

80848-1

No. 24864-0-III

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON,

Appellant,

vs.

TUCERO A. KNIPPLING

Respondent.

BRIEF OF RESPONDENT

ON APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
BEFORE THE HONORABLE JEROME J LEVEQUE

LANA C. GLENN
WSBA# 17858
W. 1309 DEAN,STE.100
SPOKANE, WA. 99201
(509) 326-2840
Counsel for
TUCERO A. KNIPPLING

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2. The trial court did not err in failing to sentence defendant as a persistent offender.

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4. The trial court did not err in entering findings in its May 24, 2006, which included the following:

On April 7, 1999, the state filed an amended information charging Mr. Knippling with one count of Second Degree Robbery, a crime not subject to automatic decline.

The Honorable James M. Murphy presided over Mr. Knippling's April 7, 1999 guilty plea in the adult court. Mr. Knippling's case was never remanded to the juvenile division of the Spokane County Superior Court for a declination hearing. Judge Murphy did not hold a declination hearing prior to entering the judgment and sentence in Mr. Knippling's case.

There is no evidence in the record that Mr. Knippling made a knowing, intelligent, and voluntary waiver of juvenile jurisdiction before entering his plea of guilty to Second Degree Robbery in the adult division of the Spokane County Superior Court on cause #99-1-003-5-6.

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I. ASSIGNMENTS OF ERROR

1. The trial court did not err in excluding defendant's 1999 second degree robbery conviction from the offender score.
2. The trial court did not err in failing to sentence defendant as a persistent offender.
3. The trial court did not err in filing a "letter" on May 24, 2006.
4. The trial court did not err in entering findings in its May 24, letter, particularly the following:

On April 7, 1999, the state filed an amended information charging Mr. Knippling with one count of Second Degree Robbery, a crime not subject to automatic decline.

The Honorable James M. Murphy presided over Mr. Knippling's April 7, 1999 guilty plea in the adult court. Mr. Knippling's case was never remanded to the juvenile division of the Spokane County Superior Court for a declination hearing. Judge Murphy did not hold a declination hearing prior to entering the judgment and sentence in Mr. Knippling's case.

There is no evidence in the record that Mr. Knippling made a knowing, intelligent, and voluntary waiver of juvenile jurisdiction before entering his plea of guilty to Second Degree Robbery in the adult division of the Spokane County Superior Court on cause #99-1-003-5-6.

5. The trial court did not err in entering conclusions in its May 24 letter.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Is a judgment and sentence invalid on its face because it does not specify whether or not the Juvenile Court declined jurisdiction to Superior Court?
2. Where a court finds a prior decision was entered by a court lacking jurisdiction, can the court invalidate the decision without remanding for a declination hearing?

III. STATEMENT OF THE CASE

On August 4, 2005, Tucero Antonio Knippling was charged by Amended Information with the following:

Count I: Conspiracy to Commit First Degree Burglary, committed as follows: That the defendants, Tucero Antonio Knippling, Calvin Jay Washington and Krista D. Gardner, as actors and/or accomplices, in the State of Washington, on or about April 19, 2005, with intent that conduct constituting the crime of First Degree Burglary, as set out in RCW 9A.52.020, be performed, did agree with one or more persons to engage in and cause the performance of such conduct, and one of the parties so agreeing did take a substantial step in pursuance of such agreement.

Count II: Conspiracy to Commit Second Degree Robbery, committed as follows: That the defendants, Tucero Antonio Knippling, Calvin Jay Washington and Krista D. Gardner, as actors and/or accomplices, in the State of Washington,

on or about April 19, 2005, with intent that conduct constituting the crime of Second Degree Robbery, as set out in RCW 9A.56.210, be performed, did agree with one or more persons to engage in and cause the performance of such conduct, and one of the parties so agreeing did take a substantial step in pursuance of such agreement.

Count III: Attempted First Degree Burglary, committed as follows: That the defendants, Tucero Antonio Knippling, Calvin Jay Washington and Krista D. Gardner, as actors and/or accomplices, in the State of Washington, on or about April 19, 2005, with intent to commit the crime of Attempted First Degree Burglary, as set out in RCW 9A.52.020, committed an act which was substantial step toward that crime, by attempting to enter and remain unlawfully in the building of Kristina M. Ploeger, located at 2114 E. 63rd Avenue, Spokane, Washington and in entering and while in such building and in immediate flight therefrom, the defendant or another participant in the crime, did assault Kristine M. Ploeger, a person therein.

Count IV: First Degree Burglary, committed as follows: That the defendants, Tucero Antonio Knippling and Calvin Jay Washington, as actors and/or accomplices, in the State of Washington, on or about April 19, 2005, with intent to commit a crime against a person or property therein, did enter and remain unlawfully in the building of Louis Cummings and Angela Cummings, located at 3705 S. Gandy, Spokane, Washington, and in entering and while in such building and in immediate flight therefrom, the defendant or another participant in the crime, did assault Louis Cummings and Angela Cummings, a person therein.

Count V: Second Degree Robbery, committed as follows: That the defendants, Tucero Antonio Knippling and Calvin Jay Washington, as actors and/or accomplices, in the State of Washington, on or about April 19, 2005, with intent to commit theft, did unlawfully, take and retain personal property, that the defendant did not own, from the person and in the presence of Louis Cummings, against such

person's will, by use or threatened use of immediate force, violence and fear of injury to Louis Cummings.

Count VI: Second Degree Robbery, committed as follows: That the defendants, Tucero Antonio Knippling and Calvin Jay Washington, as actors and/or accomplices, in the State of Washington, on or about April 19, 2005, with intent to commit theft, did unlawfully, take and retain personal property, that the defendant did not own, from the person and in the presence of Angela Cummings, against such person's will, by use or threatened use of immediate force, violence and fear of injury to Angela Cummings.

Count VII: Conspiracy to Commit First Degree Burglary, committed as follows: That the defendants, Tucero Antonio Knippling, Calvin Jay Washington, GiGi T. Rhea and Krista D. Gardner, as actors and/or accomplices, in the State of Washington, on or about April 24, 2005, with intent that conduct constituting the crime of First Degree Burglary, as set out in RCW 9A.52.020, be performed, did agree with one or more persons to engage in and cause the performance of such conduct, and one of the parties so agreeing did take a substantial step in pursuance of such agreement.

Count VIII: Conspiracy to Commit Second Degree Robbery, committed as follows: That the defendants, Tucero Antonio Knippling, Calvin Jay Washington, GiGi T. Rhea and Krista D. Gardner, as actors and/or accomplices, in the State of Washington, on or about April 24, 2005, with intent that conduct constituting the crime of Second Degree Robbery, as set out in RCW 9A.56.210, be performed, did agree with one or more persons to engage in and cause the performance of such conduct, and one of the parties so agreeing did take a substantial step in pursuance of such agreement.

Count IX: First Degree Burglary, committed as follows: That the defendants, Tucero Antonio Knippling and Calvin Jay Washington, as actors and/or accomplices, in the State

of Washington, on or about April 24, 2005, with intent to commit a crime against a person or property therein, did enter and remain unlawfully in the building of Maria Benavides, located at 1518 W. 7th Avenue, Spokane, Washington, and in entering and while in such building and in immediate flight therefrom, the defendant or another participant in the crime, did assault Maria Benavides, a person therein.

Count X: Second Degree Robbery, committed as follows: That the defendants, Tucero Antonio Knippling and Calvin Jay Washington, as actors and/or accomplices, in the State of Washington, on or about April 24, 2005, with intent to commit theft, did unlawfully, take and retain personal property, that the defendant did not own, from the person and in the presence of Maria Benavides, against such person's will, by use or threatened use of immediate force, violence and fear of injury to Maria Benavides.

Count XIV: First Degree Possession of Stolen Property Other Than a Firearm, committed as follows: That the defendants, Tucero Antonio Knippling, Calvin Jay Washington, GiGi T. Rhea and Krista D. Gardner, as actors and/or accomplices, in the State of Washington, on or about April 28, 2005, did possess stolen property, other than a firearm: jewelry, of a value in excess of \$1,500, by knowingly receiving, retaining, possessing, concealing and disposing of said property, other than a firearm as defined in RCW 9.41.010, knowing that it had been stolen, and withheld and appropriated it to the use of a person other than the true owner or person entitled to it. (CP 16-19)

On November 15, 2005, Tucero Antonio Knippling, was convicted by a jury of Count I, Count II, Count IV, Count V, Count VI, Count VII, Count VIII, Count IX, Count X, and Count XIV, totaling two counts of Conspiracy to Commit First Degree

Burglary, two counts of First Degree Burglary and three counts of Second Degree Burglary. (CP 20-22)

On December 15, 2005, a sentencing hearing was held which addressed whether the convictions on the 1999 conviction constituted a third strike. The court had reviewed many of the cases and statutes which had been cited. (RP 3-4)

Defense counsel informed the court that the state was seeking a life sentence under the Persistent Accountability Act for Mr. Knippling. Counsel informed the court that the issue was whether Mr. Knippling's 1999 Second Degree Robbery conviction counted as a strike, thus requiring the court to sentence Mr. Knippling to life imprisonment. (RP 5)

Defense counsel argued that the state alleged that Mr. Knippling had two prior strike offenses. Defense argued that the state alleged that Mr. Knippling had a 2002 Second Degree Assault conviction and a 1999 Second Degree Robbery conviction. At the time of the 1999, conviction Mr. Knippling was 16 years old. In 1999, the state filed an Information in adult court charging Mr. Knippling with First Degree Robbery. The First Degree Robbery charge triggered the automatic decline provision and the

adult court had automatic jurisdiction over Mr. Knippling. (RP 5-6)

Defense counsel informed the court that on April 7, 1999, the state amended the Information to one count of Second Degree Robbery. The Second Degree Robbery was not an offense which was subject to automatic decline. There was no decline hearing held after the judgment and sentence nor was there a decline hearing held any time. (RP 6)

Defense counsel argued that Mr. Knippling did not qualify as a persistent offender as his 1999 Second Degree Robbery conviction was invalid and did not constitute a prior strike as the adult court lacked jurisdiction when it rendered the judgment and sentence. (RP 6)

Defense counsel argued that the state in its' briefing cited State v. Ammons, 105 Wn.2d 175 (1986) as standing for the authority that Mr. Knippling was precluded from challenging his 1999 Second Degree Robbery conviction. According to defense counsel the state argued that challenging this conviction would constitute impermissible collateral attack. (RP 6-7)

Defense counsel argued that Mr. Knippling's Second Degree Robbery conviction was constitutionally invalid on its face and it was clear from the judgment and sentence and the plea agreement that the adult court lacked jurisdiction over Mr. Knippling, as he was a juvenile when it rendered its judgment and decision. (RP 7)

Defense counsel argued that State v. Mora, 138 Wn. 2d 43 (sic) was a case which dealt with the automatic decline. In Mora, supra, the defendant was 17 when he was charged in adult court with Second Degree Assault with a Deadly Weapon. The offense was subject to automatic decline and the adult court originally obtained jurisdiction. The state amended the Information as part of the plea bargain to Possession of Stolen Property and Third Degree Assault. Neither of the amended offenses triggered automatic decline. The defendant appealed the conviction. The Washington State Supreme Court held that the trial court originally obtained jurisdiction through automatic decline. The Court found that once the state amended the Information to a non-automatic offense, the trial court must remand the case to juvenile court for a decline hearing and the juvenile court must exercise discretion in

declining jurisdiction. (RP 8)

Defense counsel cited State v. Carpenter, 117 Wn. App. 673. In Carpenter, counsel argued that the appellate court dealt with a three strike case, similar to Mr. Knippling's. In Carpenter, supra, the defendant challenged a prior conviction which was being used as a basis for his three strike sentence. The prior conviction was rendered by an adult court while the defendant was a juvenile. The state had amended the Information to a non-automatic offense and no decline hearing was held. The state argued that the defendant was precluded from challenging the conviction as it would be collateral attack. The Appellate court disagreed with the state and held that because the state carried the burden of preponderance of the evidence of the prior convictions and the challenge of the convictions went to the defendant, it was not improper collateral attack. (RP 9-10)

The state argued that Mr. Knippling had no right to challenge that conviction in this forum. Mr. Knippling had to use the avenues of challenge provided for in post-conviction relief. The state argued that the court had to look strictly at the face of the conviction document. (RP 12-13)

The court inquired as to whether there was an appropriate recognition in the plea agreement which included whether Mr. Knippling waived the declination hearing. The state informed the court that there was not. (RP 14-15)

The court inquired as to whether the judgment and sentence reflected any colloquy which took place with regard to the issue of declination. The state replied in the negative. The state did not know what went on in Mr. Knippling's particular 1999 hearing. (RP 15)

The state argued that all the court had before it was the certified copy of the judgment and sentence showing that there were no constitutional problems with the document, looking at the four corners. The state argued that the Ammons case and others, required the court to just look at the document that contained no constitutional problems. (RP 15-16)

The court reviewed the judgment filed on April 9th, 1999, and opined that the document contained language which indicated that there must have been some colloquy indicating that the court at that time found no reason not to go forward. (RP 16)

Defense counsel argued that it had presented the court with the 1999 court file which showed an absolute silent record about any declination hearing or waiver to decline. Defense counsel argued that when a juvenile was declining his rights, it would need to show up in a judgment and sentence. If there was colloquy between the judge and Mr. Knippling, there would have been something, a signature on a document, which would have indicated that he waived. (RP 18-19)

Defense counsel argued that the judge made no finding that the court had jurisdiction on a situation that under the circumstances required him to do so. Defense counsel argued that this situation also required that when waiving a constitutional right, more than colloquy was necessary. The waiving of a right like this required a signature. (RP 20)

Defense counsel argued that if there was no decline hearing, the case stayed in juvenile court where it was preferred for 16 year olds to have their cases dealt with. What the state was asking the court to do was to find that there was a decline hearing based upon a complete lack of the record. The court could look at the documents in the file and there was not one document that said

that there was an intelligent waiver of a right to decline. (RP 22)

Defense counsel argued that it was the state's burden to prove that Mr. Knippling was a persistent offender. Here there was a 16 year old and a record void of any mention or finding by the court that it had jurisdiction under the circumstances. Defense counsel did not believe that the court could find by the preponderance of the evidence that there was any kind of declination hearing. (RP 23)

Defense counsel argued that once a defendant showed that a prior conviction was invalid on its face, the state must produce evidence that the conviction was valid according to State v. Stoudmire, 141 Wn. 2d. 342. (RP 23-24)

The court opined that this case was troubling as it had a defendant who had been convicted of multiple serious crimes and had caused a tremendous amount of harm in the lives of those in the community. The court did not believe that Mr. Knippling was prevented from attacking the 1999 conviction. The court believed that Carpenter was on point. (RP 24-25)

The court opined that there was not a lot of discretion for the judges to deal with these kinds of problems. The court believed

that Mr. Knippling had the right to challenge the conviction. The court believed that the state had the burden to show that Mr. Knippling was a persistent offender. (RP 26)

The court opined that Mr. Knippling's objection was that one of the convictions on its face did not reflect nor did it reflect anywhere in file that at the time the charges were amended to second degree, a declination hearing occurred. It was not an automatic decline after the charge was amended. Everything before the court justified the argument that the conviction was without jurisdiction and therefore, constitutionally invalid on its face. The court opined that as a result of the unconstitutional conviction, there was one conviction short of three strikes. In the court's analysis, it could have been referred back to juvenile court for a hearing and if that had taken place then the conviction would have stood. (RP 26-27)

The court imposed a sentence as follows: Count I, 87 months; Count II, 63 months; Count IV, 116 months; Count V, 84 months; Count VI, 84 months; Count VII, 87 months; Count VIII, 63 months; Count IX, 116 months; Count X, 84 months, and Count XIV, 57 months. (RP 39-40) (CP 81-97)

On May 24, 2006, Judge Jerome Leveque filed with the Superior Court a written letter to all counsel setting forth, inter alia the following:

On November 15, 2005, Tucero Knippling was found guilty in the present matter by jury verdict of several most serious offenses. Mr. Knippling was found guilty of two counts of Conspiracy to Commit First Degree Burglary; two counts of First Degree Burglary; and three counts of Second Degree Robbery.

A sentencing hearing was held on December 15, 2005. The state asked the court to sentence Mr. Knippling to a life sentence without the possibility of release as a persistent offender.

The state's understanding of Mr. Knippling's criminal history indicated that he had a 1999 conviction for Second Degree Robbery and a 2002 conviction for Second Degree Assault.

Mr. Knippling was sixteen-years-old when he pled guilty in the adult division of Spokane County Superior Court to Second Degree Robbery on April 7, 1999, cause #99-1-00305-6.

On February 22, 1999, the State filed the original information under cause #99-1-00305-6 in the adult division of the Spokane Superior Court charging Mr. Knippling with First Degree Robbery.

The charge of First Degree Robbery automatically subjected Mr. Knippling to the jurisdiction of the adult court under the automatic decline statute, RCW 13.04.030 (1)(e)(v).

On April 7, 1999, the state filed an amended information charging Mr. Knippling with one count of Second Degree Robbery, a crime not subject to automatic decline.

The Honorable James M. Murphy presided over Mr. Knippling's April 7, 1999 guilty plea in the adult court. Mr. Knippling's case was never remanded to the juvenile division of the Spokane County Superior Court for a declination hearing. Judge Murphy did not hold a declination hearing prior to entering the judgment and sentence in Mr. Knippling's case.

There is no evidence in the record that Mr. Knippling made a knowing, intelligent, and voluntary waiver of juvenile jurisdiction before entering his plea of guilty to Second Degree Robbery in the adult division of the Spokane County Superior Court on cause #99-1-003-5-6.

As a result, the Court concluded the following:

Mr. Knippling's 1999 Second Degree Robbery conviction under Cause #99-1-00305-6 is invalid because the adult division of the Spokane County Superior Court lacked competent jurisdiction over the case. The adult court did not retain jurisdiction after the state amended the charge to an offense not subject to automatic decline. State v. Mora, 138 Wn.2d 43 (1999). Furthermore, the adult court did not remand the case to the juvenile court for a declination hearing and Mr. Knippling did not make a knowing, intelligent and voluntary waiver of juvenile court jurisdiction. Therefore, the adult court lack competent jurisdiction over the case and Mr. Knippling's 1999 conviction for Second Degree Robbery under cause #99-1-00305-6 is invalid.

Mr. Knippling does not qualify as a "persistent offender" because his 1999 Second Degree Robbery conviction under cause #99-1-00305-6 is invalid. For purposes of sentencing in the present matter, Mr. Knippling has one prior conviction for a most serious offense, a 2002 Second

Degree Assault conviction. Therefore, Mr. Knippling does not qualify as a “persistent offender” and the law does not authorize a life sentence without possibility of release.

Mr. Knippling is not barred from challenging the validity of his 1999 Second Degree Robbery conviction for purposes of sentencing in the present matter. The 1999 Second Degree Robbery conviction is invalid on its face and was not rendered by a court of competent jurisdiction; therefore, Mr. Knippling’s challenge does not constitute an impermissible collateral attack on a prior conviction. (CP 117-118)

The state filed its appeal on January 13, 2006. (CP 98-116)

IV. LEGAL ARGUMENT

A. THE TRIAL COURT’S FINDINGS AND CONCLUSIONS IN THE LETTER OF MAY 24, 2006 WERE PROPERLY ENTERED.

The state argues that Judge’s Leveque’s May 24th, 2006, letter should be rejected as it was unnecessary, untimely and relied upon the wrong source of information. The state argues that findings contained in the letter were not supported by an appropriate record. The state also argues that findings entered four (4) months after the appeal was filed are problematic as late filed findings have the potential of tailoring to affect the appeal.

To support this argument the state cited State v. Head, 136 Wn.2d 619, 964 P.2d 1187 (1998). Contrary to what the state argues, State v. Head, supra, does not support this proposition.

State v. Head, supra, does stand for the proposition that if there is a bench trial, the trial court must file written findings of fact and conclusions of law pursuant to CrR 6.1 in order to enable the appellate court to review questions raised on appeal.

In fact, the Appellate Court in State v. Head, supra, requires that absent actual prejudice to a defendant, the proper remedy for a trial court's failure to enter written findings of fact and conclusions of law is to remand to the trial court for the entry of said written findings of fact and conclusions or law based on the evidence already taken.

The state argues that the timing of Judge Leveque's letter is problematic and that his findings contained therein were gratuitous. This argument is without merit. Upon review of the record, the findings and conclusions contained in Judge Leveque's letter were supported by the record. (See Statement of Facts above).

The state has not made any showing of prejudice. This case was not delayed due to filing of Judge Leveque's letter. This case was delayed as a result of the court reporter's ability to timely file the verbatim report of proceedings, due to so many obligations.

The state argues that a problem with Judge Leveque's findings contained in the letter was the source of the information. The state also argues that Judge Leveque's review of the 1999 court file to make his determination was dubious. The state cites State v. Mail, 121 Wn. 2d 707, 854 P.2d 1042 (1993) to support this contention. State v. Mail, supra, does not support the state's argument.

State v. Mail, supra, simply states that the Sentencing Reform Act of 1981 does not restrict the information that a sentencing court may consider in arriving at a sentence within the standard range.

The state seems to argue that if Judge Leveque reviewed the court file, he then needed to have had the guilty plea hearing transcribed. The state argues that without reviewing the hearing, Judge Leveque had no basis for finding that there was no evidence in the record that Mr. Knippling waived juvenile court jurisdiction. Judge Leveque had no obligation to have the guilty plea hearing transcribed, as based upon the record before him, he could properly conclude that a declination hearing never occurred. The state however, could have had this hearing transcribed as they

were notified of such by Mr. Knippling through his sentencing memorandum that this conviction was in question.

Judge Leveque's May 24th, 2006, letter containing the findings of fact and conclusions of law was properly entered and based upon a sufficiently complete record before the court.

B. THE 1999 JUDGMENT AND SENTENCE FORM WAS FACIALLY INVALID.

The state argues that the issue is whether a judgment form must affirmatively state its' jurisdictional authority. The state cites State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796, cert. denied 479 U.S. 930 (1986), to support its argument that the state does not have to show the constitutional validity of prior convictions used to establish a defendant's sentence. While State v. Ammons, *supra*, In re PRP of Hemenway, 147 Wn.2d 529, 55 P.3d 615 (2002), and In re PRP of Turay, 150 Wn.2d 71, 741 P.3d 1194 (2003) may stand for this proposition, these case are not dispositive of the issue before this Court. The cases cited are not applicable to the facts and circumstances in this case and do not preclude Mr. Knippling from challenging the 1999 conviction in determining whether he could have been sentenced as a persistent offender. Additionally, the cited cases did not prevent Judge

Leveque from reviewing the documents and all of the records he reviewed in determining that Mr. Knippling's 1999 conviction could not be used as a second strike.

Mr. Knippling's attack on the 1999 conviction at the sentencing hearing was proper and not a collateral attack as his attack was directed to the present use of a prior conviction to show that Mr. Knippling was a persistent offender. State v. Holsworth, 93 Wn.2d 148, 607 P.2d 845 (1980).

The state bears the burden of proving by a preponderance of the evidence that two applicable prior convictions exist when seeking a POAA sentence. State v. Manussier, 129 Wn.2d 652, 921 P.2d 473 (1996), cert. denied, 520 U.S. 1201 (1997). Mr. Knippling's argument relating to his persistent offender status was a proper defense to the state's position.

The Appellate Courts review de novo the trial court's application of the relevant statutes in making sentencing determinations under POAA. In re the Matter of the Post Sentencing Review of Charles, 135 Wn.2d 239, 955 P.2d 798 (1998). Under the POAA, a persistent offender is one who, prior to the commission of the current offense, has been convicted of at

least two most serious felony offenses. Thus, in the Court's review it must decide whether the court was correct in determining whether Mr. Knippling's 1999 conviction operated as a strike.

To answer this question, this court should review and apply the Division II holding in State v. Carpenter, 117 Wn. App. 673, (2003). In Carpenter, supra, the facts are extremely similar to Mr. Knippling's. The juvenile in Carpenter was originally charged with an offense which triggered the automatic declination of juvenile court jurisdiction. This charge was later amended to a charge which did not automatically trigger the declination. The state in Carpenter failed to seek a declination hearing until after the defendant was charged three (3) years later with two additional counts. The Appellate Court in Carpenter found that the earlier conviction did not count as a prior conviction under the POAA.

The state in this case did not meet its burden by the preponderance of the evidence. Mr. Knippling was not precluded from attacking the 1999 judgment and Judge Leveque was not restricted from reviewing the court documents and record to ascertain whether a declination hearing occurred. Additionally, Judge Leveque did not error in finding that because no

declination hearing was held, Mr. Knippling's conviction did not constitute a second strike which would subject Mr. Knippling to a persistent offender sentence.

C. THE TRIAL COURT DID NOT IMPOSE THE WRONG REMEDY.

The state argued that even if the trial court had correctly determined that the 1999 conviction was entered by a court lacking jurisdiction, its' remedy of invalidating the conviction was erroneous. The state argues that In re PRP of Dalluge, 152 Wn.2d 772, 100 P.3d 279 (2004) is dispositive. The Dalluge case involved a defendant who brought a PRP who had been charged in an adult court with first degree rape. The charges were later amended to a lesser charge and no declination hearing was held. The Appellate Court held that the adult court should have been remanded to the juvenile division for a declination hearing once the charges were amended. This case does not involve a PRP action. Distinguishing Dalluge from Mr. Knippling's case, Dalluge is not dispositive.

Again, this Court should review the holding in Carpenter, supra. The Court in Carpenter held that equitable principles require that the defendant be placed in the same position as if the judicial error had not occurred; therefore a retroactive entry was

appropriate only to remedy the record as to something that occurred, not something that should have occurred, citing State v. Smissaert, 103 Wn.2d 636, 694 P.2d 654 (1985). Thus, the Appellate Court in Carpenter held that retroactive entry was inappropriate and re-sentencing should occur on the date of the amended judgment on declination.

In applying the Carpenter holding to Mr. Knippling's case, even if Judge Leveque was required to remand Mr. Knippling's 1999 conviction to the juvenile court for a declination hearing, this conviction could not be used as the second strike which the state was seeking.

The sentencing court in this matter did not err in entering its findings and conclusions in the May 24th letter. The court did not err and was not precluded from reviewing the 1999 conviction court file and records available. The trial court was not in err in not remanding the 1999 conviction to the juvenile court for a declination hearing as the amended judgment would not be retroactive, and thus would not subject Mr. Knippling to a persistent offender sentence status..

V. CONCLUSION

Based on the foregoing facts and law as set forth above, Tucero A. Knippling respectfully requests the Court of Appeals to act in the interests of justice, and uphold the trial court's prior ruling and deny the state's request.

DATED this 5th day of March, 2007.

Respectfully submitted,

Lana C. Glenn

LANA CECILE GLENN, WSBA# 17858
Attorney for Tucero A. Knippling, Respondent.

Certificate of service:

I, Hope Glenn, not a party to this action, and competent to be a witness therein certify that I am over the age of 21 and would testify under the laws of perjury before a court of law in the State of Washington, that I personally mailed, pre-paid postage, first class, a copy of the Opening Brief in this matter to Kevin Korsmo, Attorney at Law, at 1100 W. Mallon Ave., Spokane, Wa. 99260- 2043, and to Tucero Knippling, DOC # 794799, 1830 Eagle Crest Way, Clallam Bay Wa. 98326, on this day March 5, 2007.

Date: 3/5/2007, Spokane, Washington

Hope Glenn

Hope Glenn. 3-5-07