

Supp. to PRP

Date: February 22, 2006

To: Court of Appeals, Division Two

Clerk David Ponzoha

950 Broadway, Suite 300

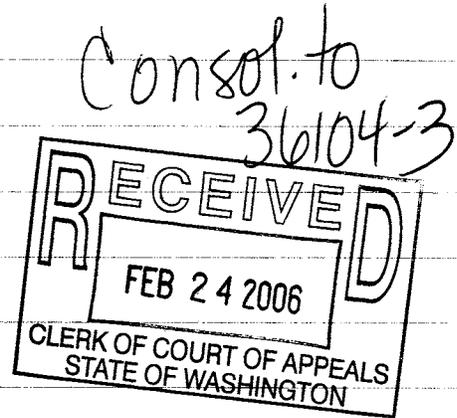
Tacoma, WA 98402 - 4454

From: Forrest Eugene Amos #809903

Stafford Creek Corrections Center

191 Constantine way

Aberdeen, WA 98520



In re: Supplement grounds for Personal Restraint Petition, No. 34375-4.

Dear Mr. Ponzoha

Enclosed is Supplement grounds and brief to be attached and considered with my Personal Restraint Petition No. 34375-4, filed on January 6, 2006.

I request that you ask the respondent, Lewis County Prosecutor, to respond to these supplement grounds as it is they have the burden of proof in one of my claims.

Thank you for your time and concern.

Respectfully Submitted,

**CERTIFICATE OF MAILING**  
I certify that I mailed  
1 copies of Supplemental grounds  
brief to Jeremy Richard Randolph  
& 3/1/06  
Date Signed

Forrest Eugene Amos  
Forrest Eugene Amos  
Petitioner.

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

PERSONAL RESTRAINT PETITION  
OF

FORREST EUGENE AMOS

No. 34375 - 4

PRO SE BRIEF ON SUPPLEMENT GROUNDS

BY  STATE OF WASHINGTON  
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## GROUND FIVE.

I, the petitioner, claims that the prosecutor violated my right to be free from Double Jeopardy by seeking to increase my sentence with the use of my subsequent offense and conviction in the calculation of my offender score at resentencing to correct an erroneous sentence in excess of statutory authority because I had a legitimate expectation of finality in both the plea agreement and sentence at the date of sentencing.

The fifth Amendment of the United States Constitution states: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

Similarly, article 1, section 9 of the Washington Constitution declares: "No person shall be... twice put in jeopardy for the same offense."

The Double Jeopardy guarantee serves "a constitutional policy of finality for the defendant's benefit". *United States vs. Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed. 2d 543 (1971). That policy protects the accused from attempts to secure additional punishment after a prior conviction and sentence. *Green vs. United States*, 355 U.S. 184, 187-188, 78 S.Ct. 221, 223, 2 L.Ed. 2d 199 (1957).

The Washington Supreme Court recognized in *State vs. Hardesty*, 129 Wn.2d 303, 915 P.2d 1080 (1996), that the Double Jeopardy Clause plays a limited role in the sentencing process. The Court focused on the three ways indicated in *United States vs. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed. 2d 32 (1980), which allows the Double Jeopardy Clause to prevent a second attempt by the state to increase a sentence.

Focusing on the third way indicated in *DiFrancesco* the *Hardesty* court held that "the Double Jeopardy Clause has a limited role

even with respect to ordinary sentencing proceedings like Hardesty's 1991 hearing. In an ordinary sentencing proceeding to correct an erroneous sentence, the analytical touchstone for Double Jeopardy is the defendants' legitimate expectation of finality in the sentence, which may be influenced by many factors such as the completion of the sentence, the passage of time, the pendency of an appeal or review of the sentencing determination, or the defendants' misconduct in obtaining the sentence." Hardesty, 129 Wn.2d at 312, (Emphasis Added).

Furthermore, the Hardesty court noted that "the case law following DiFrancesco indicates the defendant acquires a legitimate expectation of finality in a sentence, substantially or fully served, unless the defendant was on notice the sentence might be modified, due to either a pending appeal or the defendant's own fraud in obtaining the erroneous sentence. In United States vs. Jones, 722 F.2d 632, 638 (11<sup>th</sup> Cir. 1983), the court stated a defendant has an expectation of finality in a sentence once she or he begins to serve it, unless a review process is employed or the defendant "intentionally deceived the sentencing authority or thwarted the sentencing process." Hardesty, 129 Wn.2d at 312.

I believe I had a legitimate expectation of finality in both my plea agreement and sentence at the date of sentencing because I neither deceived the sentencing authority, thwarted the sentencing process nor filed what is determined as "review" under RAP 2.1.

On February 16, 2000, a plea of guilty was entered pursuant to an agreement. Upon complying with the terms of the plea agreement I submitted an understanding of my criminal history by acknowledging the prosecutor's understanding which consisted of Possession of Stolen Property 2<sup>o</sup>, Malicious Mischief 2<sup>o</sup>, and two

counts of Burglary 2<sup>o</sup>, all as a juvenile. See Exhibit A.

Both the SRA and Court rules require an understanding of the defendant's criminal history if the defendant intends to plead guilty pursuant to an agreement. See RCW 9.94A.100 and CrR 4.2 (e).

In addition to the plea agreement, I understood that if I was convicted of any additional crimes between the time of pleading guilty and the date of sentencing I was obligated to tell the sentencing judge about those convictions and being convicted of any additional crimes before sentencing both the standard sentence range and prosecutor's recommendation may increase with the plea of guilty to the charges still binding on me. See Exhibit A, section (b) (c) and (d).

By no means did I violate the terms of the plea agreement by failing to acknowledge all my criminal history at the time of pleading guilty or by failing to tell the sentencing judge about being convicted of any additional crimes between the time of pleading guilty and the date of sentencing. It is important that I note I never even committed any new crimes or had any pending charges to be convicted of between this time.

On April 25, 2000, I was sentenced according to the plea agreement. See Exhibit E. At this point I had a legitimate expectation of finality based on three reasons.

First, I did nothing to deceive the sentencing authority or thwart the sentencing process.

Second, no "review" was sought that could be considered as affecting my expectation of finality. "Review" under RAP 2.1 which provides in relevant part: "(a) The only methods of seeking review of decisions of the superior court by the Court of Appeals and by the Supreme Court are the two methods

provided by these rules. The two methods are: (1) review as a matter of right, called "appeal"; and (2) review by permission of the reviewing court, called "discretionary review".

Both "appeal" and "discretionary review" are called review".

Finally, the passage of time between sentencing on April 25, 2000, and resentencing on July 19, 2005, to correct the erroneous sentence in excess of statutory authority was more than five years. The plea agreement term of not being convicted of any additional crimes should not be binding on me for this period of time.

Now when I committed a new crime on February 26, 2004, while I was in prison serving my sentence imposed on April 25, 2000, I did not expect that this subsequent offense and conviction would be used to increase my sentence imposed on April 25, 2000, when correcting the erroneous sentence in excess of statutory authority at resentencing on July 19, 2005, because of the legitimate expectation of finality expressed above.

The most important fact is my subsequent offense and conviction occurred years after my sentencing date. See Exhibits G and H.

However, once I was granted relief from the erroneous sentence in excess of statutory authority imposed on April 25, 2000, in the form of resentencing within the statutory authority, the prosecutor sought to increase my sentence with the use of my subsequent offense and conviction in the calculation of my offender score at resentencing. See Exhibit D.

Relief was granted pursuant to *In re LaChapelle*, 153 Wn.2d 1, 13 (2004), which held the SRA did not permit the use of "under 15" offenses in the calculation of a defendant's offender score if the "under 15" offenses occurred before July 1, 1997, and his current offenses occurred before

June 13, 2002.

I believe when correcting the erroneous sentence in excess of statutory authority *State vs. Hardesty*, 129 Wn.2d 303, 915 P.2d 1080 (1996), should of prevented a second attempt to increase my sentence with the use of my subsequent offense and conviction in the calculation of my offender score.

*State vs. Hardesty*, 129 Wn.2d at 312 recognized that in an ordinary sentencing proceeding to correct an erroneous sentence, the analytical touchstone for Double Jeopardy is the defendants' legitimate expectation of finality in the sentence. As already expressed above I had a legitimate expectation of finality in both my plea agreement and sentence.

In supporting my expectation of finality, *In re Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002), held that the court has granted relief to personal restraint petitioners in the form of resentencing within the statutory authority where a sentence in excess of that authority had been imposed and correcting an erroneous sentence in excess of statutory authority does not affect the finality of that portion of the judgment and sentence that was correct and valid when imposed. *Goodwin*, 146 Wn.2d at 877.

It is important for the court to recognize here that RCW 9.94A.110 (1) requires the trial court to "specify the convictions it has found to exist at the time of sentencing." At my sentencing on April 25, 2000, the number of convictions that existed at that time was correct. So when correcting the erroneous sentence in excess of statutory authority it would not affect the finality of that judgment made at my sentencing. *Goodwin*, 146 Wn.2d at 877; also see *Carle*, 93 Wn.2d at 34.

Despite this, the prosecutor relied on *State vs. Collicott*, 118 Wn.2d 649, 827 P.2d 263 (1992), to support their increase

in my sentence with the use of my subsequent offense and conviction in the calculation of my offender score at resentencing to correct the erroneous sentence in excess of statutory authority.

The Collicott decision held that the SRA permitted the use of a subsequent conviction for the purpose of determining the offender score at the defendant's resentencing.

The Collicott case is distinguishable from my case before the court based on two major factors. First, Collicott's resentencing was the result of his filing an appeal therefore he had no legitimate expectation of finality in his sentence. Second, the mandate in Collicott was for resentencing to "redetermine" his offender score. Collicott, 118 Wn.2d at 662-663. This was not the mandate in my case. I was remanded for resentencing within the statutory authority not for any type of "redetermination" as was the case in Collicott.

In conclusion, Double Jeopardy guarantees should of prevented the prosecutor from a second attempt to increase my sentence with the use of my subsequent offense and conviction in the calculation of my offender score at resentencing to correct the erroneous sentence in excess of statutory authority because I had a legitimate expectation of finality in both my plea agreement and sentence imposed on April 25, 2000.

I should be resentenced without the use of my subsequent offense and conviction in the calculation of my offender score.

As held in *In re Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980) when correcting an erroneous sentence in excess of statutory authority resentencing "nunc pro tunc" meaning "now for then" was appropriate.

Resentencing "nunc pro tunc" would prevent being placed in jeopardy twice for the same offense and should of been the case.

when I was resentenced on July 19, 2005.

### GROUND SIX.

I, the petitioner, claims that my statutory and constitutional right to speedy sentencing was violated when I was resentenced on July 19, 2005, to correct an erroneous<sup>sentence</sup> in excess of statutory authority under terms that did not exist at the time of sentencing on April 25, 2000, where the sentencing error occurred.

On February 16, 2000, I was convicted of a number of offenses pursuant to a plea agreement. Part of the plea agreement terms was not to be convicted of any additional crimes between the time of pleading guilty and the date of sentencing. If I was convicted of any additional crimes between this period of time I was obligated to tell the sentencing judge about those convictions and being convicted of any additional crimes both the standard sentence range and prosecutor's recommendation may increase with the plea of guilty to the charges still binding on me. See Exhibit A, section (b) (c) and (d).

With this term as part of the plea agreement a defendant's speedy sentencing rights under RCW 9.94A.110(1), CrR 7.1, the Sixth Amendment of the United States Constitution and article 1, section 22 of the Washington Constitution are critical to protect against overzealous prosecutor from delaying a defendant's sentencing until after convictions add up from any pending or new offenses in order to prejudice the defendant with an increased standard sentence range and prosecutor's recommendation by counting those convictions in the calculation of their offender score.

CrR 7.1 implements the time requirement provided under RCW 9.94A.110(1). This RCW provides in relevant part: "Before

imposing a sentence upon a defendant, the court shall conduct a sentencing hearing. The sentencing hearing shall be held within forty court days following conviction."

Case law indicates the right to speedy sentencing is encompassed within the right to speedy trial as guaranteed by the Sixth Amendment and article 1, section 22. *State vs. Ellis*, 76 Wn. App. 391, 394, 884 P.2d 1360 (1994).

Under the Sixth Amendment and the Washington Constitution, if the delay is "purposful or oppressive", it violates speedy sentencing rights. *Pollard vs. United States*, 352 U.S. 334, 361, 77 S.Ct. 481, 1 L.Ed. 2d 393 (1957). To determine whether the delay is "purposeful or oppressive", the court balances the following four factors: the length and reason for the delay, the defendant's assertion of his right, and the extent of prejudice to the defendant. *Ellis*, 76 Wn. App. at 394. These same factors should provide guidance in application of CrR 7.1, which prohibits "unreasonable delays." *Johnson*, 100 Wn.2d at 629-30.

On April 25, 2000, I was sentenced after my conviction on February 16, 2000. See Exhibit E.

As required by RCW 9.94A.110 (1) this sentencing was done within the forty court day after conviction requirement. Also as required by RCW 9.94A.110 (1) the court specified "those convictions that were found to exist at the time of sentencing," which were, Possession of Stolen Property 2°, Malicious Mischief 2°, and two counts of Burglary 2°, all as a juvenile. No other convictions existed at this time and I was sentenced accordingly. See Exhibit E.

Even though my sentencing was held within the speedy sentencing requirements I believe that the violation occurred when I was resentenced on July 19, 2005, to correct an erroneous

sentence in excess of statutory authority under terms that did not exist at the time of sentencing on April 25, 2000, where the sentencing error was committed.

Years after my sentencing on April 25, 2000, the Washington Supreme Court in *In re LaChapelle*, 153 Wn.2d 1, 13 (2004), held that the SRA did not permit the use of "under 15" offenses in the calculation of a defendant's offender score if the "under 15" offenses occurred before July 1, 1997, and his current offenses occurred before June 13, 2002.

This decision required resentencing within the statutory authority because two of the convictions found to exist at my sentencing on April 25, 2000, occurred on May 2, 1997, when I was 14 years old therefore washed out under the SRA.

Now between the time I was sentenced on April 25, 2000, and resentenced on July 19, 2005, I was charged with and convicted of a new offense while I was in prison serving the sentence imposed on April 25, 2000. See Exhibits G and H.

At resentencing on July 19, 2005, this subsequent offense and conviction was used to increase my standard sentence range and prosecutor's recommendation by calculating it in my offender score after the erroneous sentence in excess of statutory authority was corrected. See Exhibit D.

This is where the speedy sentencing violation occurred because the time between my sentencing on April 25, 2000, and resentencing on July 19, 2005, is more than five years and exceeds the forty court day requirement under RCW 9.94A.110 (1).

The prosecutor relied on the Court decision in *State vs. Collicott*, 118 Wn.2d 649, 827 P.2d 263 (1992), to support their use of my subsequent offense and conviction to increase my standard sentence range and prosecutor's recommendation by counting it in

the calculation of my offender score.

In Collicott, the court held that the SRA permitted the use of a subsequent conviction for the purpose of determining the offender score at the defendant's resentencing.

I believe that this decision violates a defendant's right to speedy sentencing because the court is basically holding the defendant's resentencing to the same context as the defendant's sentencing with regard to determining those convictions that are found to exist under RCW 9.94A.110 (1) even though the defendant's resentencing was not held within the speedy sentencing requirement of forty court days after conviction as required by RCW 9.94A.110 (1).

A defendant does not waive his right to speedy sentencing by engaging in their right to appeal or collateral attack an alleged sentencing error otherwise a speedy sentencing right would be superfluous.

I ask the court to look at the four balancing factors to determine whether a sentencing delay was "purposful or oppressive" in the context of resentencing.

First, the length of the delay between my sentencing on April 25, 2000, and resentencing on July 19, 2005, was more than five years. It would be clearly oppressive to apply the plea agreement term of not being convicted of any additional crimes for this length of time.

Second, the reason for the delay between sentencing on April 25, 2000, and resentencing on July 19, 2005, was the state's error in law. The law on juvenile washout for "under 15" offenses was clarified in *In re LaChapelle*, 153 Wn.2d 1, 13 (2004), years after my sentencing on April 25, 2000.

In *State vs. Johnson*, 100 Wn.2d 607, 674 P.2d 145 (1983), the court said if "the reason for the delay was the state error of

law and while it does not pre se justify the delay, it does render it somewhat less odious." Johnson, 100 Wn.2d at 630.

Granted it may be less odious but as said it does not justify the delay. The court should keep in mind that I did not know this was an error in law at the time of sentencing on April 25, 2000. It was not known until *In re LaChapelle*, 153 Wn.2d 1, 13 (2004), which was after my subsequent offense was charged. See Exhibit G.

Third, the defendant's assertion of his right to speedy sentencing should not be a balancing factor in the context of resentencing because I had no chance to assert my right due to the fact that my sentencing was done within the speedy sentencing requirements.

Fourth, the extent of prejudice to me is determined by the differences between the two sentences imposed. If I was resentenced under the circumstances when my original sentencing occurred within the speedy sentencing requirements I would of been subject to 57-75 months for the current offense that yields the highest standard sentence range rather than the 87-116 months for the current offense that yields the highest standard sentence range I faced under the circumstances at my resentencing that was not done within the speed sentencing requirements.

The standard sentence ranges for five points rather than 7 points is significant and constitutes prejudice. This was caused by the use of my subsequent offense and conviction in the calculation of my offender score even though it did not exist at the time of sentencing on April 25, 2000, which was done within the forty court day after conviction requirement as required by RCW 9.94A.110(1).

The important fact is that if I did not file a personal restraint petition on the erroneous sentence in excess of statutory

authority imposed at my sentencing on April 25, 2000, my subsequent offense and conviction would of never been used to increase my standard sentence range and prosecutors' recommendation by calculating it in my offender score.

I believe after balancing the four factors to determine whether a speedy sentencing violation occurred, in the context of resentencing, the court must view it a "oppressive" to allow a defendant to get resentenced to correct an erroneous sentence in excess of Statutory authority under terms that did not exist at the time of sentencing which was done within the speedy sentencing requirements.

There is no authority that indicates a defendant waives his right to speedy sentencing by engaging in their right to appeal or collateral attack an alleged sentencing error.

So if viewed correctly both my statutory and constitutional speedy sentencing rights were violated when I was resentenced under terms that did not exist at the time of sentencing. See Exhibit D and E.

Exhibit E provides the criminal history that existed at the time of sentencing which was done within the speedy sentencing requirements and Exhibit D provides the criminal history that existed at the time of resentencing which was done five years after the speedy sentencing requirements.

The Washington Criminal Practice and Procedure Volume 12 provides as proper relief from an improper sentencing delay that has prejudiced a defendant as being that of resentencing under circumstances existing at the time the sentencing should have occurred.

"Where an improper delayed sentencing has prejudiced the defendant, the proper relief is a resentencing under circumstances existing at the time the sentencing should have occurred." Quoting Chapter 12, section 1201 of the Washington Criminal Practice and

Procedure Volume 12 (1997).

It would only be fair to grant this same relief to those defendants that were sentenced erroneously at their sentencing that was conducted within the speedy sentencing requirements when they obtained resentencing to correct the erroneous sentence in excess of statutory authority at a later date after expiration of the speedy sentencing requirements in order to prevent prejudicing the defendant and violating their speedy sentencing rights at their resentencing.

The court should recognize that this issue was not briefed when *State vs. Collicott*, 118 Wn.2d 649, 827 P.2d 263 (1992), was decided. There is an obvious speedy sentencing violation in this decision that allows any convictions that did not exist at the defendant's sentencing to be used at their resentencing just because the defendant engages in their right to appeal or collateral attack an alleged sentencing error.

In conclusion, it is oppressive to prejudice any defendant that was sentenced erroneously within the speedy sentencing requirements when they obtained resentencing to correct the erroneous sentence in excess of statutory by calculating any subsequent convictions, whether from pending or subsequent offenses, in their offender score in order to increase their standard sentence range and prosecutor's recommendation.

I should be resentenced under circumstances that existed at the time of my sentencing on April 25, 2000, when I was resentenced on July 19, 2005, to correct the erroneous sentence in excess of statutory authority because of my statutory and constitutional right to speedy sentencing. Therefore my subsequent offense and conviction should not be used to increase my standard sentence range and prosecutor's recommendation by calculating it in my offender score because it did not exist at my sentencing on

April 25, 2000.

GROUND SEVEN.

I, the petitioner, claims that the sentencing judge acted vindictively when resentencing me after a successful collateral attack on the erroneous sentence in excess of statutory authority imposed at my first sentencing because he increased my offender score and standard sentence range with the use of a subsequent offense and conviction in the calculation of my offender score thereby violated my right to due process of law.

Where there is a 'reasonable likelihood' that the sentencing authority increased a sentence based on actual vindictiveness, the increased sentence presumptively violates due process. *Alabama Vs. Smith*, 490 U.S. 494, 499, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

*North Carolina Vs. Pearce*, 395 U.S. 711, 713, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), creates a rebuttable presumption of vindictiveness when the same trial judge presides over two or more trials and the last sentence is 'more severe' than an earlier sentence. *Pearce* permitted on the apparent need to guard against vindictiveness in the resentencing process.

On April 25, 2000, I was sentenced according to the plea agreement and my criminal history. See Exhibit E.

As required by RCW 9.94A.110 (1) the court found those convictions that exist at the time of sentencing to be Possession of Stolen Property 2°, Malicious Mischief 2°, and two counts of Burglary 2°, all as a juvenile. No other convictions existed at this time. See Exhibit E.

Years after my sentencing the Washington Supreme Court in *In re LaChapelle*, 153 Wn.2d 1, 13 (2004), held that the

SRA did not permit the use of "under 15" offenses in the calculation of a defendant's offender score if the "under 15" offenses occurred before July 1, 1997, and his current offenses occurred before June 13, 2002.

This decision required that I was resentenced within the statutory authority because two of my juvenile offenses occurred on May 2, 1997, when I was 14 years old therefore washed out under the SRA and should not of been used in the calculation of my offender score at sentencing on April 25, 2000

If I was sentenced correctly on April 25, 2000, within the statutory authority I would of received an offender score of 5 points and a standard sentence range of 57 - 75 months for the current offense that yields the highest standard sentence range rather than the offender score of 6 points and a standard sentence range of 77 - 102 months for the current offense that yields the highest standard sentence range.

In essence, I would of received no more than 75 months at the high end of the correct standard sentence range with the 36 month firearm enhancement for a total of 111 months rather than the 120 months imposed under the erroneous terms.

The Court of Appeals, Division 2 recognized this and remanded me back for resentencing within the statutory authority.

On July 19, 2005, I was resentenced by the same sentencing judge, Richard L. Brosey, who imposed the erroneous sentence in excess of statutory authority on April 25, 2000. See Exhibits E and D.

At resentencing the sentencing judge acted vindictively after correcting the erroneous sentence in excess of statutory authority by increasing my offender score to 7 points and my standard sentence range to 87 - 116 months for the current

offense that yields the highest standard sentence range. This increase was due to counting a subsequent offense and conviction in the calculation of my offender score. See Exhibit D.

This subsequent offense and conviction occurred while I was in prison serving my sentence imposed on April 25, 2000. See Exhibits G and H. I had received an automatic consecutive sentence under the SRA, RCW 9.94A.589(2)(a), for that reason. See Exhibit I.

I believe this use of my subsequent offense and conviction in the calculation of my offender score at resentencing to correct an erroneous sentence in excess of statutory authority was a vindictive action because at my sentencing on April 25, 2000, I had a right to be sentenced correctly within the statutory authority. As expressed above no more than 111 months total would of been imposed under the statutory authority if I was sentenced correctly on April 25, 2000. It was not until I filed a Personal Restraint Petition collateral attacking the erroneous sentence in excess of statutory authority and obtained relief from such did the sentencing judge use my subsequent offense and conviction in the calculation of my offender score in order to increase my offender score and standard sentence range. Therefore, violates my right to due process of law.

Due Process of law requires that vindictiveness against a defendant for having successfully attacked his first conviction or sentence must play no part in the resentencing. And since the fear of vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collateral attack their first conviction or sentence, due process requires that the defendant be freed from apprehension of such a retaliatory motive on the part of the sentencing judge. North Carolina Vs. Pearce,

395 U.S. 711, 713, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969);  
State Vs. Larson, 56 Wn. App. 323, 783 P.2d 1093 (1989).

So because of the importance of my right to due process of law I should not have to fear the use of my subsequent offense and conviction in the calculation of my offender score for my underlying sentence if I choose to collateral attack an erroneous sentence in excess of statutory authority.

It would undermine the fairness of the criminal justice system to force me to choose between accepting the erroneous sentence in excess of statutory authority imposed on April 25, 2000, or suffer prejudice from the use of my subsequent offense and conviction in the calculation of my offender score in order to increase my offender score and standard sentence range at resentencing to correct the erroneous sentence in excess of statutory authority.

The facts and circumstance above creates beyond a "reasonable likelihood" or "rebuttal presumption" of vindictiveness thereby violates my right to due process of law.

In conclusion, there is no excuse that can justify the increase in my offender score and standard sentence range at resentencing other than pure vindictiveness because the fact of the matter is the use of my subsequent offense and conviction in the calculation of my offender score at resentencing would of never occurred if I did not engage in my right to collateral attack the erroneous sentence in excess of statutory authority imposed on April 25, 2000, by filing a Personal

### Restraint Petition.

I should be freed from this type of vindictiveness and should be resentenced without the use of my subsequent offense and conviction in the calculation of my offender score. My offender score should be 5 points and my standard sentence range should be 57 - 75 months at resentencing because if I was sentenced correctly within the statutory authority at my sentencing on April 25, 2000, this is the most I would of faced under state law. Therefore, any increase at resentencing creates a "reasonable likelihood" and "presumption" of vindictiveness.

### GROUND EIGHT.

I, the petitioner, claims I was denied my constitutional right to appeal after resentencing.

I was resentenced on July 19, 2005, due to the use of washed out juvenile offenses in the calculation of my offender score.

At resentencing my motion to merge my convictions of Robbery 1<sup>o</sup> and Assault 2<sup>o</sup> for Double Jeopardy purposes was denied and I was resentenced with the use of a subsequent offense and conviction in the calculation of my offender score. I was told to "PRP it" if I did not agree with the judges rulings.

On July 20, 2005, my finality hearing was delayed due to my filing additional motions. At this time I gave the judge the proper paperwork to prepair an appeal.

The judge told me that the appeal procedures have been changed

and said it is up to the Court of Appeals now. Since I was pro se he said he would appoint a standby counsel to do the proper paperwork.

Despite this the standby counsel did not file any paperwork for an appeal and I was continuously told by both the judge and standby counsel all I had to do was file a new PRP if I did not agree with the ruling made by the judge.

At this point I was led to believe that I did not have a right to appeal and I was never informed I had a right to appeal from this sentence.

I do not have the finances to obtain the verbatim Reports on the proceedings where I was continuously told to "PRP it" if I did not agree with the rulings. My indigence does not mean I don't have a right to appeal. Griffin vs. Illinois, 351 U.S. 12 (1956).

IF the court views the Verbatim Reports for July 20, 2005, and September 12, 2005, my claim would be proven.

Under both the Sixth Amendment of the United States Constitution and article 1, section 22 of the Washington Constitution guarantee a defendant the right to appeal. There can be no presumption in favor of the waiver of a constitutional right. State vs. Kells, 134 Wn.2d 309, 314, 949 P.2d 818. (1998).

The state bears the burden of showing that a convicted defendant has made a voluntary, knowingly, and intelligent waiver of the right to appeal. State vs. Tormal, 133 Wn.2d at 989. In other word, the state is required to "make some affirmative showing the defendant understood his right to appeal and chose not to exercise it." State vs. Kells, 134 Wn.2d at 315.

With this burden of proof on the state, the state can provide the Verbatim Reports to the court.

In conclusion, my right to appeal should be reinstated so I am not subject to the procedures of the PRP process and the Court of Appeals should consider the issues presented in the PRP as a Direct Appeal and my Brief as a Pro Se Appeals Brief. Also an Appellate Counsel should be appointed.

## GROUND FIVE

1.) I should be given a new trial or released from confinement because the prosecutor violated my right to be free from Double Jeopardy by seeking to increase my sentence with the use of my subsequent offense and conviction in the calculation of my offender score at resentencing to correct an erroneous sentence in excess of statutory authority because I had a legitimate expectation of finality in both the plea agreement and sentence at the date of sentencing.

2.) The following facts are important when considering my case: See attached Brief on Supplement Grounds for the important facts, page 4 - 10

3.) The following reported court decisions in cases similar to mine show the error I believe happened in my case: See attached Brief on Supplement Grounds for the reported court decisions relied on, page 4 - 10

4.) The following statutes and constitutional provisions should be considered by the court: See attached Brief on Supplement Grounds for the statutes and constitutional provisions relied on, page 4 - 10

5.) This petition is the best way I know to get the relief I

want, and no other way will work because the time for appeal has expired and the next avenue for relief is by way of this petition in the Washington Courts.

#### GROUND SIX.

1.) I should be given a new trial or released from confinement because my statutory and constitutional right to speedy sentencing was violated when I was resentenced on July 19, 2005, to correct an erroneous sentence in excess of statutory authority under terms that did not exist at the time of sentencing on April 25, 2000, where the sentencing error occurred.

2.) The following facts are important when considering my case: See attached Brief on Supplement Grounds for the important facts, page 10 - 17

3.) The following reported court decisions in cases similar to mine show the error I believe happened in my case: See attached Brief on Supplement Grounds for the reported court decisions relied on, page 10 - 17

4.) The following statutes and constitutional provisions should be considered by the court: See attached Brief on Supplement Grounds for the statutes and constitutional provisions relied on, page 10 - 17

5.) This petition is the best way I know to get the relief I want, and no other way will work because the time for appeal has expired and the next avenue for relief is by way of this petition in the Washington Courts.

### GROUND SEVEN.

1.) I should be given a new trial or released from confinement because the sentencing judge acted vindictively when resentencing me after a successful collateral attack on the erroneous sentence in excess of statutory authority imposed at my first sentencing because he increased my offender score and standard sentence range with the use of a subsequent offense and conviction in the calculation of my offender score thereby violated my right to due process of law.

2.) The following facts are important when considering my case: See attached Brief on Supplement Grounds for the important facts, page 17-21

3.) The following reported court decisions in cases similar to mine show the error I believe happened in my case: See attached Brief on Supplement Grounds for the reported court decisions relied on, page 17-21

4.) The following statutes and constitutional provisions should be

considered by the court: See attached Brief on Supplement Grounds for the statutes and constitutional provisions relied on, page 17-21

5.) This petition is the best way I know to get the relief I want, and no other way will work because the time for appeal has expired and the next avenue for relief is by way of this petition in the Washington Courts.

#### GROUND EIGHT.

1.) I should be given a new trial or released from confinement because I was denied my constitutional right to appeal after resentencing.

2.) The following facts are important when considering my case: See attached Brief on Supplement Grounds for the important facts, page 21-23

3.) The following reported court decisions in cases similar to mine show the error I believe happened in my case: See attached Brief on Supplement Grounds for the reported court decisions relied on, page 21-23

4.) The following statutes and constitutional provisions should be considered by the court: See attached Brief on Supplement Grounds for the statutes and constitutional provisions relied on,

page 21-23.

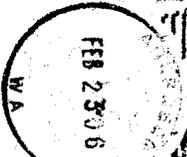
5.) This petition is the best way I know to get the relief I want, and no other way will work because the time for appeal has expired and the next avenue for relief is by way of this petition in the Washington Courts.

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