

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES	ii
CONSTITUTIONAL PROVISIONS	ii
STATUTES	ii
REGULATIONS AND RULES	ii
ARGUMENT	1
CONCLUSION	4

TABLE OF AUTHORITIES

TABLE OF CASES

Blakely v. Washington, 542 U. S. 296,
124 S. Ct. 2531, 159 L. Ed.2d 403 (2004) 2, 3, 4, 5

Crawford v. Washington, 541 U.S. 36,
124 S. Ct. 1354, 158 L. Ed.2d 177 (2004) 1, 2, 4

State v. Hughes, 154 Wn.2d 118 (2005) 3

CONSTITUTIONAL PROVISIONS

United States Constitution, Sixth Amendment. . . . 2, 3

STATUTES

RCW 9.94A.535 3

RCW 9.94A.535(2)(e) 4

RCW 9.94A.589(1) 3

REGULATIONS AND RULES

ER 801(d)(2)(v) 1

ARGUMENT

CRAWFORD V. WASHINGTON

Octavio Gonzales-Flores challenges the admission of his wife's statements under the co-conspirator exception to the hearsay rule. ER 801(d)(2)(v). He relies upon the facts and argument set forth in his original brief and the Additional Statement of Authorities previously provided to the Court.

The Additional Statement of Authorities cited *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004) in support of his argument that his wife's statements should not have been admitted.

Crawford succinctly noted at 541 U.S. 69 that:

We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police investigations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

(Emphasis supplied.)

Mrs. Flores' testimony occurred at a forfeiture proceeding. She was unrepresented by counsel. Law enforcement was involved from both the prosecution and hearing officer standpoint.

Mrs. Flores' other statements were gathered in direct response to police interrogation.

Mr. Gonzales-Flores was denied his right to confront the witness against him as required by the Sixth Amendment to the United States Constitution. As *Crawford* notes at 541 U.S. 28:

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes

The trial court committed reversible error when it failed to exclude the statements made by Mrs. Flores. They do not qualify for admission under the co-conspirator exception to the hearsay rule.

BLAKELY V. WASHINGTON

In *Blakely v. Washington*, 542 U. S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004) the Supreme Court clearly delineated the need for a jury to determine the facts in order to impose an exceptional sentence. The Court stated at 542 U.S. 303:

Our precedents make clear ... 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*. ... In other words, the relevant "statutory maximum" is not the

maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.

The trial court imposed consecutive sentences on Mr. Gonzales-Flores. The *Blakely* decision does not directly address consecutive sentences.

Recently, in *State v. Hughes*, 154 Wn.2d 118, 139-40 (2005) it was determined that the imposition of consecutive sentences by a judge, without a factual determination of the basis for those consecutive sentences by a jury, contravened a criminal defendant's Sixth Amendment right to have a jury determine the existence of those facts beyond a reasonable doubt.

Mr. Gonzales-Flores' sentences were run concurrently with the exception of the two (2) counts for involving a minor in a drug transaction. The maximum sentence on each of those counts was sixty (60) months. They ran concurrent to one another but consecutive to all other counts.

RCW 9.94A.589(1) provides, in part: "Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535."

RCW 9.94A.535 authorizes departure from the SRA Guidelines. However, the various bases for departure are the same bases condemned by the *Blakely* decision.

It appears that the trial court imposed the exceptional sentence under RCW 9.94A.535(2)(e) which states:

The current offense was a major violation of the Uniform Controlled Substances Act, Chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

- (i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;
- (ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

....

The offense of involving a minor in a drug transaction is not even listed as an aggravating factor under RCW 9.94A.535. Thus, the trial court's reasoning does not hold up under *Blakely*.

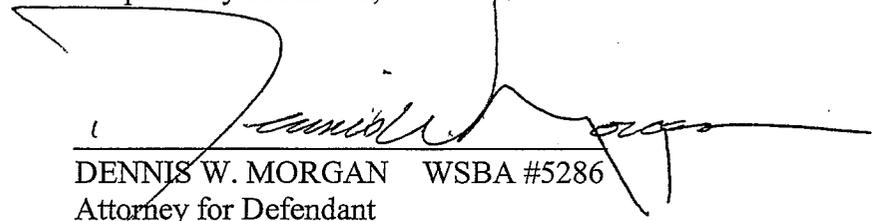
CONCLUSION

Taking into account the original appellant's brief, along with the *Crawford* and *Blakely* decisions, Mr. Gonzales-Flores' convictions must be reversed and the case remanded for a new trial.

Alternatively, if the Court determines that only the *Blakely* issue has merit, then Mr. Gonzales-Flores needs to be resentenced.

DATED this 1st day of November, 2005.

Respectfully submitted,



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