COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY ____
DEPUTY

STATE OF WASHINGTON Respondent, v. PATRICK BOYD DRUM (your name) Appellant.	))))))))))	No. 35326-1-II STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

I, Patrick Boyd Drum, 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

Clerical Mistakes. Page 3

Additional Ground 2

Abuse of Discretion By The Court. Page 4

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

Date: 02-24-07 Signature: Patrick Drum

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Additional Ground 3:

New Charges May Not Be Brought, If Remand Is Granted, Without Rebuttable Presumption OF Vindictiveness. Page 5

Additional Ground 4:

The Court, By Accepting The Plea Agreement, Is Bound By The Terms OF That Contract. Page 6

Additional Ground 5:

The Juvenile Burgulary 1st that was used to resentence me without DOSA can not Stand as a "prior" conviction along side the rule of lenity. Page 7

Additional Ground 6:

The Motion Argument Falls under The Scope OF The Apprendi/Blakely Constitutional Analysis In That A Non-Jury Juvenile Adjudication Can Not Be Used To Enhance An Adult Sentence And Should Be Submitted As A Certified Question To The United States Supreme Court Or The Adjudication Should Not Be Used To Enhance The 05-27-05 Sentence. Page 9

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Additional Ground 1:

Clerical Mistakes.

1) In Appellants' opening Brief, presently before the Court, it is important to note a clerical mistake.

In the "Table of Contents" § (D)(4)(b), it states:

"Mr. Murphy's deficient assistance was prejudicial to Mr. Johnson(...)"

at ii. (emphasis added).

The same statement is made at 14 of Appellant's opening Brief.

At 15 the same Brief states: "[t]he Court should rule that Mr. Johnson received ineffective assistance from Mr. Murphy."

(emphasis added).

These "Mr. Johnson's" should be construed as "Mr. Drum."

2) In Appellant's Opening Brief, in the "Table of Contents" § (D)(1), it states: "The Court should consider the May 22, 2005 ruling of the Court..." (emphasis added)

At page 7 of the Appellant's Opening Brief it makes the same statement. In the § (D)(1) Argument at page 8 it states: "Mr. Drum requests the Court to consider the May 22, 2005 ruling(...)." (emphasis added).

These "May 22, 2005" mistakes must be consrued as "May 27, 2005."

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Additional Ground 2:

Abuse of Discretion By The Trial Court.

It is well Founded that a trial judge does not have to Follow the recommendation of a Plea Agreement. See: 02-22-05 RP at 5, lines 9 thru 12.

However, if the agreement is rejected, the Court must advise the defendant that she or he may withdraw the plea. See, e.g., U.S. v. Serrano, 938 F. 2d 1058, 1061 (9th cir. 1991). It is important to note that Serrano pertains specifically to the Federal Rules of Criminal Procedure, however, I am certain State law provides a like or Similiar authority.

In the 05-27-05 RP at 1 thru 7, during resentencing, at no time was the defendant offered an opportunity to withdraw the guilty plea thats' sole basis For entry was the Plea Agreement (CP 21 thru 26). The subject was not even touched upon or referred to on record.

I believe this to be a prejudicial oversight on the part of the trial court. The Plea Agreement (CP 21) is in no way even mentioned during the 05-27-05 sentencing. By all rights, because neither the trial court nor the parties voided and nullyFied the Plea Agreement, the state recommending anything other than DOSA on 05-27-05 is a breach of contract (05-27-05 RP at pg. 3, lines 23 and 24). On 05-27-05, the Plea Agreement was still an active contract. If I am not mistaken, the Plea Agreement still "is" an active and binding contract.

I was not eligible For DOSA due to the "violent" juvenile OFFense (that was not violent in nature), however, eFFective 10-01-05, ESSHB 2015 (codiFied at current RCW 9.94A.660) Changes "ever" having a violent conviction to "with in the

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last 10 years." (Not verbatim quotes). See: Personal Restraint Petition Case No. 35840-9-II, consolidated with this direct appeal. My juvenile Violent offense was in 1994, the arrest date for the case at Bar is 01-01-05 (CP 11). The Juvenile offense is over 10 years old.

Due to the trial courts oversight in not seeing to it that the Plea Agreement be nullyfied, and not granting me the opportunity to withdraw from that agreement, I am now eligible for the DOSA depicted in that fully active Plea Agreement. There is no reason to believe that the trial court would not again grant the DOSA, under the current DOSA statute, without a presumption of vindictiveness. The case should be remanded for further proceedings due to trial court oversight revolving around the untouched Plea Agreement.

The court would very likely approve DOSA in light of Judge Olsens' statement on 05-27-05: "It's unfortunate that we have to do this,..." RP at 4, lines 7.

Additional Ground 3:

<u>New Charges May Not Be Brought, If Remand Is Granted, Without Rebuttable presumption of Vindictiveness.</u>

On remand, new charges and harsher penalties can not be brought without a rebuttable presumption of vindictiveness. <u>U.S. v. Wilson</u>, 639 F.2d 500, 502 (9th Cir. 1981); <u>U.S. v. Wilson</u>, 262 F.3d 305, 314 (4th Cir. 2001); <u>Neal v. Cain</u>, 141 F.3d 207, 214 (5th Cir. 1998)

In the Plea Agreement I stipulated:

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"2. The Defendant understands and agrees to the following:
a. The Defendant agrees that any attempt to withdraw the Defendant's guilty plea(s), or any attempt to appeal or Collaterally attack any conviction or agreed sentence entered under this cause number will constitute a breach of this agreement." (emphasis added) CP 24.

The defendant is not appealling or attacking the "conviction" nor the "agreed" upon sentence. I am attacking the "Amended" sentence, therefore, I am not breaching the contract. Inturn, new charges nor a harsher sentence recommendation can be imposed on remand.

Additional Ground 4:

The Court, By Accepting The Plea Agreement, Is Bound By The Terms of That Contract.

The Plea Agreement has never been voided and the guilty plea the court accepted under the provisions of the Plea Agreement (CP 21-26) has not been withdrawn.

This Court has written that "[t]he defendant is entitled to the benefit of his original bargain." State v. Tourtelotte, 88 Wn. 2d 579, 585, 564 P.2d 799 (1977) (citations omitted). "[T]he integrity of the plea bargaining process requires that once the court has accepted the plea, it cannot ignore the terms of the bargain, unless the defendant... chooses to withdraw the plea." State v. Miller, 110 Wn. 2d 528, 756 P. 2d 122 (1988) at 536.

The terms of the Plea Agreement, legally valid per current RCW 9.94A.660, must now be enforced because the court accepted it. RP 02-22-05, pg. 8, lines 21 thru 25.

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Additional Ground 5:

<u>The Juvenile Burgulary 1st that was used to resentence me without DOSA can not stand as a "prior" conviction along side the rule of lenity.</u>

The Sentence Reform Act (SRA) definition of "conviction" neither limits nor qualifies the term (See: RCW 9.94A.030(11)). Other legislation does.

For example, under RCW 9.41.040(3) (Possession of Firearms), the legislation defined that a person was "convicted" when "a plea of guilty has been filed, notwithstanding the pendency of any future proceedings, including but not limited to sentencing or disposition, post-trial or post-finding motions, and appeals."

And under the harassment statute, RCW 9A.96.100, "a person has been 'convicted' at such time as a plea of guilty has been filed, notwithstanding the pendency of any future proceedings, including but not limited to sentencing, post-trial motions, and appeals."

Had the legislature chosen to similiarily qualify "conviction" under the SRA, the juvenile burgulary 1st could be classified as a "prior conviction" and would stand, upon review, as a conviction under the SRA as of its judicial entry in 1994. But the legislature did not.

Ultimately, the burden is on the legislature to categorically clarify what actions expose an individual to penalties and the reasons for which they can be penalized. <u>State v. Knowles</u>, 46 Wn. App. 426, 432, 730 P.2d 738 (1986). Because it did not do so, the rule of lenity should apply. Hence, I contend that my juvenile Burgulary 1st should not operate as a <u>prior</u>

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Conviction for the purpose of sentencing me without DOSA. CP 50-59 and CP 38.

This reasoning is supported by Simpson v. United States, 435 U.S. 6, 55 L. Ed. 2d 70, 98 S. Ct. 909, 914 (1978) where the court relied on the principle of statutory construction that the terms of a specific statute [RCW 13.04.240: "in no case"] take precedence over a general statute [RCW 9.94A.030(1): neither limits nor qualifies], where both are addressed to the same concern.

While this court can, and does, deem juvenile adjudications "convictions", in an adult sentencing forum, under the authority of State v. Johnson, 118 Wn. App. 259, 262-63, 76 P.3d 265 (2003), review denied, 151 Wn. 2d 1021 (2004), that reasoning does not define the adjudication a "prior" conviction. "Prior," it was under the authority of the Juvenile Justice Act and **in no case** may be deemed the conviction of a crime. RCW 13.04.240. There is no authority that determines "when" an adjudication renders into a conviction in the adult sentence. "Prior" to **exactly** when? "Prior" to **exactly** what?

For these reasons the rule of lenity should apply and the adjudication should not function as a "prior" conviction for the purpose of resentencing me without DOSA; Nor should it have on May 27th, 2005.

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Additional Ground 6:

The Motion Argument Falls Under The Scope OF The Apprendi/Blakely Constitutional Analysis In That A Non-Jury Juvenile Adjudication Can Not Be Used To Enhance An Adult Sentence And Should Be Submitted As A Certified Question To The United States Supreme Court Or The Adjudication Should Not Be Used To Enhance The 05-27-05 Sentence.

First, it is important to note this appeal is directed at the 05-27-05 re-sentencing and not the 02-22-05 sentence that was entered pursuant to the Plea Agreement. CP 21. This issue pertains to the points I raised in the Motion to Amend. CP 74-77.

In the Burgulary 2nd sentence at Bar (Kitsap 05-1-00007-2) a juvenile Burgulary 1st added 2 points to my offender score. CP 50-59. Since the Burgulary 1st was obtained through proceedings that did not provide the constitutional right to a Jury Trial, it's application as a sentencing factor is constitutionally impermissible. In effect, Revised Codes of Washington (RCW) 9.94A.510, as it pertains to juvenile offenses enhancing an adult sentence, too, is constitutionally invalid. United States v. Tighe, 266 F. 3d 1187 (9th cir. 2001). Motion to Amend at 2-3.

Blakely v. Washington, 542 U.S. -, 159 L. Ed. 2d 403 (2004), at 412 Finds that every accusation against a defendant must be proved to a jury and that "an accusation which lacks any particular fact which the law makes essential to the punishment is... no accusation within the requirements of the common law, and it is no accusation in reason."

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The Constitutional reasoning found in Blakely and its predecessors does not apply to "prior convictions." However, "A prior conviction 'must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.' Jones v. United States, 526 U.S. 227, 249, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999); accord Apprendi v. New Jersey, 530 U.S. 466 (2000), at 489-90." Motion To Amend at 1.

The U.S. Supreme Court held that prior convictions did not need review by a jury in Blakely and its predecessors because the court viewed "prior conviction" in a context of a conviction already having been submitted to a jury (or the right thereof waived). This is shown in Tighe, supra, at 1193:

"Jones recognition of prior convictions as a constitutionally permissible sentencing factor was rooted in the concept that prior convictions have been, by their very nature, subject to the fundamental triumvirate of procedural protections intended to guarantee the reliability of criminal convictions: fair notice, reasonable doubt, and the right to a jury trial."

As stated in the motion at Bar, the "juvenile adjudication was not implimented through a complete or full adversary process." Motion at 1. Applying the juvenile adjudication as a sentencing factor renders the Amended Judgment and Sentence (CP 50-59) constitutionally invalid because "[It] 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." Jones v. United States, 526 U.S. 227,

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252-253, 143 L. Ed 2d 311, 119 S. Ct. 1215 (1999).

The motion argument leads inescapably to the conclusion that the juvenile burgulary 1st, and the juvenile proceedings that entered it, are unconstitutional when applied to an adult judicial scheme that constitutionally relies on a jury trial to determine each and every fact which must exist to subject the adult to a legally prescribed sentence.

To my knowledge, the Washington Supreme Court has not ruled on this matter. However the state appeals court, including Division 2, do not acknowledge this argument. See, e.g., State v. Champion, No. 33476-3-II (Wash. App. Div. 2 08/08/2006); and State v. Mounts, No. 31917-9-II (Wash. App. Div. 2 11/08/2005).

While I respect this courts authority, I disagree with it pulling authorities from other Federal circuits when circuit Nine has ruled on the issue. In State v. Weber, 127 Wn. App. 879, 892-93 (2005), Tighe was rejected and the Court followed United States v. Smalley, 294 F. 3d 1030 (8th Cir. 2002), cert. denied, 537 U.S. 1114 (2003). Weber, at 892. Smalley held that "juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption." Smalley, 294 F. 3d at 1033.

It is in no way an issue of reliability or due process being offended, it is an issue of a plain and direct constitutional right. If prison disciplinary hearings are held to be reliable, will they be sufficient to supplement or eke a sentence as a sentencing factor?

In Apprendi v. New Jersey, Justice Scalia concurring with the court, concluded her statement with:

"Justice Breyer proceeds on the erroneous and

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all-too-common assumption that the Constitution means what we think it ought to mean. It does not; it means what it says. And the guarantee that '[I]n all criminal prosecutions, the accused shall enjoy the right to... trial, by an impartial jury' has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury."

The Washington Courts, in rejecting the findings in United States v. Tighe, 266 F.3d 1187 (9th cir. 2001), are following this "all-too-common assumption." The Constitution does not say: "...right to trial, or other hearing that is reliable."

The question of whether the U.S. Supreme Court meant to encompass juvenile adjudications in the Apprendi/Blakely "prior conviction" exception has courts of all levels, all across the United States, in an uncertain and unguided debate. We can see this in Boyd v. Newland, No. 03-17098 (9th Cir. 12/29/2004); 2004. C09. 0001596 <http://www.versuslaw.com>; starting at versuslaw [58]:

"We have held that the Apprendi "prior conviction" exception encompasses only those proceedings that provide a defendant with the procedural safeguards of a jury trial and of proof beyond a reasonable doubt. United States v. Tighe, 266 F.3d 1187, 1194 (9th Cir. 2001). Consequently, we do not recognize non-jury juvenile adjudications as "convictions" falling within the Apprendi exception, and ordinarily we do not allow sentencing enhancements based on such adjudications. Id. at 1194-95.

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[59]

California Courts disagree with Tighe. They conclude that Apprendi does not preclude the use of non-jury juvenile adjudications to enhance the sentence of an adult offender. See, e.g., People v Bowden, 125 Cal. Rptr. 2d 513, 517 (Ct App. 2002) ("[T]he Tighe majority opinion is unpersuasive, and we decline to follow or extend its reasoning in the context of the Three Strikes Law."). But see: People v. Smith, 1 Cal. Rptr. 3d 901, 907-29 (Ct. App. 2003) (Johnson, J., concurring in part and dissenting in part) (relying on Tighe to argue against the use of prior non-jury juvenile conviction to enhance a defendants' sentence).

The Third and Eighth circuits have held that the Apprendi "prior conviction" exception includes non-jury juvenile adjudications, which can be used to enhance a defendant's sentence. United States v. Jones, 332 F. 3d 688, 698 (3rd Cir. 2003), cert. denied, 124 S. Ct. 1145 (2004); United States v. Smalley, 294 F. 3d 1030, 1033 (8th Cir. 2002), cert. denied, 537 U.S. 1114 (2003); CF: Note, Constitutional Law - Right to Jury Trial - Eighth Circuit Holds an Adjudication of Juvenile Delinquency to Be a "Prior Conviction" For the purposes of Sentence Enhancement at a Subsequent Criminal Proceeding, 116 Harv. L. Rev. 705, 708 (2002) (Comparing various circuits' approaches and suggesting that "Tighe's Understanding of the jury trial right is more consistent with the implications of the Supreme Court's recent jury trial jurisprudence."). To date, the Supreme Court has not resolved the conflict."

If this Court finds that I stipulated to the "Criminal History" [in the DOSA bargain], it can not find I stipulated to said

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history being Constitutionally Valid as Sentencing Facts. Again, I am appealling the May 27th, 2005, Amended Sentence; NOT, the "agreed" upon sentence in the Plea Agreement.

The juvenile adjudication can not be used as a sentencing Factor; For points or For DOSA withdrawal/striking.

I should be remanded For Sentencing without the juvenile Burgulary 1st offender points [OR] The "juvenile adjudication/ prior conviction: Apprendi/Blakely" question should be submitted to the U.S. Supreme Court For a clearly established Federal Law determination to resolve the conflicting rulings From coast to coast and Court to Court.

Date: 02-24-07 Signed: Patrick Drum

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IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. PATRICK BOYD DRUM Appellant.	Appeal No. 35326-1-II Superior Court No. 05-1-00007-2 DECLARATION OF MAILING

On this day I deposited, via Prison Legal Mail, in the United States Mail at Aberdeen, WA, a properly stamped and addressed envelope directed to:

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway Street, Suite 300
Tacoma, WA 98402

Containing 1 copy of Appellants "Statement of Additional Grounds For Review" with original signature.

And the same to:

Mr. Randall Sutton
Attorney at Law
614 Division Street, MS-35
Port Orchard, WA

[And]

Rovang Fong & Associates
569 Division, Suite A
Port Orchard, WA 98366

Sworn to be true and correct under penalties of perjury.

Date: 02-25-07

Sign: Patrick Drum
Patrick Drum

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