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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

NO. 52392-2-II

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

FINOS DALE FOX III,
Petitioner

SUPLEMENTAL BRIEF OF PETITIONER IN SUPPORT OF
PERSONAL RESTRAINT PETITION

I. ISSUES PRESENTED

(See attached)

I. Issues Presented

The Petitioner, Finos Dale Fox III, is now asking this Court to extend their reasoning on State v. Robinson, 493 P 3d 710 (Div. 1 2019) to invalidate a guilty plea predicated on avoiding a 3rd Strike where the facts do not support all the Strikes and no evidence shows four Separate assault 3s. (when Charged with one offense based on a Single Criminal act, the trial court may not accept a guilty plea to multiple Counts of lesser amended offenses based on that Single Criminal act.) See also State v. Mutch, 171 wn. 2d 646, 662, 254 P. 3d 803 (2011) when a person is Charged with multiple Counts of the same offense, "each Count must be based on a separate and distinct Criminal act., and it must be "manifestly apparent" from the record, testimony, and argument, that the two identical Charges are based on Separate acts, Mutch 171 wn. 2d at 664. At trial Mr. Fox was improperly informed that he was facing a 3rd Strike, and was Subsequently facing a penalty of life in prison without the possibility of parole. This resulted in Mr. Fox negotiating a plea agreement of (4) Assault 3s that he was sentenced to the maximum Penalty of

five years, Consecutively. It is at Mr. Fox's request to this court that the decision of Robinson be extended to him in this Matter.

II. STATEMENT OF CASE

(See attached)

II. Statement of Case

The Petitioner, Finos Dale Fox III, filed a PRP with this court and the case was on stay pending the outcome of State v. Robinson 493 P.3d 710 (Div 1, 2019). Mr. Fox appealed to this Court contending that his felony plea agreement in an invalid contract and directly violates his Constitutional protections in the following ways:

First, the trial court improperly notified Mr. Fox that if he were convicted of the crime of Assault in the First Degree he would suffer the consequences of Life in prison without the possibilitly of Parole. The State informed Mr. Fox that he had a criminal history of a Washington State felony of Assault in the Second degree (a Strikable offense) and that his Louisiana conviction of the felony of Illegal use of A weapon (which is not a Strikable offense, emphasis added) qualified him as a three-Strikes candidate. This improper instruction violates Mr. Fox's Due process protections as his interest in liberty was leveraged in favor of the State in order to secure a felony plea agreement that imposed a greater sentence then if Mr. Fox

had been found guilty at trial. (He would've been sentenced under the 2 points range).

Secondly, State v. Zhao, 157 Wn. 2d 188, 200 (2006) "allows a defendant to plead guilty to an amended charge for which there is no factual basis so long as there is a factual basis for the original charge." (Zhao does not however, allow a defendant to be convicted of two separate crimes based on one criminal act and one original charge.) When a person is charged with multiple counts of the same offense "each count must be based on a separate and distinct criminal act," State v. Mutch 171 Wn. 2d 646, 662, 254 P. 3d 803 (2011). The State chose to step outside of the parameters of law by agreeing to and artificial reduction and imposing an amendment that is supported by no factual basis. Moreover, this was accomplished in lieu of Mr. Fox's fear of facing the rest of his life in prison. This "reduction" violates Mr. Fox's Double Jeopardy protections and was executed at the cost of his interest in liberty.

Third, the State in calculating Mr. Fox's point range placed Mr. Fox in the 7-point range. This is improper as even if he were convicted of all 4 Assault 3s appropriately, Mr. Fox's range would be 5 (2 prior felony convictions plus 3 other current convictions). This becomes relevant when you consider the fact that had Mr. Fox actually been found guilty of Assault in the first Degree he would have been sentenced under the 2 point range which would have resulted in him facing less time in prison than the 20 years he was given.

III. ARGUMENT

See attached

III. Argument

The Petitioner, Finos Dale Fox III, argues that this Court should extend their reasoning in State v. Robinson, 493 P.3d 710 (Div 1, 2019) to invalidate a guilty plea predicated on avoiding a 3rd strike where the facts do not support all the strikes and no evidence shows four separate Assault 3s. Robinson held that a guilty plea where there is no factual basis for the convicted crime cannot be used as the basis for another crime without violating double jeopardy. In Robinson the defendant plead guilty to two counts of misdemeanor violations of a no-contact order. It was stipulated in the plea agreement that one of the misdemeanors did not happen and was based on a Barr plea. The defendant was then convicted of a felony harassment charge based on the two misdemeanors. Because one of the convictions did not actually happen, the trial court reversed the felony harassment charge. However, the court did not overturn the misdemeanor charges nor State v. Zhao 157 Wn.2d 188 (2006) which states that you can not

plead guilty to multiple crimes that otherwise violate double jeopardy if the original crime does have a factual basis.

This case was on stay pending the outcome of the Robinson case, where they ruled that an In re Barr waiver does not forbid a defendant from claming Double Jeopardy. Thus, to remedy the unconstitutional violations done to Mr. Fox, this court should dismiss the second, third, and fourth Assault in the third Degree and honor the plea agreement by re-sentencing Mr. Fox under the 2-point range for one Assault in the Third Degree (even if the trial court determine it to be appropriate to impose the statutory maximum of 5 years.) State v. Knight, 162 wn. 2d 806 (2008) (even with an indivisible plea, vacating the convictions that violate Double Jeopardy is the proper remedy without withdrawing the plea.) Furthermore, Mr. Fox's Barr waiver is invalid because the out-of-state conviction is not a strike in washington. He was misinformed but still wants to be re-sentenced on the single Assault in the Third Degree under

the point range of 2, which is appropriate, with credit for time served.

IV. CONCLUSION

(See attached)

DATED this 4TH day of August, 2019.

Respectfully Submitted,

Finos Dale Fox III
Petitioner

IV Conclusion

For all the reasons listed above, the Petitioner Finos Dale Fox III, respectfully prays that this Court will grant his petition, and extend the reasoning determined in State v. Robinson, 493 P.3d 710 (Div 1 2019) to invalidate his guilty plea predicated on avoiding a 3rd Strike where the facts do not support all the strikes and no evidence shows four separate Assault in the Third Degree. Mr. Fox prays this Court will dismiss three of the four Assault in the Third Degrees and give him Credit for time served under the 2-points range or remand him back to the trial court level for resentencing according to the parameters of the law, Which is appropriate, equitable and Just.

8-4-19

Washington State Court of Appeals
Division Two
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STATE OF WASHINGTON

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PRP Case Number 52392-2-II

Dear Court Clerk,

The reason why that Iam writing you this letter is because I have a DeadLine on August 19th of this month. Iam Sending you a Copy of my Suplemental Brief of Petitioner in Support of Personal Restraint Petition. So can you send the Prosecutor Attorney a copy of my Suplemetal Brief? regarding this matter. Thank you for your time!!

Respectfully,
Finos Dale Fox III