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STATE OF WASHINGTON
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No. 34804-7-11

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

STATE OF WASHINGTON,
Plaintiff,
vs.
LARRY BRUNER,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF CLARK COUNTY
CAUSE NO. 00-1-01280-2 / J&S FILED: APRIL 13, 2006
THE HONORABLE ROGER A. BENNETT PRESIDING

STATEMENT OF ADDITIONAL GROUNDS / RAP 10.10

Larry Bruner, DOC#820740
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1830 Eagle Crest Way
Clallam Bay, WA 98326-9723

CERTIFICATE OF SERVICE

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I. ASSIGNMENTS OF ERROR

1. THE TRIAL COURT'S SENTENCE EXCEEDS THE STATUTORY MAXIMUM AND MUST BE REVERSED.
2. WASHINGTON STATE'S SRA COMPARABILITY LAW VIOLATES THE EX POST FACTO CLAUSE WHEN IT WORKS TO AGGRAVATE A PRIOR OUT OF STATE CONVICTION.
3. UNDER LAVERY AND FARNSWORTH BRUNER'S OREGON CONVICTION FOR SEXUAL ABUSE IS FACTUALLY COMPARABLE TO A MISDEMEANOR; ELEMENTS WHICH CANNOT BE CONVERTED TO A COMPARABLE WASHINGTON FELONY BY A JUDGE.

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. DID THE TRIAL COURT COMMIT ERR BY IMPOSING A COMMUNITY PLACEMENT SENTENCE WHICH EXCEEDS THE STATUTORY MAXIMUM SET FORTH IN BLAKELY V. WASHINGTON?
2. DOES THE SRA COMPARABILITY LAW VIOLATE THE EX POST FACTO CLAUSE WHEN IT WORKS TO AGGRAVATE A PRIOR OUT OF STATE CONVICTION FROM A CLASS C-FELONY TO A B-FELONY - EXTENDING THE PUNISHMENT AND WASHOUT PERIOD FROM 5 to 10 YEARS?
3. DID THE TRIAL COURT ERR IN INCLUDING BRUNER'S OREGON CONVICTION FOR SEXUAL ABUSE IN HIS CURRENT OFFENDER SCORE WHEN THE UNDERLYING FACTS DEMONSTRATE THE OFFENSE WAS PLED UP FROM A MISDEMEANOR TO A FELONY; FACTS THAT A WASHINGTON STATE JUDGE CANNOT FIND MEETS THE ELEMENTS OF A COMPARABLE WASHINGTON OFFENSE WITHOUT A JURY?

III. STATEMENT OF THE CASE

Defendant Bruner agrees with the "STATEMENT OF THE CASE" set forth in the opening brief filed by his Attorney Lisa E. Tabbut, pages 1 - 3. Any additional facts relevant to the issues presented herein will be set forth in each argument.

IV. ARGUMENT

1. BRUNER'S 172 MONTH SENTENCE EXCEEDS THE STATUTORY MAXIMUM AND MUST BE REVERSED.

The face of Bruner's April 13, 2006, judgment and sentence shows that the trial court imposed 136 months of actual confinement plus 36 months of community placement, totaling 172 months of custody. J&S, §§ 4.5 & 4.6, page 6, dated April 13, 2006.

RCW 9.94A.505(5) in relevant part, reads:

... a court may not impose a sentence for a term of confinement or ... community placement, ... which exceeds the statutory maximum for a crime as provided in chapter 9A.20 RCW.

RCW 9.94A.505(5).

In Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2431, 159 L.Ed.2d 403 (2004), the State of Washington contended there was no Apprendi violation because the relevant "statutory maximum" under the SRA was governed by RCW 9A.20.

See RCW 9.94A.420 observing that no exceptional sentence may exceed the limit set forth in 9A.20 RCW.

The United States Supreme Court rejected this argument holding that the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. See Ring v. Arizona, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)(the maximum he would receive if punished according to the facts reflected in the jury verdict alone). In other words, the relevant "statutory maximum" under the SRA is not the maximum sentence set out in 9A.20. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment and the judge exceeds his proper authority. Blakely, supra. For all practical purposes, RCW 9.94A.505 setting for a limit on community placement governed by 9A.20 is identical under the SRA for Apprendi/Blakely purposes.

Bruner contends his sentence is invalid under Apprendi and Blakely because the combined period of incarceration and community placement (total custody) exceed the statutory maximum. Bruner's maximum sentence under the SRA was 136 months. This was the only punishment the judge could impose based on the jury's verdict. By imposing an additional

36 months of custody (community placement), the judge inflicted punishment that the jury's verdict alone did not allow -- because the jury had not found all the facts "which the law makes essential to the punishment." Id. Blakely, supra. In other words, the jury did not find that 36 additional months should be imposed for community placement. Consequently, the sentencing court had discretion to set Bruner's maximum penalty at 136 months. Bruner's sentence is currently 136 months of incarceration. His period of community placement (custody) is 36 months. The combined period of incarceration and community placement (punishment) is 172 months, which exceeds the statutory maximum of 136 months. Accordingly, his sentence exceeds the maximum term for the crime and the 36 months must be vacated. With zero (0) points Bruner's "statutory maximum" is 72 - 101 months. Therefore, any community placement sentence would have to be incorporated within the maximum term (101 months). Cf. State v. Hundall, No. 29043-0-II (3/11/2003)(statutory maximum 60 months. Court adjusted community placement term downward to stay within statutory maximum/36 months of actual confinement combined with 24 months of community placement, totaling 60 months of custody); State v. Zavala-Reynoso, 127 Wn.App. 119, 110 P.3d 827 (2005)(sentence reversed where community custody term of 9 - 12 months, plus standard range

sentence of 114 months exceeded statutory maximum term of 120 months).

2. WASHINGTON STATE'S SRA COMPARABILITY LAW VIOLATES THE EX POST FACTO CLAUSE WHEN IT WORKS TO AGGRAVATE A PRIOR CONVICTION - EXTENDING THE THE FELONY CLASSIFICATION OF THE CRIME FROM 5 TO 10 YEARS; CHANGING THE LEGAL CONSEQUENCES AND UNDERLYING NATURE OF THE OFFENSE TO BRUNER'S DISADVANTAGE.

The trial court found that Bruner had a prior Oregon 1980 conviction for sexual abuse in the first degree - a class C-Felony with a 5 year washout period. Despite this fact, the court found the prior conviction comparable to a class B-Felony in Washington State -- enabling the State to extend the washout period to 10 years and use the prior conviction in calculating Bruner's offender score under a 1990 statute prohibiting sex offenses from washing out. J&S § 2.2 & 2.3, pages 2-3; CP 19.

A law violates the ex post facto prohibition of both the United States and the Washington State Constitutions if it "aggravates a crime or makes it greater than it was when committed." State v. Edwards, 104 Wn.2d 63, 70-71, 701 P.2d 508 (1985); U.S. Const. Article I, section 10, cl. 1; Washington State Constitution Article I, section 23.

In 1980 when Bruner committed the Oregon sexual abuse

offense the maximum penalty was 5 years. Under the Washington SRA (9.94A), 26 years later on April 13, 2006, the court compared Bruner's prior 1980 Oregon class C-Felony (5 year max) conviction to a class B-Felony (10 year max) in Washington (Indecent Liberties). This comparability made Bruner's 1980 Oregon class C-Felony greater than it was when committed by increasing it from a class C-Felony to a Class B-Felony. It also disadvantaged Bruner by enabling the State of Washington to use the offense as prior criminal history (3 points) when calculating his offender score. By making the crime greater than it was when committed, the State was able to extend the washout period by 5 additional years to fall under a new statute which prevents sex crimes from washing out. Laws of 1990, ch. 3, section 706, effective July 1, 1990.

Consequently, as applied in the instant case, the SRA's comparability clause violates the ex post facto clause because the act (comparability - increasing the prior offense from a C-Felony with a 5 year max to a B-Felony with a 10 year max) changed the legal consequences and underlying nature of the prior offense. As such, this Court should hold that Bruner's 1980 Oregon class C-Felony cannot be converted to a B-Felony and, thus, cannot be used in calculating his offender score. Accordingly, this Court

should reverse and remand for resentencing with an offender score of zero (0) points, instead of three (3) points.

3. THE TRIAL COURT ERRED IN INCLUDING BRUNER'S OREGON CONVICTION FOR SEXUAL ABUSE IN HIS CURRENT OFFENDER SCORE WHEN THE UNDERLYING FACTS DEMONSTRATE THE OFFENSE WAS PLED UP FROM A MISDEMEANOR TO A FELONY -- RENDERING THE OFFENSE FACTUALLY NOT COMPARABLE TO ANY COMPARABLE WASHINGTON OFFENSE.

In 1980 Bruner was originally charged with a misdemeanor offense where no arrest was made. Oregon Police received information that Bruner's daughter had observed inappropriate sexual behavior. No sexual contact was alleged or made. The police contacted Bruner and his wife, showed them a report and indicated their children had been taken into custody by the Children Services Division of their local school. The officers stated the offense carried a one year maximum sentence in the county jail. As a result, they advised Bruner to get an attorney.

Bruner retained an attorney, Mr. Willard McCleagan. Mr. McCleagan met with the prosecutor and Childrens Services Division (CSD). The prosecutor advised Mr. McCleagan that CSD wanted a felony charge because it would provide better deterrent conditions. As a result, the State of Oregon and Mr. McCleagan reached a plea agreement that would result in no jail time and result in the children being immediately

returned to their home.

Mr Bruner plead guilty to sexual abuse in the first degree, a class C-Felony. In order to meet the felony element, Bruner had to admit sexual contact -- although no sexual contact actually ever occurred. This plea was agreed upon to avoid mandatory jail time on the original misdemeanor charge. In exchange for Bruner's plea the State recommended 60 months of probation and that CSD return the children. The court accepted the plea agreement and Bruner's plea, and imposed a 60 month probationary sentence and CSD to return Bruner's children. The sentence was later modified to 36 months probation, which Bruner completed in 1984 and received a discharge from probation.

On April 13, 2006, Judge Bennett compared Bruner's 1980 Oregon conviction to a class B-Felony (indecent liberties) in Washington. Bruner objected to the use of the conviction arguing that it was not legally or factually equivalent to a Washington State ^{offense.} Calculating Bruner's offender score at 3-points, the court determined his sentence range was 102 - 136 months. The court sentenced Bruner to the statutory maximum -- 136 months.

COMPARABILITY OF OUT OF STATE CONVICTION

Our Supreme Court has devised a two-part test to determine whether an out of state conviction is comparable

to a Washington offense and, therefore, whether the defendant could have been convicted in Washington had he committed the same act here. State v. Morely, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). Under this two-part test, courts include out-of-state convictions in the defendant's offender score if there is either legal or factual comparability. In re Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005); see also State v. Farnsworth, No. 32322-2-II (2006).

In cases in which the elements of the Washington crime and the out-of-state crime are not identical, the sentencing court may look at the defendant's conduct, as evidenced by the police reports, indictment or information, to determine if the conduct itself would have violated a comparable Washington statute. Morley, 134 Wn.2d at 606. However, "while it may be necessary to look into the record of an out-of-state conviction to determine its comparability to a Washington offense, the elements of the charged crime must remain the cornerstone of the comparison." Id. Here, the elements of Bruner's 1980 Oregon crime for sexual abuse and Indecent Liberties in Washington are not substantially similar. The elements of the Oregon offense are broader.

In most cases a certified copy of a prior judgment and sentence is highly reliable evidence. State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003). While this is also

true of out-of-state crimes that are identical on their face, it is not true for out-of-state crimes that are not facially identical. In essence, such crimes are different crimes. There is no question that Bruner's 1980 Oregon sexual abuse offense is a different crime than Washington's indecent liberties offense. Where the crimes are different, a legal examination of comparable elements may not be possible because there may have been an incentive for the accused to prove that he did not commit the narrower offense or to have plead out to an offense that was not committed. See, e.g., State v. Ortega, 120 Wn.App. 165, 84 P.3d 935 (2004).

Bruner's case is unique because he had no incentive to prove he did not commit the misdemeanor Oregon offense. Had he plead to the misdemeanor he would have received mandatory county jail time. Therefore, to avoid jail time, Bruner plead out to an offense which the record did not support. He plead guilty to "sexual abuse," when the facts merely established observation of inappropriate sexual behavior by a minor. No sexual contact was alleged by the victim. At best, these facts in Washington would constitute indecent exposure.

Under these circumstances, in Washington a judge cannot legally accept a plea for a crime the defendant did not

commit. The facts must establish the elements of the offense or the plea is a nullity. Boykin v. Alabama, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709 (1969). Consequently, Bruner's Oregon plea to sexual abuse was unlawfully obtained and illegal in Washington. In re Hinton, No. 73504-2 (2004); State v. R.D.L., No. 32411-3-II (2006)(Insufficient factual basis for plea requires reversal); In re Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983)(A defendant must not only know the elements of the offense, but also must understand that the alleged criminal conduct satisfies those elements).

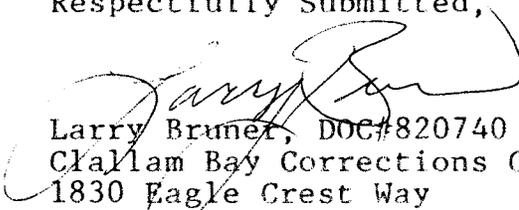
Moreover, because the case was plead up to a more serious offense, an offense which the evidence did not support, the Oregon court could not have necessarily found facts that would support each element of a comparable Washington offense. Consequently, Bruner's 1981 Oregon conviction for sexual abuse is neither legally nor factually comparable to indecent liberties. As such, the Oregon sexual abuse offense was erroneously used in calculating Bruner's offender score, and this Court should vacate the sentence and remand for resentencing with an offender score zero (0) points.

V. CONCLUSION

Based on the foregoing reasons Bruner's sentence should be reversed and remanded for sentencing without the Oregon conviction included in the offender score.

DATED this 15th day of JANUARY, 2007.

Respectfully Submitted,


Larry Bruner, DOC#820740
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1830 Eagle Crest Way
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CERTIFICATE OF SERVICE/MAILING

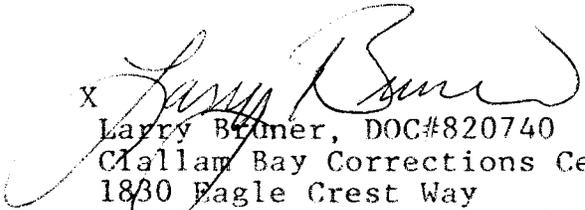
I, LARRY BRUNER, hereby certify and declare under penalty of perjury that I served a true and correct copy of the following documents: STATEMENT OF ADDITIONAL GROUNDS / RAP 10.10, on counsel of record for the Respondent State of Washington, as follows:

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TO: CLARK COUNTY PROSECUTING ATTORNEY
P.O. BOX 5000
VANCOUVER, WA 98666

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 15th day of JANUARY, 2007.

x 
Larry Bruner, DOC#820740
Clallam Bay Corrections Center
1830 Eagle Crest Way
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JANUARY 15th, 2007

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LARRY BRUNER, DOC#820740
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