COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
10 JUN 14 PM 12:00
STATE OF WASHINGTON
BY CLERK

STATE OF WASHINGTON Respondent, v. LARRY DARNELL DUNOMES (your name) Appellant.	))))))))))	No. 40126-6-II STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

I, LARRY D. DUNOMES, 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

1 VIOLATION OF APPELLANT'S DEFENSE MOTION IN LIMINE. See Mapp v. Ohio. Pg. 2 of 7

2. INEFFECTIVE ASSISTANCE OF COUNSEL. See Cuyler v. Sullivan. Pg. 3 of 7

3. AMENDED ADDITIONAL GROUNDS ON IMPOSITION OF THE PERSISTENT OFFENDER SENTENCE. See Blakely v. WASHINGTON. Pg. 5 of 7

4. ADDITIONAL GROUNDS OF Dr. KELLY'S OPINION. See Nix v. Williams Pg. 7 of 7

Additional Ground 2

If there are additional grounds, a brief summary is attached to this statement, Pages 1-7.

Date: 6-9-10

Signature: Larry D. Dunomes

Form 23

ADDITIONAL GROUNDS IN VIOLATION OF APPELLANT DUNOMES DEFENSE MOTION IN LIMINE BY THE STATE OF WASHINGINGTON. DID THE STATE OF WASHINGTON VIOLATE APPELLANT DUNOMES RIGHT BY ADMITTING A JAIL RECORDING OF APPELLANT DUNOMES FACING LIFE?

GROUNDS

(THE EXCLUSIONARY RULE)

THE EXCLUSIONARY RULE IS A JUDICIALLY-CREATED REMEDY WHICH RESULTS IN THE SUPPRESSION, BY A CRIMINAL TRIAL, OF EVIDENCE OBTAINED DIRECTLY OR INDIRECTLY THROUGH A VIOLATION OF A DEFENDANT'S CONSTITUTIONAL RIGHTS.

WEEKS v. UNITED STATES, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914) (exclusionary rule applicable in federal proceedings.)

MAPP v. OHIO, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) exclusionary rule applicable to states through the fourteenth Amendment.)

WONG SUN v. UNITED STATES, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

ARGUMENTS

HOWEVER, EVEN IF A CONSTITUTIONAL VIOLATION OCCURRED, THE PROSECUTION MAY ATTEMPT TO HAVE THE EVIDENCE ADMITTED ON GROUNDS THAT IT HAD AN ORIGIN INDEPENDENT OF THE UNCONSTITUTIONAL PROCEDURE, OR THAT THE OFFICERS WERE ACTING IN GOOD FAITH, OR THAT THE CHALLENGED EVIDENCE IS PURGED OF ITS ORIGINAL TAINT.

SEGURA v. UNITED STATES, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 441 (1984).

IF THE DEFENDANT MAKES A PRIMA FACIE SHOWING THAT THE EVIDENCE IS TAINTED BY ILLEGAL CONDUCT, THE BURDEN THEN SHIFTS TO THE STATE TO PROVE THAT THE CHALLENGED EVIDENCE WAS PURGED OF ITS ORIGINAL TAINT.

SEE WONG v. UNITED STATES.

WHILE IT HAS BEEN HELD THAT THE GOVERNMENT HAD THE BURDEN OF PROVING BY A PREPONDERANDE OF THE EVIDENCE THAT THE EVIDENCE HAS NOT BEEN TAINTED EITHER INDIRECTLY OR DIRECTLY.

UNITED STATES v. FALLEY, 489 F.2d 33 (2d Cir.1973).

THIS ERROR VIOLATED A SUBSTANTIAL RIGHT OF APPELLANT DUNOMES AND REQUIRES A REVERSIBLE ERROR.

Citations

U.S. v. Layton, 767 F.2d 549 (1985).

U.S. v. GAHAGAN, 865 F.2d 1490 (1989).

U.S. v. Browne, 829 F.2d 760 (1987).

AMENDED ADDITIONAL GROUNDS ON INEFFECTIVE ASSISTANCE OF COUNSEL DENIED APPELLANT DUNOMES A FAIR TRIAL, UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

GROUNDS

THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION GUARANTEES "IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT... TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE."

TRIAL COUNSEL'S INCOMPLETE OBJECTION TO THE ~~PROSECUTOR'S~~ Prosecutor's MISCONDUCT IN CLOSING ARGUMENT LEFT THE ERROR UNREMEDIED.

TRIAL COUNSEL'S FAILURE TO OBJECT TO IMPROPER USE OF CLASS (c) AND CLASS (a) FELONIES NOT FOUND BY A JURY BEYOND A RESONABLE DOUBT, ALSO LEFT ERROR UNREMEDIED.

DID TRIAL COUNSEL APPLY INEFFECTIVE ASSISTANCE OFCOUNSEL ?

ARGUMENTS

LIKE OTHER SIXTH AMENDMENT RIGHTS, THE RIGHT TO HAVE THE ASSISTANCE OF COUNSEL FOR ONE'S DEFENSE IS DEEMED PERSONAL TO THE ACCUSED.
FARETTA v. CALIFORNIA, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

SINCE THE RIGHT OF THE ACCUSED IN A CRIMINAL PROSECUTION TO ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS A FUNDAMENTAL RIGHT, IT IS THEREFORE MADE OBLIGATORY ON THE STATES BY THE FOURTEENTH AMENDMENT.
GIDEON v. WAINWRIGHT, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

APPOINTMENT OF COUNSEL FOR ONE ACCUSED BY A STATE OF CRIMINAL CONDUCT IS REQUIRED UNDER THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE WHICH FORBIDS ANY STATE TO "DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW." THE ASSISTANCE OF COUNSEL IS DEEMED FUNDAMENTAL AND ESSENTIAL TO A FAIR TRIAL OF THE ACCUSED AS AMATTER OF DUE PROCESS OF LAW.

THE RIGHT TO COUNSEL APPLIES AT EVERY STAGE OF A CRIMINAL PROCEEDING WHERE SUBSTANTIAL RIGHTS OF AN ACCUSED MAY BE AFFECTED INCLUDING SENTENCING.
DOUGLAS v. CALIFORNIA, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).
EVITTS v. LUCEY, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

A DEFENDANT WHO HAS A RIGHT TO COUNSEL IS ENTITLED TO THE "EFFECTIVE" ASSISTANCE BY THE LAWYER ACTING ON HIS OR HER BEHALF.
CUYLER v. SULLIVAN, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), on remand 631 F.2d 14 (3d Cir.1980), on remand 530 F.Supp. 1353 (E.D.Pa.1982), affirmed 723 F.2d 1077 (3d Cir. 1983).

THIS ERROR REQUIRES A NEW TRIAL FOR APPELLANT DUNOMES.

AMENDED ADDITONAL GROUNDS ON IMPOSITION OF THE PERSISTENT OFFENDER SENTENCE DEPRIVED APPELLANT DUNOMES OF HIS SIXTH AND FOURTEETH AMENDMENT RIGHTS TO DUE PROCESS AND A JURY TRIAL.

GROUNDS

THE APPELLANT DUNOMES SEEKS REDRESS BASED UPON STATED CAUSE No. 94-1-02574-5 OF THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY 9RP 726, 728.

APPELLANT DUNOMES SEEKS REDRESS FROM THE WASHINGTON COURT OF APPEALS DIVISION II, TO MODIFY OR CORRECT SENTENCING IMPOSED UPON APPELLANT DUNOMES ON 06/10/1994, BY THE HONORABLE JUDGE DEBROAH FLECK.

ARGUMENT

THE UNITED STATES SUPREME COURT HELD THAT AN EXCEPTIONAL SENTENCE IMPOSED UNDER WASHINGTON'S SENTENCING REFORM ACT WAS UNCONSTITUTIONAL BECAUSE IT PERMITTED THE JUDGE TO IMPOSE SENTENCE OVER THE STANDARD SENTENCE RANGE BASED ON FACTS THAT WERE NOT FOUND BY A JURY BEYOND A RESONABLE DOUBT.

DUE PROCEES REQUIRES THAT A JURY FIND BEYOND A REASONABLE DOUBT ANY FACT THAT INCREASES THE DEFENDANT'S MAXIMUN POSSIBLE SENTENCE. BLAKELY v. WASHINGTON, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 402 (2004).

APPRENDI v. JERSEY, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)

UNITED STATES v. GAUDIN, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

IN ADDITION TO ENSURING THAT PLEAS ARE KNOWING AND INTELLIGENT JUDGES ARE ALSO SUPPOSED TO DETERMINE IF THERE IS AN ADEQUATE BASIS IN FACT FOR ACCEPTING THE PLEA; THAT IS, WHETHER THE DEFENDANT COMMITTED THE CHARGED CRIME. WHEN A DEFENDANT FORMALLY PLEAD GUILTY OR NO CONTEST BUT ALL THE WHILE SAYS HE IS INNOCENT, A JUDGE DOES NOT HAVE TO ACCEPT THE PLEA. NORTH CAROLINA v. ALFORD, 400, U.S. 25, 91 S.Ct. 160, (1970).

APPELLANT DUNOMES' PRIOR CONVICTION UNDER CAUSE #94-1-02574-5 OF ARSON IN THE FIRST DEGREE WAS BASED UPON AN EARLIER GUILTY PLEA AND HAS BEEN SHOWN THAT THE PLEA WAS NOT KNOWINGLY OR INTELLIGENTLY MADE AND THAT THE APPELLANT DUNOMES GAVE UP HIS CONSTITUTIONAL RIGHTS OUT OF IGNORANCE.

ON THIS CAUSE # 94-1-02574-5, KING COUNTY SUPERIOR COURT JUDGE FLECK CONVICTED AND SENTENCE APPELLANT DUNOMES WITH AN ARSON IN THE FIRST DEGREE, APPELLANT **DUNOMES' CONVICTION UNDER THIS CAUSE # 94-1-02574-5 DOES NOT MET THE REQUIREMENTS OF A ARSON IN THE FIRST DEGREE. SEE BLAKELY v. WASHINGTON.**

ISSUE: DID THE TRIAL COURT IMPROPERLY ADMIT CERTAIN CONVICTIONS IN APPELANT'S DUNOMES CRIMINAL HISTORY FOR CALCULATING APPELLANT DUNOMES OFFENDER SCORE ?

THEREFORE APPELLANT DUNOMES'CONVICTION FOR ARSON IN THE FIRST DEGREE SHOULD BE MODIFIED OR CORRECTED,FROM SENTENCING IMPOSED UPON APPELLANT DUNOMES ON 06-10-1994, SEE BLAKELY v. WASHINGTON .

WHEREFORE APPELLANT DUNOMES RESPECTFULLY ASK THAT THIS COURT, TO GRANT THE MODIFICATION OR CORRECTION OF JUDGMENT AND CONVICTION IMPOSED ON APPELLANT ON CAUSE# 94-1-02574-5.

AMENDED GROUNDS OF Dr. EDWARD KELLY'S OPINION THAT APPELLANT DUNOMES STATEMENTS WERE NOT CREDIBLE,VIOLATED DUNOMES'CONSTITUTIONAL RIGHT TO A JURY TRIAL AND REQUIRES REVERSAL.

GROUNDS

DID Dr. KELLY S OPINION THAT APPELLANT DUNOMES STATEMENT WERE NOT CREDIBLE ?

THE FEDERAL RULE OF EVIDENCE RULE 704 (b) STATES:OPINION ON ULTIMATE ISSUE.

NO EXPERT WITNESS TESTIFYING WITH RESPECT TO THE MENTAL STATE OR CONDITION OF A DEFENDANT IN A CRIMINAL CASE MAYSTATE AN OPINION OR INFERENCE AS TO WHETHER THE DEFENDANT DID OR DID NOT HAVE THE MENTAL STATE OR CONDITION CONSTITUTING AN ELEMENT OF THE CRIME CHARGED OR OF A DEFENSE THERETO.

ALSO STATES: THAT "GENERALLY NO EXPERT COULD OFFER TESTIMONY IN THE FORM OF AN OPINION REGARDING THE VERACITY OF THE DEFENDANT. SUCH TESTIMONY IS UNFAIRLY PREJUDICIAL TO THE DEFENDANT BECAUSE IT INVADES THE EXCLUSIVE PROVINCE OF THE JURY."

THUS, AN EXPLICIT OR NEARLY EXPLICIT EXPERT OPINION ON THE DEFENDANT'S GUILT OR CREDIBILITY CAN CONSTITUTE A MANIFEST CONSTITUTIONAL ERROR, WHICH SHOULD BE CHALLENGED ON APPELLANT DUNOMES APPEAL.

ARGUMENTS

ON DECEMBER 10, 2008, APPELLANT DUNOMES WAS INTERVIEWED BY A Dr. KELLY WHO IS EMPLOYED BY WESTERN STATE HOSPITAL AS A FORENSIC EXPERT. Dr. KELLY SUPPLIED DOCUMENTS OF APPELLANT DUNOMES' INTERVIEW TO THE SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY OFFICIALS. Dr. KELLY ALSO INTERVIEWED APPELLANT DUNOMES FOR A SECOND EVALUATION AT WESTERN STATE HOSPITAL AND SUPPLIED THE SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY WITH DOCUMENTS FROM THIS INTERVIEW.

THE STATE ALSO PRESENTED TESTIMONY FROM Dr. KELLY, THE PSYCHIATRIST WHO INTERVIEWED APPELLANT DUNOMES AT WESTERN STATE HOSPITAL. 8RP 554

Dr. KELLY TESTIFIED THAT APPELLANT DUNOMES " SAID HE DROVE OVER TO WHERE SONYA WAS AFTER SHE CALLED HIM. HE WAS UPSET THAT EVERYONE WAS SMOKING CRACK. 8RP 558

THE CONSTITUTION DOES NOT FORBID FORCING A SUPECT TO TALK. IT ONLY FORBIDS USING COERCED WORDS TO GAIN A CRIMINAL CONVICTION.

7 WIGMORE RULE 1920, 1921; McCORMICK RULE 12. THE BASIS USUALLY ASSIGNED FOR THE RULE, TO PREVENT THE WITNESS FROM " USURPING THE PROVINCE OF THE JURY."

CITATIONS

WONG SUN v. UNITED STATES, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed 2d 441 (1963).

LANIER v. SOUTH CAROLINA, 474 U.S. 25, 106 S.Ct. 297, 88 L.Ed.2d 23 (1985).

NIX v. WILLIAMS, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

IT IS IMPORTANT TO NOTE THAT ALTHOUGH DR. KELLY CONDUCTED A COMPETENCY EVALUATION OF APPELLANT DUNOMES, HE WAS NOT CALLED TO RENDER AN OPINION ON THAT SUBJECT AT TRIAL. RATHER, HE WAS CALLED AS A FACT WITNESS TO RECOUNT STATEMENTS APPELLANT DUNOMES MADE DURING THE EVALUATION. 4RP 49; 8RP 554. SEE ER 702. IN ANY EVENT, NOT EVEN AN EXPERT MAY GIVE AN OPINION AS TO THE DEFENDANT'S CREDIBILITY. DAUBERT v. MERRELL DOW PHARMACEUTICALS, INC., 509 U.S. 579 (1993).

KUMHO TIRE Co. v. carmichael, 119 S.Ct. 1167 (1999).

THE STATE COULD PROVE BEYOND A REASONABLE DOUBT THAT THE VERDICT WAS AFFECTED BY Dr. KELLY'S IMPROPER OPINION, APPELLANT DUNOMES IS THEREFORE ENTITLED TO A NEW TRIAL.

Larry D. Dunomes

Print Name: Larry Dunomes # 721939

SUBSCRIBED AND SWORN to before me this 9th day of June, 2010.

Wanda K Heimann

Notary Public in and for the State of Washington, Residing in Walla Walla, Washington. My commission expires: 8/20/11