § 3; 2002 c 107 § 3; 2001 c 264 § 5; 2000 c 28 § 15; prior: 1999 c 352 § 10; 1999 c 331 § 1; 1998 c 211 § 4; 1997 c 338 § 5; prior: 1995 c 316 § 1; 1995 c 101 § 1; prior: 1992 c 145 § 10; 1992 c 75 § 4; 1990 c 3 § 706; 1989 c 271 § 103; prior: 1988 c 157 § 3; 1988 c 153 § 12; 1987 c 456 § 4; 1986 c 257 § 25; 1984 c 209 § 19; 1983 c 115 § 7. Formerly RCW 9.94A.360.]

RCW 9A.44.076

Rape of a child in the second degree.

1) A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Rape of a child in the second degree is a class A felony.

RCW 9A.44.086

Child molestation in the second degree.

(1) A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the second degree is a class B felony.

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DIVISION II

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)	Clark County No. 00-1-01280-2
)	Court of Appeals No. 34804-7-II
Respondent,)	
)	
vs.)	AFFIDAVIT OF MAILING
)	
LARRY LEE BRUNER,)	
)	
Appellant.)	
_____)	

LISA E. TABBUT, being sworn on oath, states that on the 13th day of December 2006, affiant deposited in the mails of the United States of America, a properly stamped envelope directed to:

Michael C. Kinnie
Clark County Prosecuting Attorney
P.O. Box 5000
Vancouver, WA 98666

And

Larry L. Bruner/DOC# 820743
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723

AFFIDAVIT OF MAILING - 1 -

LISA E. TABBUT
ATTORNEY AT LAW

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And that said envelope contained the following:

- (1) APPELLANT'S BREIF
- (2) AFFIDAVIT OF MAILING

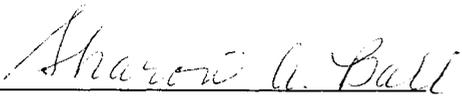
Dated this 13th day of December 2006.



 LISA E. TABBUT, WSBA #21344
 Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 13th day of December 2006.





 Sharon A. Ball
 Notary Public in and for the
 State of Washington
 Residing at Longview, WA 98632
 My commission expires 06/10/07