

74962-5

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COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

STATE OF Washington)

Respondent,)

v.)

HUNG NGUYEN)

Appellant)

No.74962-5-I

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, Hung Nguyen, have received and reviewed the opening brief prepared by my attorney. Summarized within are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits. There are additional grounds, a brief summary is attached to this statement.

Hung Nguyen
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, Wa. 99362

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STATE OF WASHINGTON
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TABLE OF CITATIONS

U.S. SUPREME COURT DECISIONS

Almendarez-Torres, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed 350 (1998).

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000).

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

Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed. 2d 311 (1999).

McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed. 2d 67 (1986).

Ring v. Arizona, U.S. 584, 122 S.Ct. 2428, 153 L.Ed. 2d 556 (2002).

United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310 ().

Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed. 2d 108 (1976).

WASHINGTON SUPREME COURT DECISIONS

In Re the Matter of the Personal Restraint of Thompson, 141 Wn. 2d 712, 10P. 3d 380 (2000).

State v. Ammons, 105 Wn. 2d 175, 713 P. 2d 719 (1986).

State v. Furth, 5 Wn. 2d 1, 104 P.2d 925 (1940).

State v. Green, 94 Wn. 2d 216, 616 P. 2d 628 (1980).

State v. Manussier, 129 Wn. 2d 652, 921 P. 2d 473 (1996).

State v. Smith, 150 Wn. 2d 135, 75 P. 3d 934 (2003).

State v. Tongate, 93 Wn. 2d 751, 613 P. 2d 121 (1980).

State v. Wheeler, 145 Wn. 2d 116, 34 P. 2d 799 (2001).

COURT OF APPEALS DECISIONS

State v Phillips, 94 Wn. App 313, 972 P. 2d 932 (1999).

GROUND 1

THE TRIAL COURT ERRED BY COUNTING AS A QUALIFYING OFFENSE FOR PURPOSES OF THE POAA PRIOR CONVICTIONS WHERE THE CONVICTIONS WERE FACIALLY INVALID.

At sentencing defense counsel argued NGUYEN'S prior convictions should not be used to elevate his maximum sentence for the purposes of POAA because his prior pleas were not factually valid, thus rendering the prior pleas involuntary and constitutionally invalid. (RP 680- 694).

A. Due Process precludes the consideration of NGUYEN'S prior offense as "STRIKES" under POAA because the pleas were not knowing or voluntary. HUNG NGUYEN'S prior guilty pleas from 4/2/2012 and 10/14/1994, used as strikes in the instant matter are based on facts that are not strikes. The State made NGUYEN a deal in his plea bargain that allowed him to get out of jail and probation in exchange for his plea. In sum NGUYEN pled guilty to a non-existent crime. Second degree assault in 2012.

"A sentencing court cannot consider a prior conviction that is constitutionally invalid on its face-over that evidences infirmities of a constitutional magnitude". State v. Phillips, 94 Wn. App. 313, 317, 972 P. 2d 932 (1999). Citing State v. Ammons, 105 Wn. 2d. 175, 187-88, 713 P. 2d 719 (1986). "The phrase 'on its face' has been interpreted to mean those documents signed as a part of a plea agreement". In Re the Matter of the Personal Restraint of Thompson, 141 Wn. 2d 712, 718, 10 P.3d 380 (2000). "A plea may be involuntary either because the accused does not understand the

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nature of the constitutional protections he is waiving, or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt". Henderson v. Morgan, 426 U.S. 637,645, 96 S.Ct. 2253, 49 L.Ed. 2d 108 (1976). Citations Omitted. NGUYEN gives notice that this issue should be considered under the United States federalized constitutional standard of review as well as Washington's constitution and authority.

GROUND 2

THE JURY SHOULD HAVE DETERMINED NGUYEN'S POAA STATUS UNDER THE UNITED STATES CONSTITUTION.

(a) In recent cases, the United States Supreme Court has recognized that this principle applies not just to the essential elements of the charged offense, but, also extends to the facts labeled "sentencing factors" where the factors increase the maximum penalty faced by the defendant. In Blakely, the court held that an exceptional sentence imposed under Washington's Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. Blakely, 124 S.Ct. at 2537. Likewise, prior to the Blakely decision, the Court found Arizona's death penalty scheme unconstitutional because a defendant could receive the death penalty based upon aggravating factors found by a judge by a preponderance of the evidence.

Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed. 556 (2002). And in Appendi, the Court found New Jersey's "hate crime" legislation unconstitutional because it permitted the court to give a sentence above the statutory maximum after making a factual finding of the preponderance of the evidence Appendi, 530 U.S.

(b) Due process requires a jury to find, beyond a reasonable doubt, any fact that increases a defendant's maximum possible sentence. The due process clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. Amend. 14. The 6th Amendment also provides the defendant with a right to trial by jury. U.S. Amends. 6, 14. Thus, it is axiomatic that a criminal defendant has a right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt.

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 2536-37, 159 L.Ed. 2d 403 (2004); Appendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, L.Ed. 2d 435 (2000); In Re Winship, 397 U.S. 358, 364 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970); State v. Green, 94 Wn. 2d 216, 220-21, 616 P.2d 628 (1980). The constitutional rights to due process and a jury trial "indisputably entitle a criminal defendant to a jury determination that [he] is guilty of every element of the crime beyond a reasonable doubt". Appendi, 530 U.S. at 476-77 quoting United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed. 2d 444 (1995).

In these cases, the Court rejected arbitrary distinctions between sentencing factors and elements of the crime. The Ring Court pointed out the dispositive question is one of substance not form. "If a State makes an increase in defendant's authorized punishment contingent on the findings of a fact, that fact, no matter how the state labels it must be found by a jury beyond a reasonable doubt." 536 U.S. at 602 (citing Appendi, 530 U.S. 482-483). Thus a judge may only impose punishment based upon the jury verdict or guilty plea, not an additional finding. Blakely, 124 S.Ct. at 2537.

(c) Federal decisions leave this issue unresolved. In Almendarez -Torres v. United States the Court held that recidivism was not an element of the substantive crime that needed to be pled in the information, even though the defendant's prior conviction was used to double the sentence otherwise required by federal law. 523 U.S. 224, 246, 118 S.Ct. 1219, 140 L.Ed. 2d 350 (1998). Almendarez-Torres pled guilty and admitted his prior convictions, but argued that his prior convictions should have been included in the indictment. 523 U.S. at 227-282. The Court determined that Congress intended the fact of a prior conviction to act as a sentencing factor and not an element of a separate crime. *Id.* The Court concluded that the prior conviction need not be included in the indictment because (1) recidivism is a traditional basis for increasing an offender's sentence. (2) The increased statutory maximum was not binding upon the sentencing judge.

(3) The procedure was not unfair because it created a broad permissive sentencing range, and judges have typically exercised their discretion within a permissive range, and,

(4) The statute did not change a preexisting definition of the crime; thus Congress did not try to "evade" the Constitution. Id. at 244-45. The Almendarez-Torres Court, however, expressed no opinion as to constitutionally required burden of proof sentencing factors that increase the severity of the sentence or whether a defendant has a right to a jury determination of such factors. Id. at 246.

Since the 5-4 decision in Almendarez-Torres, the court has not addressed recidivism and has been careful to distinguish prior convictions from other facts used to enhance the possible penalty. Blakely, 124 S.Ct. at 2536; Apprendi, 530 U.S. at 476; Jones v. United States, 526 U.S. 227, 243 n.6, 199 S.Ct. 1215, 143 L.Ed. 2d 311 (1999). The Apprendi Court distinguished Almendarez-Torres because the defendant only raised the indictment issue. 530 U.S. at 488, 495-96. The Apprendi Court went so far as to state "it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested". 530 U.S. at 489. The Court therefore treated Almendarez-Torres as a "narrow exception" to the rule that a jury must find any fact that increases the statutory maximum sentence for a crime beyond a reasonable doubt. Id.

In Blakely, Apprendi and Jones, the Court stated that,

"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." This statement, however cannot be read as a holding that prior convictions are necessarily excluded from the Apprendi rule. Rather, it demonstrates only that the Court has not yet considered the issue of prior convictions under Apprendi. Colleen P. Murphy, *The Use of Prior Convictions After Apprendi*, 37 U.C. Davis L. Rev. 973, 989-90 (2004). For example, Justice Thomas, who was one of five justices signing the majority opinion in Almendarez-Torres, opined in a concurring opinion in Apprendi that both Almendarez-Torres and its predecessor, McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed. 2d 67 (1986), were wrongly decided. 530 U.S. at 499. Rather than focusing on whether something is a sentencing factor or an element of the crime, Justice Thomas suggested the Court should determine if the fact, including a prior conviction, is a basis for imposing or increasing punishment. *Id.* at 499-519. Accord Ring v. Arizona, 536 U.S. 610 (Scalia, J. concurring) ("I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives whether the statute calls them elements of the offense, sentencing factors, or Mary Jane-must be found by the jury beyond a reasonable doubt").

The Washington Supreme Court has recognized the United States Supreme Court's failure to embrace the Almendarez-Torres decision. State v. Smith, 150 Wn. 2d 135, 141-42, 75 P.3d 934 (2003), cert. denied sub nom., 124 S.Ct. 1616 (2004) (addressing Ring); State v. Wheeler, 145 Wn. 2d 116, 121-24, 34 P.2d 799 (2001) (addressing Apprendi). The Washington Supreme Court however, has felt constrained to follow "Almendarez-Torres", 118 S.Ct. at 1226. But Congressional intent does not established the parameters of due process.

Here, the initiative places the persistent offender definition within the sentencing provisions of the SRA, thus evincing a legislative intent to create a sentencing factor. This is in stark contrast to prior habitual criminal statutes, which required a jury determination of prior convictions as consistent with due process. Chapter 86, Laws of 1903, p. 125 Rem. & Bal. Code, §§ 2177, 2178; Chapter 249, Laws of 1909, p. 899, § 34, Rem. Rev. Stat. §2286; State v. Furth, 5 Wn.2d 1, 104 P. 2d 925 (1940).

Blakely makes clear that the judicial finding by a preponderance of the evidence of the sentencing factor used to elevate Mr. NGUYEN 's maximum punishment to a life sentence without the possibility of parole violates due process. The "narrow exception" in Almendarez-Torres has been marginalized out of existence. This Court should revisit Washington's adherence to that now disfavored decision and remand for a jury determination of the prior convictions.

CONCLUSION

For the reasons stated and in the Interest of Justice this Court should consolodate the PRP with the direct appeal, Court Of Appeals No. 74962-5-I.

RELIEF REQUESTED

(1) Appellate requests an Order for a Evidentairy Hearing on his Ineffective Assistance of Counsel issues found in his pending Personal Restraint Petition.

(2) Appellate moves the court for an Order to consolidate the issues in his PRP with his Direct Appeal in Division I No. 14-1-06738-7.

(3) Any other relief this Court deems proper in the Interest of Justice.

RESPECTFULLY SUBMITTED:

March 22, 2017

Nguyen. Hung
Hung Nguyen

HUNG VAN NGUYEN)
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NO. 74962-5-1

AFFIDAVIT OF SERVICE
BY MAILING

I, HUNG V. NGUYEN, being first sworn upon oath, do hereby certify that I have served the following documents:

Statement of Additional Grounds

Upon: ~~XXXXXXXXXXXX~~ ^{HUN} Donna Lynn Wise
King County Prosecutor
516 Third Avenue
Seattle, Washington 98104

By placing same in the United States mail at:

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On this 22 day of MARCH, 2017.

Nguyen Hung
Name & Number
HUNG VAN NGUYEN #725663

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.