

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION TWO  
NO. 41461-9-II  
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OF THE STATE OF WASHINGTON  
DIVISION TWO

STATE OF WASHINGTON, )  
 )  
 Respondent, ) No. 41461-9-II  
 )  
 v. ) STATEMENT OF  
 ) ADDITIONAL GROUNDS  
 NEIL GRENNING, ) FOR REVIEW  
 )  
 Appellant. )

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I, Neil Grenning, have received and reviewed the Opening Brief prepared by my attorney. Below are my additional grounds for review pursuant to RAP 10.10.

This brief incorporates by reference facts in the Opening Brief and adds pertinent details where necessary. I ask this court to recognize I am not an attorney, and to interpret these additional grounds broadly, raising the best possible arguments they may infer, and to accord them a meaningful review under the Washington Constitution, Article 1 § 22; State v. Rolax, 104 Wn.2d 129, 133, 142, 702 P.2d 1185 (1985); State v. Sweet, 90 Wn.2d 282, 289, 581 P.2d 579 (1978).

ADDITIONAL GROUND 1

THE SENTENCING COURT ABUSED ITS DISCRETION  
BY NOT PERFORMING THE SAME CRIMINAL  
CONDUCT ANALYSIS REQUESTED BY DEFENDANT

At sentencing, defendant made a clear request that the court perform a Same Criminal Conduct analysis based on the new sentencing circumstances which struck down facts otherwise relied upon by the court that a jury did not find. RP-7<sup>1</sup>. Counsel specifically offered as example the fact that a jury had not been asked to determine the date of offenses, and that the court should find, pursuant to RCW 9.94A.589(1)(a), that all the offenses against BH encompass same criminal conduct, and that all the offenses against RW encompass same criminal conduct.

The court neither performed the same criminal conduct analysis, nor declined to perform it. The court did not ask the State to proffer any argument or evidence to supply record to support findings either made or not made.

A court that fails to perform a Same Criminal Conduct analysis to determine offender score abuses its discretion by not exercising discretion. State v. Mehaffey, 125 Wn.App. 589, 599, 105 P.3d 447 (2005).

Appellant respectfully asks that the appellate Court find that the sentencing court abused its discretion by not performing the Same Criminal Conduct analysis requested by the defendant.

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<sup>1</sup> Report of Proceedings for date of resentencing, October 26, 2010.

ADDITIONAL GROUND 2

THE SENTENCING COURT VIOLATED DEFENDANT'S  
EQUAL PROTECTION RIGHTS BY SUBJECTING HIM  
TO A SENTENCING SCHEME MORE HARSH THAN  
THAT INTENDED FOR CRIMES OF HIGHER GRAVITY,  
PRODUCING AN ABSURD RESULT

Attorney for appellant set forth the particulars of the SRA's intent of equal protection under RCW 9.94A.010. (See: Opening Brief, p. 35-36). Appellant here offers an expansion upon his attorney's argument.

Appellant believes his argument is an issue of first impression.

RCW 9.94A.589 (1)(a) and (b) offer distinct sentencing schemes for defendants being sentenced for violent offenses, ((1) (a)), and seriously violent offenses ((1)(b)) respectively. Mr. Grenning was sentenced under RCW 9.94A.589(1)(a), which reads in part:

...whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score [ ] Sentences under this section shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.

Under this statute, Mr. Grenning received an exceptional consecutive sentence for his multiple convictions, using an offender score of 96.

RCW 9.94A.589(1)(b) provides for the consecutive sentencing

of serious violent offenses by default, but utilizes a different offender score calculation:

...the standard range for the offenses with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard range for the other serious violent offenses shall be determined by using an offender score of zero.

Mr. Grenning has received a consecutive sentence under (1)(a) comparable to sentencing under (1)(b), but unlike (1)(b), Grenning was assessed an offender score of 96 instead of the offender score of zero he would be assessed under (1)(b) on all but the first count. Understood logically, this means Grenning received a consecutive sentence as if his crimes were serious violent offenses, but beyond that he was further prejudiced by an offender score of 96 that even a seriously violent offender would not have been subjected to.

During resentencing counsel informed the court of the sentence that would issue for multiple murders and that, considering proportionality, and that murder is an arguably greater offense, defendant should not be given a sentence greater than a conviction for murder would receive. RP 10-11.

The legislature cannot have intended, in setting forth distinguished felony point scoring for serious violent offenses on consecutive sentencing from the scoring used in concurrently imposed violent offenses, that a defendant with violent offenses be sentenced under a scheme more harsh than that for multiple

crimes of higher gravity. This produces an absurd result and violates appellant's equal protection rights.

Appellant asks this Court to remand for resentencing under a scheme that does not produce the absurd result of a sentence and felony points calculation more harsh than a sentencing scheme used for offenses of higher gravity.

### ADDITIONAL GROUND 3

THE SENTENCING COURT VIOLATED BLAKELY V. WASHINGTON BY TREATING DEFENDANT'S OTHER CURRENT CONVICTIONS "AS IF THEY WERE" PRIOR CONVICTIONS FOR THE PURPOSE OF ENHANCING HIS OFFENDER SCORE TO INCREASE PUNISHMENT

The sentencing court treated all of Mr. Grenning's convictions as if they were prior convictions, then calculated that he had 96 felony points, or in other words a criminal history of 96 points.

Counsel for the defendant made a record of the actual fact that Grenning "had no previous criminal history" RP-9, which gives rise to the question of how the court determined Grenning had a criminal history in the absence of any evidence of such.

A defendant may challenge an erroneous sentence based on a miscalculated offender score at any time. Pers. Restraint of Cadwallader, 155 Wn.2d 867, 874, 123 P.3d 456 (2005).

#### Blakely Exclusionary Clause

"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." Blakely v. Washington, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)(quoting Appendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)).

This has become known as the Blakely or Appendi exclusionary clause, and the basis for Washington's assertion that there is no violation of Blakely when the court determines that a defendant's other current convictions should be considered prior convictions and hence criminal history.

This interpretation cannot be upheld consistent with United States Supreme Court precedent for the following reasons:

A. Conflicting redefinition of the fact of a prior conviction

Washington relies on the wording in RCW 9.94A.589(1)(a), which instructs the sentencing court to use:

[A]ll other current offenses and prior convictions as if they were prior convictions for the purpose of the offender score...

This works in disparate conjunction with RCW 9.94A.525:

A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed 'other current offenses' within the meaning of RCW 9.94A.589.

This sentencing scheme of treating current convictions "as if they were" prior convictions to establish offender score and criminal history is ambiguous and inconsistent, and requires the court to

consider what reasonably and unambiguously defines "criminal history" and "prior convictions," two phrases that are frequently used synonymously.

The conflicting statement "within the meaning of RCW 9.94A.589" essentially annuls the definition of a "prior conviction" in RCW 9.94A.525. An unambiguous definition of criminal history that more aptly applies is "any conviction, other than another count in the current case which was brought in the same information or complaint or which was joined for trial with other counts in the current case." This definition, taken from Kansas statute, appropriately defines actual criminal history. Other states and federal sentencing guidelines regularly refer to criminal history as "prior sentences," thus eliminating any ambiguity.

This understanding is consistent with the way Apprendi understood the fact of a prior conviction as applied from recidivism:

More important, as Jones made crystal clear, our conclusion in Almendarez-Torres turned heavily upon the fact that additional sentence to which the defendant was subject was "the prior conviction of a serious crime." See also id. at 243 (explaining that "recidivism" ...is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence"); id. at 244 (emphasizing "the fact that recidivism 'does not relate to the commission of the offense...'" )

Apprendi v. New Jersey, 530 U.S. at 488; see also: State v. Weber, 159 Wn.2d 252, 259, 149 P.3d 646 (2006).

Where sentencing is at issue, the judge, enhancing a sentence in light of recidivism,

must find a prior individual crime, which means that an earlier factfinder (e.g., a unanimous federal jury in the case of a federal crime) found that the defendant committed the specific earlier crime.

Richardson v. United States, 526 U.S. 813 (1999) at 822. The Eighth Circuit found that a conviction for possession of marijuana was properly considered a prior conviction because there was no evidence that the possession conviction was tied to the instant offense. U.S. v. Nastase, 329 F.3d 622 (2003) at 623. This finding draws a clear distinction that a prior conviction used to enhance a current sentence is not in any way connected to the current offense to which the defendant is being sentenced.

There is a Due Process protection in determining criminal history, which Washington's practice of counting other current offenses "as if they were prior convictions" circumvents. "[T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had a right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find [a] required fact under a lesser standard of proof." People v. Black, 29 Cal.Rptr.3d 740, 113 P.3d 534 (2005).

[F]undamental principle of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record. Information relied upon at sentencing "is false or unreliable" if it lacks "some minimal indicium of reliability beyond mere allegation." The State does not meet its burden through bare assertions, unsupported

by the evidence.

State v. Mendoza, 162 P.3d 439 (Wash.App.Div.2 2007)(quoting State v. Ford, 137 Wash.2d at 479-82, 973 P.2d 452). Mr. Grenning has no criminal history and no prior convictions requiring a sentencing court to sentence him as if he were a 96 felony point recidivist, thus the record is lacking in indicia of reliability, and the accusation that he has prior felonies is mere allegation. "[P]rior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." State v. Hughes, 154 Wn.2d 118 (2005) at 135.

The State in Mr. Grenning's case has not met the requisite indicia of reliability by renaming defendant's current convictions "as if they were" prior convictions, and this artificial inflation of his criminal history as expressed in felony points is not subject to the exclusionary rule to Due Process in Apprendi and Blakely.

B. Redefinition of the term 'fact' violates the Real Facts Policy

The practice of counting current offenses "as if they were" prior convictions also violates the "real facts" policy of the SRA. The Adult Sentencing Manual RCW 9.94A.530, "Standard Sentence Range," includes this comment:

Concerns were raised about facts which were not proved as an element of the conviction or the plea being used as a basis for sentence decisions, including decisions to depart from the standard range. As a result, the "real facts policy" was adopted.

The plain language doctrine in law looks to and employs the

everyday definition of a word or phrase unless the surrounding statutory language infers a different definition. The Oxford Dictionary defines the word 'fact' as a "Thing that is known to have occurred, to exist, or be true." Oxford American Desk Dictionary and Thesaurus, Second Edition, Copyright 2001, page 283. Black's Law Dictionary provides that a 'fact' is "Something that actually exists; an aspect of reality." Black's Law Dictionary, Abridged Eighth Edition, Copyright 2005, page 501.

It is not a "fact" of a prior conviction if Mr. Grenning's other current convictions are being treated "as if they were" prior convictions—this language in RCW 9.94A.589(1)(a) vitiates any proposition of a "fact" of a prior conviction, and thus violates the "Real Fact Policy" of the SRA.

C. First time offenders sentenced  
the same as repeat offenders

A sentencing court complying with the mandate in RCW 9.94A.589(1)(a) to treat other current convictions "as if they were prior convictions for the purpose of the offender score" will invariably impose disparate sentences if the offender has no actual or relevant prior convictions for purposes of calculating the offender score. Generally termed the Multiple Offense Policy, this would sentence first-time offenders like Mr. Grenning as if he were a recidivist. This scheme of offender score calculation dismisses the SRA intent of imposing:

[S]entences that apply equally to offenders  
in all parts of the state, without discrimi-  
nation as to any element that does not

relate to the crime or to a defendant's  
previous criminal record.

Adult Sentencing Manual, 2005, page I-ix. (emphasis added).

When a first-time offender is sentenced using other current offenses "as if they were" actual or relevant prior convictions, the offender is no longer sentenced equally to any other first-time offender with no actual or relevant criminal history. This absurdity was recognized by an Alaskan court very early on, noting that:

reading the statute to apply without regard to the sequence of the commission of the underlying crimes would mean that a defendant who had committed several crimes in a day would be treated the same as a defendant who persisted in committing the same number of crimes after having had opportunities to reform. That, the court held, "would distort the underlying purpose of this statute."

Oregon v. Allison, 143 Or.App. 241, 923 P.2d 1224 (1996)(quoting State v. Carlson, 560 P.2d 26 (Alaska 1977)). Thus, a first-time offender is accorded no difference than an offender whose multiple returns to prison have failed to reform him, vitiating any purpose in structuring offender scores to reflect growing punishment for recidivist behavior. The following language establishes the importance of distinguishing recidivism from first-time offenders:

[W]hen the circumstances show "a greater disregard for the law than otherwise would be the case" based on the "especially short time period between prior incarceration and re-offense."

State v. Saltz, 137 Wn.App. 576, 585, 154 P.3d 282 (Wash.App.Div.3 2007).

Other courts have recognized the anomaly of treating first-

time offenders the same as recidivist offenders: "The basic philosophy underlying recidivist statutes might be expressed in this fashion: where the punishment imposed against an offender for violating the law has failed to deter him from further infractions, a harsher and more severe penalty is justified." State v. Wilson, 6 Kan.App.2d 302, 627 P.2d 1185, 1188 (1981); see also People v. Nees, 200 Colo. 392, 396, 615 P.2d 690, 693 (1980) ("The general rule is that penalty enhancement statutes for repeat offenders apply only if the presently charged offense was committed after there had been a conviction of any offenses sought to be used as a basis for the penalty enhancement." (emphasis in original)); Graham v. State, 435 N.E.2d 560, 561 (Ind. 1982); Bray v. Commonwealth, 703 S.W.2d 478, 479-80 (Ky. 1986); Koonsman v. State, 116 N.M. 112, 113-14, 860 P.2d 754, 755-56 (1993); State v. Linam, 93 N.M. 307, 309-10, 600 P.2d 253, 255-56 (1979); State v. Gehrke, 474 N.W.2d 722, 724-26 (S.D. 1991).

In assessing an Oregon statute similar to RCW 9.94A.525(1), the Allison court wrote:

Given that a defendant already has been found guilty of a listed crime before sentencing, however, he or she always will have been "previously" convicted of a listed crime. Thus, any conviction, even a first-time conviction of a single crime, would constitute a "previous conviction" under the statute. Such a construction is unlikely; it effectively reads out of the statute any distinction between a defendant's "conviction" and a "previous conviction."

Oregon v. Allison, 143 Or.App. 241, 923 P.2d 1224 (1996).

This same sentencing scheme is the one Washington adopted in Mr. Grenning's case: a first-time offender with no criminal history indicating recidivism resulting from failure to conform to reformatory efforts, is sentenced the same as one whose many returns to the criminal justice system net him 96 cumulative felony points. This disregards the principles of the SRA, and produces an absurd result that cannot be the intention of the legislature.

D. Disparate application to offenders sentenced under POAA

Another overt conflict arises with sentences under the Persistent Offender Accountability Act and its statutes, RCW 9.94A.030(32)(b)(1) and RCW 9.94A.570. It is clear the legislature intended for offenders to be held accountable for prior convictions and receive harsher punishments based on persistent felony behavior. The courts are mandated to sentence an offender under the persistent offender statute if the offender has a qualifying prior conviction.

The conflict arises if one asks how Mr. Grenning, with what the court has called prior convictions, is not sentenced as a persistent offender? Here follows the reason:

To count a prior conviction for the purposes of establishing a sentence under the persistent offender statute, the conviction must have existed prior to the commission of the current felony being sentenced. This is the true definition of "the fact of a prior conviction," which Apprendi and Blakely addressed. In other

words, other current offenses counted "as if they were" prior convictions cannot meet the due process requirements of the Apprendi exclusionary rule.

The State simply cannot strike out an offender using other current offenses "as if they were" prior convictions. To do so would violate the fundamental due process guarantee in State v. Hughes, 154 Wn.2d at 135 ("prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees...").

In reviewing a similar habitual offender statute, the 9th Circuit enforced the same core understanding of what a prior conviction was, stating that "at least two of the prior convictions must have sentences which are counted separately—that is, sentences imposed in unrelated cases." U.S. v. Gallegos-Gonzalez, 3 F.3d 325 (9th Cir. 1993) at 326.

E. Comparison to federal United States Sentencing Guidelines

Looking to federal sentencing guidelines for guidance in determining the validity of Washington's RCW 9.94A.589 policy of counting other current offenses "as if they were" actual prior convictions, it is clear that no such practice would pass federal constitutional muster.

An application note in the United States Sentencing Guidelines indicates criminal history points are based on sentence pronounced, not length of time actually served, which is intended to help courts

determine length of sentence of imprisonment after a court has determined that defendant in fact has a "prior sentence of imprisonment," and does not suffice to determine whether defendant's prior convictions resulted in imprisonment. U.S.S.G. § 4A1.1(a-c), 4A1.2(a), (a)(3), (b), (b)(2), (c), 18 U.S.C.; U.S. v. Urbizu, 4 F.3d 636 (1993) at 638.

A criminal defendant accumulates criminal history points for prior convictions. A defendant earns three points for a "prior sentence of imprisonment" exceeding 13 months, U.S.S.G. § 4A1.1(a); two points for a "prior sentence of imprisonment" of at least 60 days but less than 13 months, U.S.S.G. § 4A1.1(b); and one point for "each prior sentence not counted in (a) or (b)," U.S.S.G. § 4A1.1(c).

Urbizu, 4 F.3d at 637,

Further examination of federal sentencing guidelines supports this premise. United States Sentencing Guidelines defines the term "prior sentence" as "[A]ny sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense." U.S.S.G. § 4A1.2 (emphasis added).

Washington's sentencing scheme of classifying other current convictions "as if they were" prior convictions only because they came before the sentencing on the same convictions is wholly inconsistent with well-established federal law.

#### Conclusion to Additional Ground 3

Because Mr. Grenning has no criminal history, no prior incarcerations, and the State cannot produce a certified copy of a prior

judgment and sentence, Grenning's sentence should be overturned and remanded for resentencing with an offender score of zero that correctly reflects this. Any other interpretation subjects Grenning to the due process violations inherent in the State's offender score calculation scheme and assumes a presumptive range far above that which Grenning's complete lack of criminal history accords him.

The points listed in A, B, C, D and E above have already been appropriately considered by Oregon's Appellate court, which stated clearly:

The legislative history offers no suggestion that the purpose of the statute was to impose tougher penalties on a defendant simply because he or she has committed a series of criminal acts or has committed a single act that gives rise to a series of charges.

State v. Allison, 143 Or.App. 241, 923 P.2d 1224 (1996). Appellant urges this Court to read fully the well-reasoned argument of Oregon's court before upholding a Washington sentencing scheme that is inconsistent with all other state and federal sentencing practices, and in violation of the due process requirements inherent in Blakely and Apprendi, and the 5th, 6th and 14th Amendments of the United States Constitution.

#### ADDITIONAL GROUND 4

THE SENTENCING COURT VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE WHEN IT FAILED TO EXERCISE DISCRETION—OR TO EVEN ADDRESS—ANY OF DEFENDANT'S POINTS OF LAW GOING TOWARDS RESENTENCING

The Appearance of Fairness Doctrine "requires the reviewing court to consider how the proceedings would appear to a reasonably disinterested person." State v. Ring, 134 Wn.App. 716, 722, 141 P.3d 669 (2006). It may be applied once evidence of a judge's actual or potential bias is shown. State v. Gonzales-Morales, 91 Wn.App. 420, 428, 958 P.2d 339 (1998). "The law goes further than requiring an impartial judge; it also requires that the judge appear to be impartial." State v. Worl, 91 Wn.App. 88, 96, 955 P.2d 814 (1998).

"A judicial proceeding is valid only if it has an appearance of impartiality, such that a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing." State v. Ryna Ra, 144 Wn.App. 688, 704-05, 175 P.3d 609 (2008)(quoting State v. Bilal, 77 Wn.App. 720, 722, 893 P.2d 674 (1995)); State v. Perala, 132 Wn.App. 98, 113, 130 P.3d 852 (2006); Marriage of Meredith, 148 Wn.App. 887, 903, 201 P.3d 1056 (2009).

The statutory test for disqualification under the Appearance of Fairness Doctrine is whether a reasonable person with knowledge of all facts would conclude that the judge's impartiality might reasonably be questioned. U.S. v. Nelson, 718 F.2d 315 (1993);

Sherman v. State, 128 Wn.2d 164, 205-06, 905 P.2d 355 (1995).

Appellant argues that the sentencing judge's willingness to address each point raised by the State, but none of the points raised by defense—in fact to even acknowledge any of defense's arguments—raises evidence that the judge's impartiality may reasonably be questioned under the Appearance of Fairness Doctrine.

The State raised 7 distinct points of law, arguments, or recommendations during resentencing:

1. Court of appeals did not address any counts other than the depictions of minors engaged in sexually explicit conduct. RP 4.
2. Recommended the judge simply subtract 12 months from defendant's 117 year sentence. RP 4.
3. Argued that if any basis for imposing an exceptional sentence was reversed, court would still impose the same sentence. RP 5.
4. Recommends the sentence be set at 1392 months. RP 5.
5. Recommends the offender score should be 96. RP 5.
6. Argued that new findings of fact and conclusions of law were not addressed or reversed by any appellate court. RP 5.
7. Suggests adding and subtracting out language relating to counts not addressed by the Supreme Court in findings of fact and conclusions of law. RP 5.

The defense raised 11 distinct points of law, arguments, or recommendations during resentencing:

1. Objected to the State seeking an exceptional sentence where no notice was given in the charging documents. RP 6.
2. Court needs to make a decision whether defendant is sentenced under RCW 9.94A.712 or not. RP 6-7.

3. Recommends the court adopt the rule of lenity. RP 7.
4. Asks the court to perform a same criminal conduct analysis, finding each offense against BH encompasses same criminal conduct, and each offense against RW encompasses same criminal conduct. RP 7.
5. Argues that the aggravating circumstances in RCW 9.94A.535 have to be found by jury. RP 7-8.
6. Argues that, under RCW 9.94A.345, sentences imposed must be determined in accordance with the law in effect at the time of the offenses. RP 8.
7. Argues that, with regard to the Multiple Offense Policy, the legislature has taken into account that there may be more than 9 felony points when the grid says "9 or More," and that this nullifys the 'clearly too lenient' language. RP 8-9.
8. Argues that punishment be proportionate to the crime and that defendant has no criminal history. RP 9.
9. Argues that, with regard to the 2 and 3 strikes policy, the legislature intended that someone would have to commit an offense, get out of prison, and re-commit an offense before receiving a life sentence. RP 9-10.
10. Compares defendant's sentence to other sentences given to murderers, where defendant has not committed the arguably greater offense of murder, but is doing substantially more time than even a multiple murderer. RP 10-11.
11. Recommends the court consider that, with a sentence of 318 months, the court could put the defendant on lifetime community custody if it felt he needed monitoring. RP 11.

In deliberating over the resentencing hearing, (RP 14-16), Judge Orlando addressed each one of the State's 7 points, adopting every recommendation the State made. In contrast, of the 11 distinct points raised by the defense, the judge did not address, or even acknowledge them. The one point he did assert turned out

to be demonstrably erroneous (he claimed the State did file a Notice of Intent to Seek Exceptional Sentence "well in advance of the trial," RP 16; there is no record of any such notice before trial; see: Opening Brief, p. 4-5, 9 and 31). The judge additionally did not address anything said in Mr. Grenning's allocution.

The court could very well have at minimum indicated that it had considered the arguments and evidence raised by the defense, or even simply both parties. It did not do this. Far from simply not exercising any discretion granted by law which may constitute abuse of discretion (State v. Mehaffey, 125 Wn.App. at 599), the court did not even acknowledge that defense had spent more than fifteen minutes arguing points of law. As such, had defense counsel's record been removed from the transcripts, no reader would be able to discern from the judge's deliberation that anything was missing.

If a judge is unwilling to presume constitutionality and listen to and give unbiased consideration to arguments, he is prejudicial and the party may be entitled to a change in judges. State v. Franulovich, 89 Wn.2d 521, 523-26, 573 P.2d 1298 (1978) (West's commentary). Although a court may be unwilling to presume bias when a case is returned to the same judge after overturning his decision, that doesn't mean bias can't be shown to be present. State v. Belgarde, 119 Wn.2d 711, 717-18, 837 P.2d 599 (1992).

Appellant offers that no reasonably prudent and disinterested person would conclude—observing that the Grenning resentencing

court addressed and adopted all 7 of the State's points but did not even acknowledge any of defenses 11 points—would conclude that both parties obtained a fair, impartial, and neutral hearing. For this reason the judge violated the Appearance of Fairness Doctrine, prohibiting "even a mere suspicion of partiality" which "[debilitates] the public's confidence in our judicial system." Sherman, 128 Wn.2d at 205-06.

Appellant requests this Court find the resentencing judge did not give the appearance of fairness and to remand for resentencing under a different judge.

#### CONCLUSION

Appellant respectfully asks that the appellate Court, in addition to the arguments raised in his counsel's Opening Brief, give meaningful consideration to each of the four additional grounds raised in the foregoing.

Respectfully submitted this 7 day of April, 2011.

  
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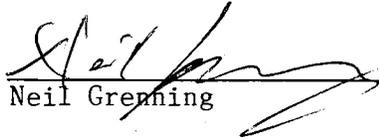
CERTIFICATE OF SERVICE

I certify that on the 7 day of April, 2011, I caused a true and correct copy of the enclosed STATEMENT OF ADDITIONAL GROUNDS, or copy thereof, to be placed in the legal mail system of the Airway Heights Corrections Center, with appropriate postage, addressed to:

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Court of Appeals, Division II  
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Neil Grenning

4-7-11  
DATE at Airway Heights, WA