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STATE OF WASHINGTON
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WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

Personal Restraint Petition OF MICHAEL RHEM	NO: 35195-1-II AMENDED PERSONAL RESTRAINT PETITION SUBMITTING ADDITIONAL GROUNDS

AMENDMENTS

I, MICHAEL RHEM, Pro Se Petitioner, Beseech the above named Court to allow me to submit the following ADDITIONAL GROUNDS to the Personal Restraint Petition in the above case number. An AMENDED RELIEF is also included.

ADDITIONAL GROUNDS

#1. RAP 16.4 (c)(2). Legally Invalid Sentence.
PURPORT: The imposition of a consecutive sentence, when the charges at Bar constituted "the same criminal conduct," was not supported by "written Findings of Fact and conclusions of law" as required by Washington Law in RCW 9.94A.535. The prejudice of this error is the imposition of a

sentence that is approximately 20 years in excess confinement.

ARGUMENT: The Petitioner was sentenced to a consecutive sentence for the charges of: Assault 1st; Assault 1st; and Unlawful Possession of a Firearm. All of these charges occurred at the same time, on the same date, and are under the same Pierce County Cause Number.

RCW 9.94A.589(1)(a) clearly states: "If the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535."

RCW 9.94A.535 states: "The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Whenever a sentence outside the standard sentence range is imposed, the court <u>shall set forth the reasons for its decision in written findings of fact and conclusions of law</u>." (Emphasis Added).

The required written findings of fact and conclusions of law were not set forth with the Judgement and sentence. The consecutive sentence is therefore legally invalid.

CONCLUSION: The consecutive sentence in the case at Bar is legally invalid and therefore

this case should be remanded for resentencing. Note that the Court can not submit the Findings of Fact and conclusions of law at a resentence hearing and I ask the Court of Appeals note this in its Final Decision.

#2. RAP 16.4(c)(2). Legally Invalid Sentence.

PURPORT: The exceptional sentence imposed in the manner of a consecutive sentence was not submitted before a jury to determine the facts and whether or not said facts justify the imposition of said exceptional sentence, as required by the Sixth Amendment of the United States Constitution and the Washington State Constitution article I, sections 21 and 22. The prejudice of this error is the imposition of an exceptional sentence that is approximately 20 years in excess confinement which was applied against the Petitioners Rights under the Federal and state Constitutions.

ARGUMENT: As stated in ADDITIONAL GROUND #1 of this Amendment, there are no written Findings of Fact and conclusions of law to support the exceptional sentence (consecutive sentence). Even if there were, the facts were never submitted to a Jury for determination.

Under the common law of criminal jurisprudence, the truth of every accusation against a defendant should be confirmed by the unanimous suffrage of twelve of the defendant's equals and neighbors.

An accusation which lacks any particular fact

which the law makes essential to the punishment is no accusation within the requirements of the common law, and it is no accusation in reason.

APPRENDI v. NEW JERSEY, 530 US 466 (2000), at 490, Finds: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

It is important to note that "prior conviction record" is not grounds for an exceptional sentence because the offender score provisions of RCW 9.94A.525 already covers that aspect of sentencing.

CONCLUSION: The exceptional sentence constitutes a penalty beyond the prescribed statutory maximum and therefore should have been submitted to a jury for consideration. It was not, so this case should be remanded for resentencing. Note that the court can not submit the findings of fact, nor submit them to a jury at a resentence hearing and I ask the Court of Appeals note this in its Final Decision.

#3. RAP 16.4(c)(2). Legally Invalid Sentence.

PURPORT: The State, when calculating the Petitioners offender score, calculated <u>other current offenses</u> constituting the same criminal conduct into the score. This is contrary to the law of Washington by violating RCW 9.94A.525 (5)(a)(i) and the Washington State Sentencing Guidelines.

ARGUMENT: In the Case at Bar, I was charged

with Assault 1st, Assault 1st, and Unlawful Possession of a Firearm. The State calculated 3 Felony points into my sentence score for these crimes that "encompassed the same criminal conduct." This is Clearly erroneous upon a glance at the Washington Sentence Guidelines for any one of the 3 charges listed above. The Guidelines state plainly: crimes that encompass the same criminal conduct, do not count in the present offender score.

RCW 9.94A.589 (1)(c) does not apply because there is no charge of "Theft of a Firearm" nor "possession of a stolen Firearm" present with the Unlawful Possession of a Firearm.

CONCLUSION: Since the offender score was obtained unlawfully, by including crimes from the same criminal conduct, this case should be remanded to the trial court for resentencing without the 3 Felony points unlawfully obtained.

The prejudice in this ground, is that my offender score was unlawfully raised, inturn creating excess time at sentencing.

#4. RAP 16.4 (c)(2). Legally Invalid Sentence.

PURPORT: The State, when calculating the Petitioners offender score, calculated <u>prior Felony convictions</u> constituting the same criminal conduct into the score. This is contrary to the law of Washington by violating RCW 9.94A.525 (5)(a)(i) and the Washington Sentencing Guidelines.

ARGUMENT: The State calculated my prior "Possession of Stolen Property 1st" and a "Felony Elude" as seperate offenses.

RCW 9.94A.525 (5)(a)(i) clearly states:

"The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consequtively, whether those offenses shall be counted as one offense or as seperate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), ..."

The prior Possession of Stolen Property 1st and the Felony elude were the same criminal conduct. The Possession of Stolen Property was the vehicle that I eluded in. This should have been "1" offense when calculating the offender score, per RCW 9.94A.589(1)(a). It was erroneously calculated as "2".

CONCLUSION: This case should be remanded for resentencing with the two charges listed above counting as one prior offense. The prejudice of this issue is that my offender score was unlawfully raised, inturn creating excess time at sentencing.

#5. RAP 16.4(c)(2). Legally Invalid Sentence.

PURPORT: The State, at trial, did not submit the sentencing facts of my juvenile adjudications to the jury. This is contrary to the Sixth Amendment

OF the United States Constitution and the Washington State Constitution article I, sections 21 and 22. The prejudice of this is that these unlawful sentencing facts were used to increase my sentence, by way of raising my offender score.

ARGUMENT: Juveniles do not have the Right to a Trial by jury in regards to their juvenile adjudications. SEE: JuCR 7.11. The juvenile adjudications in the defendants criminal history were used to increase the punishment for the underlying offenses that were submitted to the jury in trial. The juvenile adjudications were not submitted to the jury.

Every accusation against a defendant must be proved to a jury and an accusation which lacks any particular fact which the law makes essential to the punishment is no accusation within the requirements of the common law, and it is no accusation in reason. SEE: APPRENDI, supra.

Under the common law of criminal jurisprudence, the truth of every accusation against a defendant should be confirmed by the unanimous suffrage of twelve of the defendant's equals and neighbors. United States Supreme Court Digest, Lawyers' Edition: Jury § 34. SEE ALSO: APPRENDI, Supra.

The Federal Constitutions' Sixth Amendment, which guarantees the right to a jury trial, (1) by its terms is not a limitation on judicial power, but a reservation of jury power; and (2) limits judicial power only to the extent that the claimed judicial

power infringes on the province of jury. United States Supreme Court Digest, Lawyers Edition; Jury § 2. SEE ALSO: APPRENDI, Supra.

APPRENDI V. NEW JERSEY, 530 US 466, Found that there is no constitutional Right for Jury review of "prior convictions."

Back in 2003, this Court reviewed a case called STATE V. CARPENTER, 117 Wn. App. 673, 72 P. 3d 784, and determined "juvenile adjudications" do not constitute "prior convictions," until the adult court takes control of them.

My juvenile adjudications did not become "convictions" in the case at Bar until the adult court took control of said adjudications. Therefore, they do not constitute "prior" convictions. CF: RCW 9.94A.030(11). In this reasoning, I assert and contend that there is a constitutional right to have a jury determine the sentencing Fact of a juvenile adjudication that was obtained without original jury review (nor the right thereof waived).

CONCLUSION: The juvenile adjudications were not obtained through the right of a trial by jury, they were not reviewed by the jury in the case at Bar, yet they were used as sentencing Facts to increase Punishment. This violated the defendants Right to have a jury decide all elements essential to the punishment.

For these reasons this case should be remanded for resentencing with the juvenile adjudications dismissed with prejudice (in regards to this case).

#6. RAP 16.4 (c)(2). Legally Invalid Sentence.

PURPORT: The State, when calculating the defendants' offender score, included a juvenile offense, that occurred prior to the age of 15, and were prior to Sentencing Reform Act amendment of 1997. This is contrary to the Washington State Sentencing Reform Act.

ARGUMENT: There is a juvenile Burgulary from 1990 that was an adjudication prior to the defendants 15th birthday.

In STATE v. CRUZ, 139 Wn. 2d 186, 985 P.2d 384 (1999) and in STATE v. SMITH, 144 Wn. 2d 665, 30 P.3d 1245 (2001), it was found that offenses prior to the age of 15 and prior to the 1997 SRA amendment would not be used in adult offender scores.

CONCLUSION: The offender score obtained from the 1990 Burgulary should be stricken. The prejudice is that the offender score caused a raised sentence that was unlawful. This case should be remanded for resentencing on this ground.

#7. RAP 16.4 (c)(2). Legally Invalid Sentence.

PURPORT: The imposition of a Firearm enhancement to the offense of Assault 1st violates Double Jeopardy Protection Rights under the United States Constitution as well as the Washington Constitution. The prejudice of this error is that two 5 year enhancements were unlawfully applied to my sentence.

ARGUMENT: Initiative 159, "Hard Time For Armed

Crime," was passed during the 1995 legislative session and became effective for offenses committed after July 23, 1995. This initiative increased penalties and expanded the range of crimes eligible for weapon enhancements. "Enhancements apply to all felonies <u>except where the use of a firearm is an element of the offense</u>." (Quoted from page I-18 of the Adult Sentencing Guidelines Manual 2005; emphasis added; earlier versions of the sentencing guidelines state this as well, however page is unknown).

I was found guilty of two counts of Assault in the First Degree under RCW 9A.36.011. An element of that offense is "With a Firearm." The court also submitted to the jury a Firearm enhancement, under RCW 9.94A.533(3), to each Assault 1st. In each enhancement verdict, the jury again found that the Assaults were committed "with a Firearm." Both of these Firearm findings, in each Assault, were obtained by using the same facts and conclusions of law. I was, in each Assault, twice convicted and punished for the same "single" element of the crime. This is contrary to the Double Jeopardy Protection Clause of the United States Constitution, as well as the Washington State Constitution.

When a Firearm enhancement is attached to a crime, the enhancement is an element of the core crime. It can not be denied that attaching a Firearm enhancement to an Assault 2nd would manifest the Assault 2nd into an Assault 1st.

CF: APPRENDI v. NEW JERSEY, 530 US 466, (2000), at 494: "Indeed, the effect of New Jersey's sentencing "enhancement" here is unquestionably to turn a second-degree offense into a first-degree offense, under the state's own criminal code."

The enhancement is an element of the core crime. This fact is an inescapable reality according to the U.S. Supreme Courts finding that:

"If the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact [,]... the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. <u>The aggravating fact is an element of the aggravated crime</u>." RING v. ARIZONA, 536 US 584, (2002), at 605, Quoting APPRENDI v. NEW JERSEY, 530 US 466, (2000), at 501 (emphasis added).

Under this reasoning, I was convicted twice for each aggravated crime ("Assault 1st" "w/ Firearm enhancement") that each had "a" Firearm twice as an element.

This reasoning is the factor that contributes to the circumstance of "drive-by shooting" and "use of a machine gun in a Felony" being barred from Firearm enhancements under RCW 9.94A.533 (3)(F). Why? Because the Firearm is an element of those crimes, just as it is an element to Assault First.

This reasoning trumps Washington court rulings, from

the 1980's, that enhancements could be attached to charges that had the same facts as the enhancements.
CONCLUSION: Double Jeopardy Protection was violated in each of my two convictions for Assault 1st because in each charge I was twice convicted and twice punished for the one element of committing the Assault "with a Firearm." Both the said elements, in each Assault, were reviewed by the jury under the same facts and conclusions of law.

For these reasons, this case should be remanded for resentencing without the Firearm enhancements.

REFERENCE TO THE RECORD

All claims and facts in this Amendment can be concluded and shown by referring to the "Judgement and sentence" submitted with Respondants Reply Brief.

AMENDED RELIEF

The Petitioner asks for the following relief:

1. Remanded to trial court for resentencing with:
   (i) The consecutive sentence corrected to a concurrent sentence;
   (ii) The offender score correctly calculated pursuant to Appeals Court Ruling;
   (iii) The juvenile adjudications ommitted from the sentencing facts; AND

(iv) The two Firearm enhancements, attached to the Assault 1st, be dismissed with prejudice.

OATH

I, MICHAEL RHEM, hereby depose and say: I am the Petitioner in this case and the Foregoing Facts and claims are true and correct to the best of my knowledge, this statement is made under the penalties of perjury.

Date: 9.03.06

Signed: Michael Rhem

Michael Rhem #723868
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* Affidavit pursuant to 28 U.S.C. 1746, DICKERSON v. WAINWRIGHT, 626 F. 2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has Full Force of law and does not have to be verified by Notary Public.