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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
Respondent,)
v.)
MARK ALLEN SMITH,)
Defendant.)

C.O.A. No. 36288-7-II²

STATEMENT OF ADDITIONAL
GROUND FOR REVIEW

I, Mark Allen Smith, 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.

GROUND NUMBER ONE

Mr. Smith did not waive the factual issues underlying the comparability of his prior non felony convictions.

In the event this court finds Mr. Smith somehow acquiesced to the absence of comparability analysis or evidence of the convictions of their comparability, despite his prior objections and even though his attorney, Mr. Bill Houser, did not request more time to prepare this complicated analysis, he did not waive his right to a jury determination of the facts necessary to use his prior convictions in his elevated offense requiring prior predicates.

A waiver of a constitutional right must be knowing, intelligent and voluntary. City of Bellevue v. Acrey, 103 Wn.2d 203, 207 (1984). Absent an adequate record to the contrary, a reviewing court must indulge every reasonable presumption against the validity of an alleged waiver of a constitutional right. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938); State v. Wicke, 91 Wn.2d 638, 645 (1979). The court does not "presume acquiescence in the loss of fundamental rights." Johnson v. Zerbst, 304 U.S. at 458.

In order to be effective, the "waiver of a fundamental constitutional right must be 'an intentional relinquishment or abandonment of a known right or privilege.'" State v. Thomas, 128 Wn.2d 553, 558 (1996) (quoting Johnson v. Zerbst, 304 U.S. at 458). The burden is on the state to demonstrate a valid waiver on record. Id. "Presuming waiver from a silent record is impermissible." Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) (quoting Carnley v. Cochran, 369 U.S. 506, 516, 82 S.Ct. 884, 8 L.Ed2d 70 (1962)).

Because the facts needed to elevate the statutory maximum punishment for offenses are the functional equivalent of elements, and the facts pertaining to prior offenses fall outside of the "prior conviction" exception to Apprendi and Blakely, a defendant has the Sixth Amendment right to have a jury make the factual determinations of comparability. Therefore Smith cannot waive his right through silence - or by his lawyer's acquiescence to the state's calculation that the two priors met the required predicate, on just the state's say-so.

The record here does not provide sufficient proof of the comparability of the two priors of the Bremerton municipal code used as underlying convictions.

GROUND NUMBER TWO

Record not factually developed to affirm conviction.

The state failed to meet the threshold required to factually show there was adequate predicate offenses. (RP 3/19/2007, Pgs. 19-20). This violated Smith's due process rights. *United States v. Rivera*, 83 F.3d 542 (1st Cir. 1996).

Under the Sentencing Reform Act (SRA). the State must prove the defendant's criminal history by a preponderance of the evidence. RCW 9.94A.110; State v. Ammons, 105 Wn.2d 175. 186 (1986). As set forth above, the SRA also requires the State prove the non RCW is comparable to a felony under Washington law, and the classification of that felony. Former RCW 9.94A.360(3); Ford, 137 Wn.2d at 480; see also State v. Duke, 77 Wn. App. 532, 535-36 (1995) (Foreign conviction could not be included in offender score because State failed to prove underlying conduct met elements under Washington law).

The Morley court found the record must provide reliable evidence found beyond a reasonable doubt that the prior conviction was based upon findings of the elements required under RCW. The elements of the statute remain the touchstone of comparability analysis. The trial court failed to conduct any comparability tests. The court erred by accepting these as comparable predicate domestic violence offenses.

GROUND THREE

Elements used to reach the predicate for the exceptional sentence were not admitted to nor proven beyond a reasonable doubt.

The state never established the relevancy of the documents used because there is "no information concerning that prior order" which defense counsel pointed out to the court (RP 4/10/07, Pg. 7).

Defendant Smith did not admit to the predicate used by the state in the Trial by Stipulated facts, The state dropped the ball in adequately proving relevancy of the documents the used under defense objection, and they failed to prove them genuine beyond a reasonable doubt. This violated Smith's due process rights. Rita v. United States, No. 06-5754 (U.S. 2007); Fry v. Pliler, No. 06-5247 (U.S. 2007).

Here the charging document includes non of the essential elements for the crime charged, nor can we merely or fairly imply them from the use of the terms "violation of a no contact order". State v. Justice, No. 31908-0-II (Wash. App. Div. II 2005).

GROUND ~~FOUR~~

Admitted statement deemed reliable by a judge is fundamentally at odds with the right to confrontation.

The prosecutor, Kristie Barham, vouched for the comparison of codes between Bremerton Municipality Code and the RCW. Judge Olsen accepted this as fact. (RP 03/19/2007).

This violated Smith's right to confrontation. Whorton v. Bockting, No. 05-595 (U.S. 2007).

Date: October 24, 2007

Signature: Mad C. Smith

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DIVISION TWO
OF THE STATE OF WASHINGTON
~~UNITED STATES DISTRICT COURT~~
~~WESTERN DISTRICT OF WASHINGTON~~
AT TACOMA

STATE OF WASHINGTON

vs.

MARK ALLEN SMITH,

Respondent.

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STATE OF WASHINGTON
BY DEPUTY

PROOF OF SERVICE

I, MARK ALLEN SMITH, pro se, do declare that on this date, the 25
day of OCTOBER, 2007, I have served the enclosed STATEMENT OF ADDITIONAL
GROUND

on every other person required to be served, by presenting an envelope to state prison
officials at the Clallam Bay Corrections Center, containing the above documents for
U.S. mailing properly addressed to each of them and with first-class postage prepaid.

IN COMPLIANCE w/ WA. Ct. RULE 3.1

The names and addresses of those served are as follows:

MR. RANDALL SUTTON
PROSECUTOR
614 DIVISION ST. MS-35
PORT ORCHARD, WA 98306

I declare under penalty of perjury under the laws of the United States, pursuant
to Title 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on this 25 day of OCTOBER, 2007

Mark Allen Smith