DISTRICT COURT, TELLER COUNTY, COLORADO Court Address: 101 W. Bennett Avenue Cripple Creek, CO 80814 Court Phone: (719) 689-7360	DATE FILED: December 16, 2019 9:14 AM FILING ID: 9681992E0176B CASE NUMBER: 2019CR17
THE PEOPLE OF THE STATE OF COLORADO, v. KRYSTAL LEE KENNEY, Defendant.	▲ COURT USE ONLY ▲ Case Number: 19CR17
Dru Nielsen, #28775 Eytan Nielsen LLC 3200 Cherry Creek South Drive, Suite 720 Denver, CO 80209 Telephone: (720) 440-8155 Facsimile: (720) 440-8156 Email: dru@eytan-nielsen.com *ATTORNEY FOR DEFENDANT KRYSTAL LEE KENNEY*	Courtroom/Division: 11

OBJECTION TO AGGRAVATED RANGE SENTENCING

Ms. Krystal Lee Kenney, by and through undersigned counsel, objects to the Court imposing a sentence in the aggravated range. Undersigned counsel moves this Court to find that Ms. Kenney is not subject to an aggravated sentencing range pursuant to the Federal and State Constitutions, relevant case law, the plea agreement in this case, lack of a knowing, voluntary, and intelligent waiver of her *Blakely* rights, and her detrimental reliance on the December 20, 2018 agreement. As grounds for this motion, Ms. Kenney states the following:

FACTUAL BACKGROUND

On December 20, 2018, an agreement was entered between the Fourth Judicial District Attorney and Ms. Krystal Lee Kenney. The agreement was memorialized in a letter signed and dated December 20, 2018. The crux of the agreement was that if Ms. Kenney provided truthful information and full cooperation, the District Attorney agreed not to file additional charges and would allow Ms. Kenney to plea to Tampering with Physical Evidence, a class six felony.

In the December 20, 2018 agreement, the District Attorney indicates that, "the potential sentence would be a sentence to the Colorado Department of Corrections (DOC) in the range of 1 year to 18 months or up to 3 years in the aggravated range**,** community corrections or probation. The actual sentence would be up to the Court."

On December 20 and 21, 2018, pursuant to and in reliance of the agreement she had entered with the District Attorney, Ms. Kenney provided significant information to law enforcement which resulted in Mr. Frazee's arrest on December 21, 2018 and eventually his conviction. Throughout this process, undersigned counsel received confirmation from the prosecutors that they deemed Ms. Kenney to be in compliance with the terms of the plea agreement.

Leading up to February 8, 2019 court date where Ms. Kenney was to formally enter her guilty plea, undersigned counsel repeatedly asked the prosecutors to provide the plea paperwork sufficiently in advance of the plea hearing in order to have time to review the paperwork. Additionally, law enforcement had requested and scheduled an additional interview of Ms. Kenney at 10:00 am on February 7, 2019. Undersigned counsel has emails to the prosecutors on February 4 and 6, 2019 requesting the plea paperwork. The plea paperwork was not emailed to undersigned counsel until 6:26 pm on February 6, 2019.

In the plea paperwork received by undersigned counsel the night of February 6, 2019, the District Attorney included terms that had not been part of the December 20, 2018 signed agreement or agreed to by Ms. Kenney. Specifically, the District Attorney included in the plea paperwork the following language: "The Defendant further stipulates to the existence of extraordinary aggravating circumstances that would allow the court to sentence in the aggravated range."

After the first review of the written plea paperwork, undersigned counsel emailed the prosecutor at 8:24 pm on February 6, 2019: "I have some issues and concerns that need to be discussed. Unfortunately, given the timing of receiving the paperwork, I am still reviewing and will do my best to convey those to you has soon as possible. These need to be resolved before we move forward." At 10:19 pm on February 6, 2019, undersigned counsel followed up with another email to the prosecutor stating, "We did not agree 'to stipulate to the existence of extraordinary aggravating circumstances.' You added that sentence into the plea agreement which was never part of our original agreement advising of the potential sentencing range. I never advised Ms. Lee that as part of her agreement she had to stipulate to aggravation, nor was that part of our agreement." The next morning, February 7, 2019, undersigned counsel and the prosecutor exchanged emails, but undersigned counsel had to pick up Ms. Kenney and drive her to Colorado Springs for her scheduled interview with law enforcement. It was decided that undersigned counsel could discuss the plea paperwork with the District Attorney prior to Ms. Kenney's third interview with law enforcement.

After a lengthy meeting with the District Attorney, the language about stipulating to aggravation was removed from the final plea paperwork which was signed and submitted to the Court. The parties agreed to let the Court determine whether the December 20, 2018 agreement allows the Court to sentence Ms. Kenney in the aggravated range. Undersigned counsel emailed the prosecutor on February 12, 2019 to memorialize the discussion about aggravating circumstances. See Attachment "A" – Email to prosecutor memorializing discussion related to aggravating circumstances.

Ms. Kenney was complying with all of her obligations under the December 20, 2018 agreement, and in reliance of that agreement had already provided many hours of interviews, information, and scene walk throughs. Ms. Kenney formally entered her guilty plea pursuant to the agreement on February 8, 2019. As the parties had agreed, Ms. Kenney plead guilty to one charge of Tampering with Physical Evidence, a class 6 felony. The final plea paperwork language mirrors what was in the December 20, 2018 agreement: "[t]he potential sentence would be a sentence to the Colorado Department of Corrections in the range of 1 year to 18 months or up to 3 years in the aggravated range, community corrections or probation. The actual sentence will be open to the Court." page 2, number 7, subsection (2). There was no waiver of Ms. Kenney's *Blakely* rights or a stipulation to the existence of extraordinary aggravating circumstances that would allow the court to sentence in the aggravated range contained in either the December 20, 2018 agreement or the written plea paperwork.

LAW

The United State Supreme Court holds that "[o]ther 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." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Four years later in *Blakely v. Washington*, 542 U.S. 296, 301 (2004), the Supreme Court applied the *Apprendi* rule to the State of Washington's statutory sentencing scheme to strike down a sentence above the "standard range." The Supreme Court held that the maximum sentence a judge may impose is not the sentence he "may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-04 (emphasis in the original).

The Colorado Supreme Court states, "*Apprendi* and *Blakely* provide a clear answer to the question of what facts are covered by the jury-trial right: The *Blakely* right extends to all facts that are not reflected in a jury verdict or, in the case of a plea bargain, to all facts beyond those that establish the elements of the charged offense." *People v. Isaacks,* 133 P.3d 1190, 1193 (Colo. 2006). In *Isaacks*, the defendant signed a Petition to Enter a Plea of Guilty which stated he understood the judge could sentence him to an aggravated term beyond the presumptive range and agreed to waive "all rights to trial by jury." *Id.* at 1191. However, Mr. Isaacks was not advised of, and did not waive, his right to a jury trial on facts used to form the basis of an aggravated sentence. Therefore, while Mr. Isaacks waived his right to a jury trial on the issue of guilt by agreeing to plead guilty, he never waived the right to a jury determination of aggravating facts. In *Isaacks*, the Colorado Supreme Court concluded that "*Blakely* does not permit a sentencing court to use a defendant's factual admissions to increase his sentence unless the defendant first effectuates a knowing, voluntary, and intelligent waiver of his *Blakely* rights." *Id.* at 1195.

APPLICATION OF THE LAW

Like Mr. Isaacks, Ms. Kenney did not effectuate a knowing, voluntary, and intelligent waiver of her *Blakely* rights, nor did she agree to stipulate to the existence of extraordinary aggravating circumstances that would allow the court to sentence in the aggravated range. In fact, the language that the District Attorney attempted to insert into the plea paperwork - "[t]he Defendant further stipulates to the existence of extraordinary aggravating circumstances that would allow the court to

sentence in the aggravated range" - was specifically and intentionally removed from the final paperwork as it was not part of the operative December 20, 2018 agreement.

Under the United States Supreme Court decision of *Santobello v. New York*, "a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. 257, 262 (1971). Ms. Kenney relied on the December 20, 2018 agreement and implicated herself in the clean-up of the crime scene and tampering with evidence. Nowhere in that December 20, 2018 agreement does Ms. Kenney stipulate to the existence of extraordinary aggravating circumstances that would allow the court to sentence in the aggravated range or waive her *Blakely* rights. Any other information, such as testimony from Ms. Kenney at Mr. Frazee's trial or information contained in the Presentence Investigation Report, would implicate Ms. Kenney's Sixth Amendment right under the U.S. Constitution and *Blakely,* thus requiring a jury finding regarding the information.

As she did not effectuate a knowing, voluntary, and intelligent waiver of her *Blakely* rights in the December 20, 2018 agreement, Ms. Kenney rightfully understood the possible maximum sentence in her specific case to be 18 months, unless she had a criminal history that qualified as a *Blakely* exempt fact. Ms. Kenney's reliance is reasonable because there is no language in the letter from December 20, 2018 that indicates she is specifically consenting to judicial factfinding of aggravation or that she is specifically waiving her *Blakely* rights. The only language present simply advises Ms. Kenney of the statutory possibilities, which is done in most standard plea agreements. In consideration of Ms. Kenney's detrimental reliance evident through the relinquishment of her constitutional right against self-incrimination, the maximum sentence that this Court can impose is 18 months imprisonment.

Respectfully submitted this 16th day of December, 2019,

EYTAN NIELSEN LLC

s/ Dru Nielsen
Dru Nielsen, #28775

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2019 a true and correct copy of the foregoing **OBJECTION TO AGGRAVATED RANGE SENTENCING** was served via CCE as follows:

4th Judicial District Attorney's Office
112 N. A St, P.O. Box 958
Cripple Creek, CO, 80813

s/ Tonya Holliday
Tonya Holliday

Dru Nielsen

From: Dru Nielsen
Sent: Tuesday, February 12, 2019 1:00 PM
To: 'Jennifer Viehman'
Subject: Discussion Related to Aggravating Circumstances

DATE FILED: December 16, 2019 9:14 AM
FILING ID: 9681992E0176B
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Jennifer,

I am sending this email to memorialize our lengthy in-person conversation between you, Dan May, and me on February 7, 2018. After much discussion, we agreed to let the judge interpret the following sentence in the December 20, 2018 letter - "The potential sentence would be a sentence to the Colorado Department of Corrections (DOC) in the range of 1 year to 18 months or up to 3 years in the aggravated range, community corrections or probation." As you know, the defense will argue that Ms. Lee has not waived any constitutional rights as it relates to the finding of aggravating factors and will argue that the court cannot sentence Ms. Lee in the aggravated range. You have reserved the right to make an argument to the Court that the December 20, 2018 letter means that the Court can sentence her in the aggravated range.

During this discussion, I raised a concern over the sentence in paragraph 14b of the Plea Agreement. You agreed that you will not use paragraph 14b as any evidence or support for your argument that Ms. Lee has agreed to be sentenced in the aggravated range. (Again, to be clear, she will contend that she has not agreed). You agreed that 14b's purpose is only to advise of the potential aggravated range IF the judge finds that he can sentence in that range.

Please let me know if you have any disagreements with this memorialization of our discussion.

Thanks,
Dru

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Exhibit A