62926-3

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COA # 62926-3

Court of Appeals

The State of Washington
Division One

Defendant Samuel Ryan Pro Se

Additional Grounds Brief
With Motion to Dismiss
Kidnapping Charges
And Consolidate

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# Assignment of Error:

1). Multiple punishment as an condition of correction of an erroneous conviction violates the Fifth Amendment of the United State and Washington State Constitution.

2). Kidnapping Charges that are Incidental to a crime Violates Double Jeopardy if not Dismissed causing Judicial Vindictiveness.

3). Increase of punishment for exercising a Constitutional or Statutory Right causing Prosecutorial Vindictiveness on the behalf of Prosecutor.

4). Consecutive Sentence, Kidnapping Charges, aplied without a jury finding beyond a reasonable doubt violates Due Process.

5). Firearm Enhancement imposed without a jury finding beyond a reasonable doubt is a Due Process Blackely Violation.

IN THE COURT OF APPEALS THE STATE OF WASHINGTON DIVISION ONE

| | |
|---|---|
| STATE OF WASHINGTON, Plaintiff, vs. SAMUEL RYAN, Defendant | NO. 62926-3-1 Defendant's Pro Se Additional Grounds Statement Brief |

Come NOW Defendant Samuel Ryan, pro Se, and present this Additional Ground Statement Brief before this Court.

Background of the Case

This is the third appearance of this case before this Court. I was found guilty by the Superior Court of KING COUNTY following a Stipulated trial to the bench. Verbatim Report of proceedings (RP) dated 08/01/03 at page 4.

During Sentencing the State presented evidence of two prior most serious offenses in order to me sentenced as a persistent offender under Washington's Persistent Offender Accountability Act (POAA). 08/01/03 - RP at 4-5.

This court found that by a preponderance of the State's evidence that I had two previous convictions that were most serious offenses. 08/01/03 - RP at 13.

The State then asked for a life sentence on each count of the four count information to run concurrent, and that I not be allowed to possess firearms. 08/01/03 - RP at 13-14. Prior to the court imposing its sentence, the counsel for defense nor I made a statement. 08/01/03 - RP at 14-15.

The trial court then sentence me to Life Without the Possibility of Parole on each count, and $ 500 victim assessment penalty, with no contact orders for each victim, and community placement. The court further requested DNA sampling. There was no mention of firearms enhancement penalties, and the court granted the State's request that each sentence run concurrently. 08/01/03 - RP at 15; Judgment and Sentence, pg. 4.

FIRST APPEAL

On appeal in Division I, of the court of Appeals, I nor the State challenged any of the facts surrounding the court's findings during trial. I challenged the issues of my prior Illinois conviction in attempts to invalidate my sentence under the POAA, due to in-effective assistance of counsel (Michael Danko); determination of the trial court that I had two comparable prior offenses; and violation

of the Single Subject act. SEE unpublished Opinion - C.O.A. # 52892-1-I. The State conceded that I was denied ineffective assistance of counsel Unpublished opinion - C.O.A. # 52892-1-I pg. 2-3. On 08/23/04, the Court of Appeals remanded my case back to trial court with instructions that the State be allowed to have an opportunity to prove that the disputed prior conviction from Illinois was comparable to a current Washington State most serious conviction. U.P.O. # 52892-1-I pg. 5. The Court of Appeals did not reach my constitutional issue. U.O # 52892-1-I pg. 5.

RESENTENCING IN TRIAL COURT

On February 11, 2005, I appeared for resentencing before trial court, again represented by Michael Danko. 02/11/05 RP at 2.

The State did not follow the instructions of the Court of Appeal to prove the Illinois Conviction, the State did however argue that all four counts in which I was convicted of should this time run consecutive to each other, and that they should each have consecutive firearms enhancements. 02/11/05 - RP at 4.

That court, after hearing arguments from both sides specifically found that the kidnappings in my case were not an integral part of the robbery, and were merely incidental to the robbery itself, and not an independent crime. 02/11/05 - RP at 9-11. The court further found that the victims were not abducted or "transported" to "some remote spot where they were not likely to be found." 02/11/05 - RP at 10.

After making the following findings of facts the court concluded that the kidnappings were Incidental and merged with the robbery in the first degree and sentenced me to 68 months, plus 60 months on the firearm enhancement. See Judgment and Sentence at pg. 4; 02/11/05 - RP at 15.
(The Sentence of the trial court was not outside the standard range).

Second Appeal

The State appealed the finding of the trial court arguing that the trial court improperly merged the kidnapping into first degree Robbery Charge. (See Unpub. O., COA # 55871-4-I at page 3).

The court of Appeals reversed under State v. Louis, 155 Wn.2d 563 (2005) stating that "Kidnapping, "even when incidental" to the robbery does not merge with robbery," and "that RAP 2.2(b) expressly grants the State the right to appeal sentence when the State believes there has been a miscalculation of the standard range."

I was resentenced on 01/23/09 to 437 months, 240 of them firearm enhancement that a jury did not find beyond a reasonable doubt. See Judgment and Sentence of 01/23/09 page 4.

Issue:

Violation of the Fifth Amendment, Of the United State and Washington State Constitution

Argument:

Being Struck-out in 2003 erroneously, I appealed the Sentence and won in 2004 and was resentenced in 2005 with three, kidnapping mengering into robbery in the first.

The State apealed the merger and won in 2007. At the 2005 Sentencing, I received 68 months for the robbery and 60 month firearm enhancement. In 2009 I was Sentence again but this time I received a consecutive sentence for all the kidnapping Charges that was originally ran concurrent in 2003 see judgment + sentencing 2003 page 4.

The State request the concurrent sentence See CP August 1, 2003 page 14 line 4. The State on January 23, 2009, request for consecutive Sentence because I'm no longer Struck-out. I receive a harsher penalty for exercising my Constitutional and Statutory right this was vindictiveness but moreover it violated my Constitutional right not to be punished with multiple punishment for the same offenses.

Whaley v. State of North Carolina, 379 F.2d 221 (1967) at 222-23. The State may not require an accused to rellinquish his constitutional right to protection from multiple punishment as an Condition of correction of an erroneous Conviction.

Clear Support for this view is found in this Court's decision in United State V. Walker, 346 F. 2d 428 (4th cir 1965) treated more extensively in Patton. There the defendant, having applied for Correction of his defective Sentence, was given a more Severe penalty.

This was held to violate the fifth amendment to the constitution, not only by punishing the defendant twice for the Same offense, but also by unfairly conditioning his right to seek correction of the defective Sentence.

Patton V. State of North Carolina, 381 F. 2d 636 (1967) at 645. Double Jeopardy prohibit against multiple punishment. See Ex parte Lange, 85 U.S. (18 Wall) 163, 21 L.Ed 872 (1873). It is this aspect which has been consistently relied upon to prohibit an increase in a defendant's Sentence, Once Service has commenced. E.g. Ex parte Lange, Supra; United State V. Benz, 282 U.S. 304, 307, 51 S. Ct. 113, 75 L.Ed 354 (1931); United State V. Sacco, 367 F. 2d 368 (2d cir 1966); United States V. Adams, 362 F. 2d 210 (6th cir 1966); Kennedy V. United States, 330 F. 2d (9th cir 1964).

My kidnapping Conviction Should have been dismiss because they were ruled Incidental to the robbery as a matter of law. State V. Womac, 160 Wn. 2d 643; 160 P. 3d 40, (2007).

The double jeopardy doctrine protects defendants against "prosecution oppression". Wayne R LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure § 25.1 (b), at 630 (2d ed. 1999). The Fifth Amendment to the United State Constitution provides "NO person Shall be subject for the Same offense to be twice put in jeopardy of life or limb". Article I, Section 9 of the Washington Constitution mirrors the federal Constitution Stating "no person Shall be twice put in jeopardy for the Same offense." "Washington's double jeopardy Clause offers the Same Scope of protection as the federal double jeopardy Clause". In re Pers. Restraint of Percer, 150 Wn. 2d 41, 49, 75 P. 3d 488 (2003) citing State v. Grocken, 127 Wn. 2d 95, 107, 896 P. 2d 1267 (1995). Both prohibit "(1) a Second prosecution for the Same offense after acquittal, (2) a Second prosecution for the Same offense after conviction, and (3) multiple punishment for the Same offense imposed in the Same proceeding". Percer, 150 Wn. 2d at 48-49 citing State v. Bobic, 140 Wn. 2d 250, 260, 996 P. 2d 610 (2000); Grocken, 127 Wn. 2d at 100). RCW 10.43.050 also affords defendants protections against double jeopardy, providing in part:

Whenever a defendant shall be acquitted or convicted upon an indictment or information Charging a Crime consisting of

different degrees, he cannot be proceeded against or tried for the Same Crime in another degree, nor for an attempt to Commit Such Crime, or any degree thereof.

"Offenses are not Constitutionally the Same if there is any element in one offense not included in the other and proof of one offense would not necessarily prove the other." State V. Trujillo, 112 Wn. App. 390, 410, 49 P.3d 935 (2002) (citing Calle, 125 Wn. 2d at 777-78). Washington Courts, however, have occasionally found a Violation of double jeopardy despite a determination that the offenses involved Clearly contained diff legal elements.

State V. Schwab, 98 Wn App. 179, 184-85, 988 P. 2d 1045 (1999) ("See State V. Johnson, 92 Wn. 2d 671, 679-80, 600 P. 2d 1249 (1979) (examining convictions for first degree rape, first degree kidnapping, and first degree assault and striking the kidnapping and assault convictions even though the offenses involve different legal elements because the kidnapping and assault were incidental to, and element of the first degree rape); Same for the case at bar, the movement and restraint are element of robbery so the kidnapping was ruled incidental Should be dismiss; State V. Potter, 31 Wn. App. 883, 887-88, 645 P.2d 60 (1982) See also In re Pers Restraint of Burchfield, 111 Wn. App. 592, 599, 46 P.3d 840 (2002) "Although the offenses do not contain identical legal elements,

We conclude that the legislature did not intend to punish Shooting a Victim both as an assualt and as a homicide").

United State V. Wilson, 420 U.S. 332, 43 LEd 2d 232, 95 S.ct. 1013 at 243, respondent content that Ball and Kepner Stand for the proposition that the key to invoking double jeopardy protection is not whether the defendant might be Subjected to multiple trials, but whether he can point to a prior Verdict or judgment of acquittal.

In Ball, however, the Court explained that review of the verdict of acquittal was barred primarily because It would expose the defendant to the risk of a Second trial after the finder of fact had ruled in his favor in the first.

And, although the Kepner case technically involved only a Single proceeding, the Court regarded the practice as equivalent to two Separate trials, and the evil that the court saw in the procedure was plainly that of multiple prosecution.

In my case the prosecutor only wanted to increase my Sentence for appealing the erroneous conviction of three Strike, using incidental kidnapping conviction and ask for consecutive Sentence when the original Sentence was concurrent thus violating double jeopardy.

My Kidnapping Charges Should be Dismiss because of Judicial Vindictiveness That Violates Double Jeopardy

Argument:

1) North Carolina V. Pearce is the foundation for the doctrine of vindictiveness. Pearce was convicted in a North Carolina court of assault with intent to commit rape and was sentenced to 12 to 15 years in prison.

After serving several years of his sentence, he initiated a post-conviction proceeding and obtained a reversal of his conviction. "The case at bar was reverse, keep in-mind I was struck-out with all the convictions runing concurrent at the request of the State prosecutor."

He was retried by the same judge who presided at his first trial, same as the case at bar; convicted, and sentenced to an eight-year prison term which, when added to the time already served, amounted to a longer sentence than that originally imposed. In my case my sentence notwithstanding I was struck-out but the sentence was ran concurrent. The Supreme Court vacated the conviction, finding the harsher sentence unconstitutional.

Although neither the Double Jeopardy nor Due Process clauses absolutely precludes harsher sentences upon reconviction, the imposition of a penalty upon a defendant for having successfully pursued a statutory right of appeal or collateral remedy was held to violate due process.

To eliminate the penalty imposed against a defendant for exercising his constitutional rights, and the chilling effect upon future defendants, the court set forth the following principle;

Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendants exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

Imposition of a more severe sentence upon a defendant after a second conviction, in the case at bar a third sentence; is constitutional only when based upon "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding".

This requirement, in effect, places the burden of proof on the prosecutor when a likelihood of vindictiveness has been demonstrated. This was judicial vindictiveness because I was originaly sentence to concurrent sentence with-out anything left out, in otherwords all the cards was on the table was the State request concurrent sentence, and after exercising a constitutional an statutory right the State request a consecutive sentence and the original judge that was the judge throughout trial and

all of the Sentencings Jeopardy attaches to punishment after conviction. Brown V. OHIO, 53 LEd 2d 187 432 U.S. 161; 97 S.Ct 2221.

But because this Same Judge ruled the kidnapping incidental to the robbery the Kidnapping Should have been dismissed because of double jeopard. State V. Womac, 160 Wn. 2d 643 160 P.3d 40 (2007) WA. Lexis 462 October 26, 2006, Argued June 14, 2007.

When a defendant is charged with and Convicted of multiple Separate offenses and the Convictions are reduced to judgment but the defendant is Sentenced for only one of the Conviction based on a determination by the trial Court that Sentencing for all of the Convictions would place the defendant in double jeopardy, the defendant is entitled to have the additional Convictions vacated.

"In the case at bar incidental kidnapping that was not overruled by the courts violates Double Jeopardy too because incidental being encompass of the robbery." That the defendant received only one Sentence is of no matter as the defendant Still Suffers the punitive consequences of the Convictions. Conviction, and not merely imposition of a Sentence, constitutes punishment. Double jeopardy concerns arise in the presence of multiple Conviction for the "Same offense" regardless of what kind of Sentence is imposed. The Separate Convictions apart from the trial Court's Sentencing decision, have potential adverse collateral Consepuences that may not be ignored.

Brown v. Ohio, 53 L.Ed 2d 187 432 U.S. 161; 97 S.ct. 2221. (1977).
The double jeopardy clause protects against a second prosecuting for the same offense after acquital. It protects against a second prosecution for the same offense.

Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishment for the same offense. Where successive prosecutions are at stake, the guarantee serves a constitutional policy of finality for the defendant's benefit. The policy protects the accused from attempts to relitigate the facts underlying a prior acquittal and from attempts to secure additional punishment after a prior conviction and sentence.

Gore v. United State, 357 U.S. 386 (1958) Bell v. United State, 349 U.S. 81 (1955); Ex parte Lange 18 Wall. 163 (1874), United State v. Jorn, 400 U.S. 470, 479 (1971), Ashe v. Swenson, 397 U.S. 436 (1970), United States v. Martin Linen Supply Co, 430 U.S. 564 (1977) and from attempts to secure additional punishment after a prior conviction and sentence see Green v. United States 355 U.S. 184, 187-188 (1957); Cf. North Carolina v. Pearce, supra.

State v. Larkin, 70 Wn. App 349, 853 P.2d 451. The double jeopardy clause embodied in the fifth amendment to the United State

Constitution and article 1, Section 9 of the Washington Constitution

The double jeopardy clause of the fifth amendment guarantees that no individual shall be "subject for the same offense to be twice put in jeopardy of life or limb". United State Const. amend. 5. Similarly, the Washington constitution provides: No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense".

Constitution art. 1 § 9. The article 1, section 9 double jeopardy provision has been construed to provide protection identical to the provided under the federal constitution. State V. Schoel, 54 Wn. 2d 388, 391, 341 P. 2d 481 (1959).

The double jeopardy clause provides threefold protection against: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishment for the same offense.

The "appearance of vindictiveness" test has been applied by most circuit and state courts. The essential premise of vindictiveness is the violation of due process when the prosecutor increases the severity of charges in response to the exercise of constitutional or statutory rights. Under this appearance test, once a defendant has shown that the charges against him were increased after he exercised a constitutional or statutory right, an appearance

of Vindictiveness by the prosecutor has been demonstrated that Creates a presumption that the prosecutor acted Vindictively. The burden then Shifts to the prosecutor to Show that any increase in the Severity of the Charges Was not motivated by Vindictiveness but by independent reason or intervening Circumstances.

North Carolina V. Pearce, 395 U.S. 711, 23 L.Ed. 2d 656, 89 S.ct. 2072. To be Sure, this Societal interest is Compromised to a degree if the Second judge is forbidden to impose a greater punishment on retrial than was meted out at the first trial. For example, new facts may develop between the first and Second trial which would, as an initial matter, be Considered in aggravating of Sentence.

But the Same token however the prosecutor who was able to prove only Second-degree murder at the former trial might improve his case in the interim and acquire Sufficient evidence to prove murder in the first degree. In either instance, if on View the Second trial in a Vacuum, the defendant has received less punishment than is his due. But in both cases, the compromise is designed to protect other Societal interests, and it is after Green, a compromise compelled by the Double Jeopardy Clause. [395 U.S. 75].

Issue: Prosecutorial Vindictiveness Constitutional Due Process Principle Prohibit Prosecutorial Vindictiveness. See generally United State V. Goodwin, 457 U.S. 368, 372-85, 102 S. ct. 2485, 73 L.Ed. 2d 74 (1982).

Argument:

At my original Sentence, dated August 1, 2003 RP page 14 and judgment and Sentencing date Aug. 1, 2003 page 4. The State prosecutor asked the court to run all of the charges con-current and the court granted the request, judgment and Sentence of Aug. 1, 2003 pg. 4. I appealed the three strike conviction and won and was resentence in 2005, the State appeal the merger and won in 2007 and I was resentence in 2009.

The State then ask for all the charges to run consecutive and gave no reason for the increase but that they can ask for whatever they want, judgment and of 2009, January 23 page 9.

What the State did not understand is that double jeopardy is aplied to punishment once Sentence "Commenced." See Ex parte Lange, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873). It is this aspect which has been consistently relied upon to prohibit an increase in a defendant's Sentence, once service has commenced. E.g., Ex parte Lange, Supra; United States V. Benz, 282 U.S. 304, 307, 51 S.ct. 113, 75 L.Ed. 354 (1931); United States V. Sacco, 367 F. 2d 368 (2d Cir. 1966); United State V. Adams, 362 F. 2d

210 (6th cir. 1966); Kennedy v. United States, 330 F. 2d (9th cir 1964).

Patton v. State of North Carolina, 381 F. 2d 636 (1967) at 645; We perceive no constitutionally significant distinction between the increase in punishment following retrial thus, unless a defendant is held to waive this double jeopardy protection in seeking a new trial, "in the case at bar a new sentence" a harsher penalty may not be imposed. And we have already declared, in Part II of this opinion, that we decline to predicate a prisoner's exercise of his right to seek a new trial on the fiction that he has "waived" the benefits of his initial sentence, because of the restrictive effect this has an access to postconviction remedies.

This is in accord with this circuit's decision in United States v. Walker, 346 F. 2d 428 (4th cir. 1965), that, in seeking correction of an erroneous sentence, a defendant does not waive his double jeopardy right not to be subjected to multiple punishment.

Whaley v. State of North Carolina, 379 F. 2d 221 (1967) at 222-23; The State may no require an accused to relinquish his constitutional right to protection from multiple punishment as an condition of correcting an erroneous conviction. Clear support for this view is found in this court's decision in United States v. Walker, 346 F. 2d 428 (4th cir 1965), treated more extensively in Patton.

There the defendant, having applied for Correction of his defective Sentence, was given a more Severe penalty. This was held to Violate the Fifth Amendment to the constitution, not only by punishing the defendant twice for the Same offense, but also by unfairly conditioning his right to seek Correction of the defective Sentence,

Prosecutorial Vindictiveness occurs when "the government acts against a defendant in re-Sponse to the defendant prior exercise of Constitutional or Statutory rights". United States V. Meyer, 258 U.S. App. D.C. 263, 810 F.2d 1242, 1245 (D.C cir. 1987).

Thus a prosecutorial action is "Vindictive" only if designed to penalize a defendant for invoking legally protected rights." Once Sentence "Commence" double jeopardy is aplied. Ex parte Lange, 85 U.S. (18 Wall) 163, 21 L Ed. 872 (1873), Kennedy V. United States, 330 F2d (9th cir 1964).

Because the State's prosecutor original asked for the concurrent Sentence when the State beleived I was Struck-out, can not now ask Vindictively for a consecutive Sentence now that I'm no longer faceing life without. And the only reason the State has for now asking for a consecutive Sentence is we can ask for what ever we wish. Nothing Chanced in the evidence that was not on the record at the original Sentence. The State is just being Vindictive and Violating my double jeopardy rights, and Due process. Remedy Dismissal of Kidnapping Charges under

CrR 8.3 (b) government misconduct.

There are two kinds of prosecutorial vindictiveness: actual vindictiveness and a presumption of vindictiveness. A presumption of vindictiveness arises when a defendant can prove that all of the circumstances, when taken together, support a realistic likelihood of vindictiveness.

The prosecution may then rebut the presumption by presenting "objective evidence justifying the prosecutorial action!" Blackledge v. Perry, 417 U.S. 21 94 S.ct. 2098, 40 L Ed. 2d 628 (1974). The defendant must show a "reasonable likelihood of vindictiveness," creating an apprehension in future defendant that the State would retaliate against their exercise of constitutional or statutory rights. NO actual vindictiveness or retaliation motive was required to be shown.

The record will show the State has no reason for asking for consecutive sentence now, but because I appealed my conviction. So I'm respectfully requesting a dismissal of the kidnapping charges, for an vindictive violation of my Constitutional Rights.

ISSUE: Kidnapping Charges Ran Consecutive Unconstitutionally, Violates Due Process.

**Argument**

Exceptional Sentence not Authorize by Jury beyond a reasonable doubt are

unconstitutionally appied when the Court finding determined the facts.

Any time the State increases punishment based on a factual determination, those facts must be proved to a jury beyond a reasonable doubt. Apprendi, 530 U.S. at 490 U.S. Const. amends 6, 14; Wash. Const. art 1 §§ 3, 22.

At the request of the State on Jan. 23, 09 the court Sentence me to consecutive Sentences; Kidnapping Charges that was found to be "Incidental" to the robbery conviction, not overruled by the Same judge, now Sentence the kidnappling Charges as "Separate and distinct" Serious violent offenses as defined in RCW 9.94A.030. 1/23/09 RP 12-13; RCW 9.94A.589 requiring consecutive Sentence for "Separate and distinct" Conduct that is criminal.

The court violated my 6, 14 Constitutional rights under the federal government and Wash. const. art 1 §§ 3, 22. The State may argue I gave-up this right and the Sentence Should Stand, but under State V. Hagar, 158 Wn 2d. 369, 144 P. 3d 298.

Hagar's exceptional Sentence is unconstitutional. Like Blakely's Hagar's Sentence is unconstitutional. After Hagar waived his right to a jury trial the court found him guilty of three counts of first-degree theft based on Hagar's admission to the elements of the offense. CP. 23

Hagar faced a sentence range of 3-9 months on each count. CP. 26; Blakely, 124 S. ct. at 2537. Instead of imposing a standard range sentence, the sentencing court found additional facts by a mere preponderance of the evidence and used them to give Hagar an aggravated 30-month sentence, 320% higher than the statutory maximum permitted by the guilty finding. CP. 45. The 30-month sentence was no authorized by the court's guilty verdict, and thus violated Hagar's right to a jury trial and to proof of every element of the crime beyond a reasonable doubt.

Hagar did not waive his right to a jury determine proof beyond a reasonable doubt of aggravating factor use to support an exceptional sentence. Same for the case at bar.

The question to the State is "<u>how an accued can knowingly waive a constitutional right he did not know he possessed under a stipulate to real facts</u>"? Hagar waived rights to a jury trial only as to the elements of the charged crime not as to any aggravating factors.

Moreover Hagar nor I was not advised of the right to have a jury find aggravating factors beyond a reasonable doubt in the statement or the in-court colloquy. To the contrary, he was erroneously told that the judge could make this finding.

The Same Statement was made in my Stipulated trial. See Stipulated facts pg. 2 paragraph 2.

"Simply Put" the Standard of proof is not the defendant's to waive; it is a burden placed on the government, without which a conviction cannot be "obtained". See Boykin, Apprendi and Terrell, infra. That result is not as the State Suggests, that a defendant's real facts stipulation waived the jury trial right he did not know he possessed, but rather that "NO Valid Waiver Occurred."

Hagar was remanded for resentencing within the Standard range, the Same Shoud be the case with the case at bar. Sentencing enhancement that are unconstitutionally applied must be vacated. Harmless error analysis does not apply.

State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007). Harmless error analysis does not apply to a violation of a defendant's Sixth Amendment right to have a jury determine aggravating Circumstances, upon proof beyond a reasonable doubt, the facts Supporting a Sentence above the Standard Sentencing range if the error Occurred at a time when State law did not provide a procedure for a jury to find the Sentencing facts that would justify imposing an exceptional Sentence Under the Sentencing Reform Act of 1981 Chapter 9.94A RCW.

ISSUE: Firearm Enhancement

The SRA that permits a judge to impose a Sentence above the Standard range base upon facts that are not found by a jury and are not proven beyond a reasonable doubt are unconstitutional on their face.

Argument;

My firearm enhancement is an illegal exceptional Sentence. The court does not have authority to impose a firearm enhance that was not found by a jury, beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 125 S.ct. 2531, 2536-38, 159 L.Ed. 2d 403 (2004).

Applying Blakely in State v. Hughes, this Court reversed exceptional Sentence base on facts by a judge by a preponderance of the evidence, this Court further held the Statutory maximum of 10 years for a class B felony was not the 10-year maximum found in RCW 9A.20.021(1)(b), but rather the high end of the Standard Sentence range. Blakely, 124 S.ct. at 2537.

"The Statutory maximum for Apprendi purposes is the maximum Sentence a judge may impose Soley on the basis of the facts reflected in the jury verdict or admitted by the defendant." (Emphasis in Original) Id. citing King, 536, 563, 122 S.ct. 2406, 153 L.Ed 2d 524 (2002).

In other words, the relevant maximum is the maximum the judge may impose with no additional factual findings Blakely, 124 S.ct. 2537. Washington exceptional Sentence procedure thus is fundamentally incompatible

With the Sixth Amendment. Id at 2538

Washington Sentencing Guidelines Commission, Adult Sentencing Guidelines Manual, Comment at II-67. This law Sought to increase the punishment for armed crime and to differentiate crimes committed with a firearm from crimes committed with some other deadly weapon.

In re Charles, 135 Wn. 2d 239, 246, 955 P. 2d 789 (1998). While the purpose of 159 was to increase punishment for armed crime, the Legislature's failure to create a Statutory procedure by which a jury could find a firearm Special verdict precludes the imposition of the firearm enhancement. RCW 9.94A.533(3), Which purpose to add time if the defendant is armed with a firearm is not rooted in a Statutory procedure authorizing a jury to enter a Special verdict form, Such as that authorized by RCW 9.94A.602.

After the decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed. 2d 403 (2004), holding that any fact which authorized a Sentence longer than the top the Standard range had to be submitted to a jury and proven beyond a reasonable doubt, the Washington Supreme Court held that Blakely undermined Washington's exceptional Sentence provisions.

Where the legislature has not creased a procedure for jury to find aggravating facts and has, instead, explicitly provided for judges to do So we refuse to imply Such a procedure On "remand."

Because the court found that on "remand" it Could not Submitte the question of aggravating facts under current Statutes because legislature has not Created a procedure for juries to find aggravating factors i.e. firearm without a valid waiver to aggravating factors violated my Blakely Sixth Amendment right. Recuenco 154 Wn. 2d at 162.

The SRA permits a judge to impose a Sentenc above the Standard range base upon facts that are not found by a jury and are not proven beyond a reasonable doubt, with or without a valid waiver are unconstitutional on their face. RCW 9.94A.530(2) RCW 9.94A. 535.

The exceptional Sentence provisions of the SRA are thus Unconstitutional on their face. The Kansas Supreme Court declared its exceptional Sentence provision Unconstitutional based upon Apprendi one of the foundation of the Blakely opinion. State V. Gould, 271 Kan. 394, 23 P.3d 801, 814 (2001). At the time, Kansas's determinate Sentencing Scheme was remarkably Similar to the SRA. see Gould, 23 P.3d at 811-12. The court was permitted to impose an exceptional Sentence above the Standard range base upon factual findings. Gould, 23 P. 3d at 811-12, Citing K.S.A. 2000 Supp. 21-4716.

The burden of proof was a preponderance of the evidence. Gould 23 P.3d at 812 citing State V. Spain, 263 Kan. 708, 713 953 P. 2d 1004 (1998). The Gould Court found the exceptional

Sentence Statue Unconstitutional on its face. The Gould court also held unconstitutional Schemes can not Stand and are not harmless errors. Must Remand for resentencing within the Standard range.

Conclusion:

For reasons Stated above I, Samuel Ryan respectfully request a dismissal of the kidnapping Charges that were incidental to the robbery, dismissal because of government misconduct which is the remedy for Vindictiveness or remand for resentence to concurrent sentence that was originally ordered by trial court.

Second remand for resentencing within the Standard range for all the convictions which is the remedy for violation of sixth amendment rights in light of Washington V. Recuenco, 165 L.Ed. 2d 466 U.S. 126 S.ct 2546 (2006)

In The Court Of Appeals The State Of Washington Division One

| | |
|---|---|
| State of Washington<br>Plaintiff<br>vs.<br>Samuel Ryan<br>Defendant | No. 62926-3-1<br>Defendant's Pro Se<br>8.3(b) CrR Motion to Dismiss Kidnapping Charges |

Dismissal in Furtherance of Justice CrR 8.3(b). Provides as follow:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or government misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The Court shall set forth its reason in a written Order.

Rule 8.3(b) requires a Showing of arbitrary action or government misconduct before dismissal of a prosecution is appropriate.

I'm respectfully requesting a dismissal under CrR 8.3(b) Government Misconduct Judicial and Prosecutorial Vindictiveness which Violated Due Process and Double Jeopardy as Stated in the above Case.

In The court of Appeals of Washington
Division One

| | |
|---|---|
| State of Washington<br>Plaintiff<br>vs.<br>Samuel Ryan<br>Defendant | COA no. 62926-3-1<br>Defendant's Pro Se Affidavit to Support CrR 8.3(b) Motion to Dismiss Kidnapping Charges |

I, Samuel Ryan, do depose and Say:

I am the petitioner in the above entitled CrR 8.3(b) motion to dismiss kidnapping Charges.

I am over the age of 18 and currently reside at the McNeil Island Correction Center (MICC) Pierce County, State of Washington.

I have first hand knowledge of the matters to which I attest.

I am Submitting this affidavit in Support of the CrR. 8.3(b) motion to dismiss kidnapping Charges in My Case, do to government Misconduct. State V. Michielli, 132 Wn.2d 937 P.2d 587.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 SEP 23 PM 4:55

Date 9,20,09
Samuel Ryan

If there is government misconduct or arbitrary action that prejudices the defendant's right to a fair trial, State V. Michielli, 132 Wn. 2d 937 P.2d 587. Simple mismanagement of the prosecution may be Sufficient to establish government Misconduct.

Date 9,20,09

Samuel Ryem

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 SEP 23 PM 4:49

## DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document **Appellant's Statement of Additional Grounds for Review** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 62926-3-I** and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for ☒ respondent **Dennis McCurdy - King County Prosecuting Attorney**, ☐ appellant and/or ☐ other party, at the regular office or residence or drop-off box at the prosecutor's office.

MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: September 23, 2009