FILED
COURT OF APPEALS
DIVISION II

06 AUG 31 AM 10:57

STATE OF WASHINGTON
BY DEPUTY

IN THE COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,	)	NO: 34109-3-II
	)	
Respondent,	)	APPELLANT'S STATEMENT
	)	OF ADDITIONAL GROUNDS
Vs.	)	FOR REVIEW (SAG)
	)	
DANIEL NORMAN AGUE-MASTERS,	)	
	)	
Appellant.	)	

I, Daniel N. Ague-Masters, have received and reviewed the BRIEF OF APPELLANT prepared by my attorney, Mr. Thomas E. Doyle. Below is an additional ground for review that is not addressed in his brief. I understand the Court will review this SAG together with the attached evidentiary exhibit when my appeal is considered on the merits.

ADDITIONAL GROUND

THE TRIAL COURT DID NOT PERMIT ME THE OPPORTUNITY FOR ALLOCUTION AT SENTENCING IN VIOLATION OF STATE LAW.

RCW 9.94A.500 in part states: "The court **shall** ... allow arguments from ... the offender ... as to the sentence to be imposed." The language of this statute is clear that the right to allocution at

sentencing is mandatory not optional. The sentencing court is required to afford the offender the opportunity to address the court on his own behalf prior to the imposition of sentence. It is the duty of the court to ensure this requirement is met.

Black's Law Dictionary, 8th Edition (2004) defines Allocution as: "A trial judge's formal address to a convicted defendant, asking him or her to speak in mitigation of the sentence to be imposed."

> "Before a court pronounces a sentence, a defendant must be allowed to make 'arguments.' ... This right is derived from the common-law right of allocution. State V. Crider, 78 Wn App. 849, 856, 899 P.2d 24 (1995). 'Allocution is a plea for mercy; it is not intended to advance or dispute facts.' State V. Lord, 117 Wn.2d 829, 897, 822 P.2d 117 (1991) cert. denied, 506 U.S. 856 (1992); see In re Personal Restraint of Benn, 134 Wn.2d 868, 893, 952 P.2d 116 (1998)(only ligitimate purpose for allocution is for defendant to express remorse and ask for mercy)."

State V. Serrano, 95 Wn.App. 700, 709, 977 P.2d 47 (1999).

Exhibit #1 is a copy of the Verbatim Report of Proceedings (RP) from the sentencing hearing of November 4, 2005. An examination of the 11 pages of this record shows that at no time did the Court afford me any opportunity to allocute in any form whatsoever. "We recognize that allocution is a statutory right... The sentencing court erred in denying allocution."

State V Beer, 93 Wn.App 539, 546, 969 P.2d 506 (1999).

The trial court's imposition of a sentence on me before hearing anything in mitigation from me had an obvious chilling effect on the exercise of my right to make any statement on my own behalf. It is highly unlikely the court could be expected to put aside any sentence it may have already imposed and reconsider that sentence after then allowing me the opportunity to allocute. "Harmless error analysis does not apply in cases in which sentence is imposed before the right of allocution is given." State V Aguilar-Rivera, 83 Wn App. 199, 202, 920 P.2d 623 (1996).

Because the trial court failed to properly follow the statute and provide me the opportunity to allocute prior to imposing sentence, the sentence was imposed in violation of the law and as such it is illegal. An illegal sentence is invalid. State V Loux, 69 Wn.2d 855, 857, 420 P 2d 693 (1966).

Respectfully submitted this 29th day of August, 2006.

Daniel N. Ague-Masters 774474
191 Constantine Way GB-D31
Aberdeen, WA 98520

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,	)	NO: 34109-3-II
	)	
Respondent,	)	CERTIFICATE OF SERVICE
	)	SERVICE BY MAIL
Vs.	)	
	)	
DANIEL NORMAN AGUE-MASTERS,	)	
	)	
Appellant	)	

I, Daniel N. Ague-Masters, appellant in the above entitled case, pursuant to RCW 9A.72.085 and 28 U.S.C. § 1746 and under the penalty of perjury, do certify that on the date noted below I sent the following copies of my STATEMENT OF ADDITIONA GROUNDS FOR REVIEW (SAG) to:

Thurston Co. Prosecuting Attorney
2000 Lakeridge Dr. S.W.
Olympia, WA 98502

Mr. Thomas E. Doyle
Attorney at Law
P.O. Box 510
Hansville, WA 98340

BY PROCESSING AS LEGAL MAIL, WITH FIRST CLASS POSTAGE AFFIXED THERETO, AT THE:

Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Dated this 29 of August, 2006

Daniel Ague

Daniel N. Ague-Masters 774474
191 Constantine Way GB-D31L
Aberdeen, WA 98520

Exhibit #1

FILED
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DIVISION II
06 FEB 10 AM 9:53
STATE OF WASHINGTON
BY _____
DEPUTY

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.
06 JAN 25 PM 3:41
BETTY J. GOULD, CLERK
BY _____
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, Plaintiff, v. DANIEL N. AGUE-MASTERS, Defendant.	THURSTON COUNTY CAUSE NO. 01-1-00650-2 COURT OF APPEALS CAUSE NO. 34109-3-II SENTENCING

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on November 4, 2005, the above-entitled matter came on for hearing before the HONORABLE CHRIS WICKHAM, Judge of Thurston County Superior Court.

Reported by: Sonya L. Messing, Official Reporter, CCR#2112
2000 Lakeridge Drive SW
Olympia, WA 98502
(360) 786-5571

APPEARANCES:

FOR THE STATE OF WASHINGTON:

DAVID SOUKUP
Thurston County Prosecutor's Office
2000 Lakeridge Drive SW
Olympia, Washington 98502
(360)786-5540

FOR THE DEFENDANT:

EPHRIAM BENJAMIN
107 N Tacoma Ave
Tacoma, Washington 98403
(253) 272-3733

1 THE COURT: Good morning. You may be seated.
2 This is the sentencing of *State of Washington v. Daniel*
3 *Norman Ague-Masters*, and I don't recall, counsel, is he
4 being sentenced in both matters this morning?
5 MR. SOUKUP: That is correct, your Honor.
6 MR. BENJAMIN: Yes, your Honor.
7 THE COURT: So the two cause numbers are
8 01-1-650-2 and 04-1472-5. Go ahead.
9 MR. SOUKUP: Thank you, your Honor. When you
10 said you would be ready at ten after, I thought that was a
11 little ambitious, but actually in sitting here and looking
12 at the issues a little bit, that might be the case. I
13 think everyone is going to agree that time range is 60
14 months to 120 months here. The maximum for manufacturing
15 methamphetamine is ten years, unless there is a prior
16 offense or if there is an enhancement for the crime having
17 been convicted in a protected zone, and in this particular
18 case, we didn't have one.
19 We went to the jury, didn't have an allegation of the
20 protected zone. We had allegations as to the firearm and
21 as to the child being present, and, as you will recall,
22 the jury found that both those things are present, and
23 they return yeses to those along with a guilty verdict.
24 So effectively that is a -- the enhancement for the
25 child presence is 60 months. The enhancement for the

1 firearm is 36 months. So that is 96 months right there,
2 and then I understand that Mr. Benjamin and I are going to
3 have a dispute about the range, but it appears whichever
4 way it came out, even if the state's position was
5 erroneous, it would be harmless error if this matter were
6 ever appealed.
7 The state's position is that his range under the old
8 range that was in effect at the time he committed this
9 crime is 62 to 82 months. He has got two points, one
10 point for his attempting to elude conviction, and the
11 other point for the escape conviction that he plead to
12 here.
13 The other way, Mr. Benjamin's position, is that under
14 some equal protection argument that he can argue that it
15 is 51 to 68 months. Well, 51 plus the 96 is more than 120
16 months. So it appears that will be Mr. Ague's sentence
17 here is 120 months. Thank you.
18 Other aspects, your Honor, should be the nine and
19 12 months community supervision. There is a drug fine
20 that must be imposed, and in a methamphetamine case,
21 manufacturing methamphetamine case, that is a minimum of
22 $3,000. I will ask for $10,000 in this case.
23 Mr. Ague-Masters is going to prison, but his life
24 isn't over. He can certainly earn money in prison and
25 when he gets out of prison, and the damage he has done to

1 our community is certainly worth $10,000, if not a lot
2 more.
3 He should pay a large sum for all the services he has
4 been provided at public expense here. I will leave that
5 in the Court's discretion, of course, the $500 victim
6 assessment, $110 court cost, $100 DNA collection fee, and
7 the crime lab fee. Thank you.
8 THE COURT: Mr. Benjamin?
9 MR. BENJAMIN: Thank you, your Honor. Your
10 Honor, essentially what the prosecutor stated is correct.
11 Our only argument really relates to the standard range
12 whereas when my client was charged in 2001, the standard
13 range would have been I believe 62 to 82 months. However,
14 because the changes that have occurred by the legislature
15 under the SRA, the standard range now for zero to two
16 points is 51 to 68 months.
17 I believe that if you apply the rule of levity and
18 also do a constitutional analysis on whether or not he
19 should be able to benefit from a lenient -- a new law that
20 gives a more lenient sentence, I think you would arrive at
21 the 51 to 68 and apply the new law.
22 Nevertheless, as the parties have agreed, because my
23 client was convicted of the enhancements, the enhancement
24 are going to run consecutive to one another, and the
25 enhancements are going to eat up most of the standard, the

1 maximum range of 120 months. So any way we look at that,
2 he is still looking at 120 months, regardless of what the
3 standard range would be, because of the 96 months.
4 96 months are going to be straight time under the
5 enhancements. So there is no dispute between the parties
6 on that issue alone.
7 As far as the legal financial obligations that the
8 state is seeking against my client, I would ask the Court
9 that if the state is seeking $10,000 in legal financial
10 obligations for the clean up fees, then I would ask for
11 restitution hearing, because I believe those fees have
12 already -- that the clean up has already been taken care
13 of. It was taken care of out of pocket by my client's
14 family, and if the state can provide any proof that the
15 state is out of any funds, whatsoever, then we can address
16 that issue.
17 In any event, your Honor, my client is indigent. He
18 has -- he previously had a retained attorney. However, as
19 a result of some changes in his life primarily being
20 incarcerated for quite a period of time, he has had to
21 obtain an appointed attorney in this matter. I am
22 appointed to represent Mr. Ague, and I would ask the Court
23 to take his indigency into consideration in imposing any
24 legal financial obligations upon him.
25 I would ask the Court to impose the low end of the

1 range, specifically, because as I stated earlier, most of
2 the sentence is going to be eaten up by the enhancements.
3 Thank you, your Honor.
4 THE COURT: Without having had additional
5 briefing or time to evaluate the arguments of the parties,
6 I will adopt the lower of the two ranges, attempting to
7 show some levity toward the defendant, and will select the
8 mid point of that standard range or 60 months as the base
9 sentence for him. With the enhancements, the total
10 sentence will be 120 months.
11 I will order a drug fine of $3,000, the Crime
12 Victim's Compensation assessment fee of $500, $110 court
13 costs, $100 DNA fee and the crime lab fee. I will also
14 order a thousand dollars to the Office of Assigned Counsel
15 for the excellent work that defense counsel did in this
16 case.
17 MR. BENJAMIN: Thank you, your Honor.
18 THE COURT: And I will order the nine and
19 12 months community supervision.
20 MR. SOUKUP: Your Honor, I understand the
21 Court's ruling, but just a word for the record about the
22 range issue just so it can be on the record, and that is
23 that I think that -- and I apologize for not having
24 briefed this. I think I was kind of thinking Mr. Benjamin
25 would brief it, and then there would be a response

1 brief -- but my understanding is it's a procedural
2 provision, excuse me, it's governed by the sentencing law
3 that is in effect at the time. So I believe --
4 THE COURT: I don't dispute that. I just,
5 without having briefed it, I am going to give the benefit
6 of the doubt to Mr. Ague-Masters.
7 MR. SOUKUP: Right, I understand. Thank you.
8 THE COURT: You are free to argue that at a
9 later date with appropriate citations.
10 MR. SOUKUP: I can't envision a situation
11 that that is something that anyone would be interested in
12 doing, but just in case.
13 THE COURT: Thank you.
14 MR. SOUKUP: Thank you. That will take me
15 just a moment to draft.
16 THE COURT: Sure.
17 MR. SOUKUP: So, your Honor, then I am going
18 to, since I guess it is an equal protection argument, I am
19 going to indicate that the Court is finding that the --
20 no, I will put it on there as you are finding that it's a
21 drug three offense under the new SRA provision.
22 THE COURT: That is fine.
23 MR. SOUKUP: Because I think that is the idea
24 that you are going to give him the benefit of that so he
25 has a lower range.

1 THE COURT: That sounds fair. I think
2 perhaps while they are working out the judgment and
3 sentence in this case, we will move on to a couple other
4 matters to give them more time.
5 * * * * *
6 THE COURT: The record will reflect that I am
7 entering the judgment and sentence for Daniel
8 Ague-Masters.
9 MR. BENJAMIN: Thank you, your Honor.
10 THE COURT: In both matters. Thank you,
11 Mr. Benjamin.
12 MR. SOUKUP: Your Honor, I don't believe
13 Mr. Ague-Masters has been advised of his rights to appeal.
14 I also notice that Mr. Benjamin seems to have a Notice of
15 Appeal in his hand right now.
16 MR. BENJAMIN: That is right, your Honor.
17 THE COURT: Mr. Ague-Masters, I understand
18 you have presumably already discussed this with your
19 attorney, but it's my duty to advise you that you have the
20 right to appeal the convictions that are being entered
21 today; that you have the right to appeal any sentence
22 outside the standard range; that unless a notice is filed
23 within 30 days after the entry of the judgment, which was
24 entered today, that the right to appeal is irrevocably
25 waived; and that the clerk will, if requested by a

1 defendant appearing without counsel, supply a Notice of
2 Appeal form and file it upon completion by the defendant;
3 and that if you are unable to pay the costs thereof, you
4 are entitled to have counsel appointed and portions of the
5 trial record necessary for review of assigned errors
6 transcribed at public expense; and that you also are
7 limited in terms of the amount of time that you can
8 collaterally attack any judgment entered this morning.
9 Is there a request for me to sign an Order of
10 Indigency related to the appeal today?
11 MR. BENJAMIN: Yes, your Honor. I have an
12 Order for Indigency prepared.
13 THE COURT: And I will sign that.
14 MR. BENJAMIN: And I have to effect an appeal
15 in other matters.
16 THE COURT: Thank you.
17 MR. BENJAMIN: Thank you, your Honor.
18 THE COURT: Anything further, counsel?
19 MR. SOUKUP: No, your Honor. Thank you.
20 MR. BENJAMIN: Nothing from the defense
21 either.
22 THE COURT: Thank you, Mr. Benjamin.
23 MR. BENJAMIN: Thank you, your Honor.
24 [Proceedings adjourned]
25

CERTIFICATE OF REPORTER

STATE OF WASHINGTON)

COUNTY OF THURSTON)

I, SONYA L. MESSING, CCR, Official Reporter of the Superior Court of the State of Washington, in and for the County of Thurston, do hereby certify:

That I was authorized to and did stenographically report the foregoing proceedings held in the above-entitled matter, as designated by Counsel to be included in the transcript, and that the transcript is a true and complete record of my stenographic notes.

Dated this the 11th day of January, 2006.

SONYA L. MESSING, CCR
Official Court Reporter
Certificate No. 2112