IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, **Plaintiff,** **v.** **RODNEY EUGENE DORSEY,** **Defendant.**	**Case No. CF-2008-1601** **Judge William Kellough**

BRIEF CONCERNING REQUEST FOR CLARIFICATION OF APPLICABLE SENTENCING RANGE FOR POSSESSION OF MARIJUANA SECOND OFFENSE

COMES NOW Rodney Dorsey by and through his attorney of record and offers this Court a brief outlining the issues as counsel sees them, regarding the applicable guideline range of unlawful possession of marijuana second and subsequent offense.

OVERVIEW OF THE ISSUE

Mr. Dorsey is charged with felony possession of marijuana in violation of Title 63 O.S. § 2-402. Counsel has been informed, by the state that it is their position that the punishment range for this offense carries from 6 years to life. Counsel has been informed that it is the state's position that because of Mr. Dorsey's prior convictions that under the provisions of the Habitual Offender Act that this is the appropriate guideline range. It is counsel's belief that possession of marijuana under Title 63 O.S. § 2-402 B (2) never carries greater than a 10-year sentence. It is also counsel's understanding that the state routinely informs defendants in similar situations that the applicable guideline range is enhanced under Title 21 O.S. §51.1.

Counsel has an ethical obligation to advise his client on the appropriate range of punishment for the offense that he is charged with. Furthermore, any waiver that Mr. Dorsey may make is not a knowing and voluntary waiver unless he advised of the appropriate range of punishment for that particular offense. *(See Moore v. Bryant, 348 F.3d 238(7th Cir. 2003) finding that an Illinois Appellate court acted unreasonably in rejecting an ineffective assistance of*

counsel claim where trial counsel induced defendant to plead guilty based upon misinformation regarding his sentence.) Finally, Mr. Dorsey and counsel are unable to decide on an appropriate course of action unless counsel and his client are clear on the range of punishment that Mr. Dorsey would face at a jury trial.

ARGUMENT FOR PUNISHMENT RANGE NOT TO EXCEED TEN YEARS

Title 63 O.S. § 2-402 (B) (2) provides that a first time possession of marihuana is a misdemeanor but that a second and subsequent offense is a felony punishable by two to ten years in prison.

> B. Any person who violates this section with respect to:
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> …2. Any Schedule III, IV or V substance, marihuana, a substance included in subsection D of Section 2-206 of this title, or any preparation excepted from the provisions of the Uniform Controlled Dangerous Substances Act is guilty of a misdemeanor punishable by confinement for not more than one (1) year. A second or subsequent violation of this section with respect to any Schedule III, IV or V substance, marihuana, a substance included in subsection D of Section 2-206 of this title, or any preparation excepted from the provisions of the Uniform Controlled Dangerous Substances Act is a felony punishable by imprisonment for not less than two (2) years nor more than ten (10) years.
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> (See Title 63 O.S. § 2-402 (B) (2), emphasis added)

Title 63 O.S. § 2-412 defines what a second and subsequent offense is:

> An offense shall be considered a second or subsequent offense under this act, if, prior to his conviction of the offense, the offender has at any time been convicted of an offense or offenses under this act, under any statute of the United States, or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs, as defined by this act.
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> (See Title 63 O.S. § 2-412, emphasis added)

Title 21 O.S. § 11 proscribes how punishment shall be determined when different statutes provide different punishments for the same offense. Title 21 O.S. § 11 specifically states that

under no circumstances shall the same criminal act be punished under more than one section of law.

> A. If there be in any other provision of the laws of this state a provision making any specific act or omission criminal and providing the punishment therefore, and there be in this title any provision or section making the same act or omission a criminal offense or prescribing the punishment therefore, that offense and the punishment thereof, shall be governed by the special provisions made in relation thereto, and not by the provisions of this title. But an act or omission which is made punishable in different ways by different provisions of this title may be punished under any of such provisions, except that in cases specified in Section 434 of this act or Section 54 of this title, the punishments therein prescribed are substituted for those prescribed for a first offense, **but in no case can a criminal act or omission be punished under more than one section of law**; and an acquittal or conviction and sentence under one section of law, bars the prosecution for the same act or omission under any other section of law.
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> (See Title 21 O.S. § 11, emphasis added)

In *Faubion v. State*, 1977 OK CR 302, 569 P.2d 1022 the defendant was convicted of Larceny of Controlled Drugs, AFCF, in violation of Title 63 O.S. § 2-403 and sentenced under the Habitual Offender Act to 50 years in prison. The conviction was reversed and remanded to district court. In the Faubion case the Court of Criminal Appeals cited Title 21 O.S. § 11 and determined that the specific provisions of Title 63 O.S. § 2-403 controlled and that statute provided the specific punishment range that was applicable for the defendant in that case.

> ¶10 Also, defendant Faubion asserts that it was error for the court to instruct the jury under the Habitual Criminal Act rather under the specific enhancement provisions provided by the Uniform Controlled Substance Act. It is provided in 63 O.S. 1971 § 2-403 [63-2-403], that:
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> "Any person found guilty of larceny, burglary or theft of controlled dangerous substances is guilty of a felony punishable by imprisonment for a period not to exceed ten (10) years. A second or subsequent offense under this section is a [569 P.2d 1025] felony punishable by imprisonment for not less than four (4) nor more than twenty (20) years. Convictions for second or subsequent violations of this section shall not be subject to statutory provisions or suspended sentences, deferred sentences or probation." (Emphasis added)

> Clearly, 63 O.S. 1971 § 2-403 [63-2-403], makes specific provision for enhancement of punishment and 21 O.S. 1971 § 11 [21-11], provides that specific provisions for punishment control over general provisions.
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> ¶11 However, the State contends that the instant case would not fall under the enhancement provision of 63 O.S. 1971 § 2-403 [63-2-403], since the prior conviction upon which enhancement was based was not obtained under the same section as was the conviction for the instant case. While the State emphasizes the words, "under this section," it attempts to argue this language out of context. The language "under this section" refers only to the second or subsequent offense. To qualify as a second or subsequent offense under the Uniform Controlled Dangerous Substances Act, the prior conviction need only be obtained under any section of this Act. See, 63 O.S. 1971 § 2-412 [63-2-412].
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> ¶12 In the instant case, it appears from the record that the prior conviction upon which enhancement was based was for possession of a controlled drug. Therefore, the enhancement provision of Section 2-403 is specifically applicable in this case, and the jury should be so instructed upon retrial in the event that the jury again return a finding of guilt.
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> *Faubion v. State*, 1977 OK CR 302, 569 P.2d 1022, 1024.

In the present case Mr. Dorsey is charged not under Title 63 O.S. § 2-403, but under Title 63 O.S. § 2-402. However, both statutes provide a specific punishment provision for second a subsequent offenses. In the *Faubion* case the statute provided a punishment range of;

> A second or subsequent offense under this section is a [569 P.2d 1025] felony punishable by imprisonment for not less than four (4) nor more than twenty (20) years.
>
> *Faubion v. State*, 1977 OK CR 302, 569 P.2d 1022, 1024.

In the present case the statute provides a specific punishment range of from 2 to 10 years;

> A second or subsequent violation of this section with respect to any Schedule III, IV or V substance, marihuana, a substance included in subsection D of Section 2-206 of this title, or any preparation excepted from the provisions of the Uniform Controlled Dangerous Substances Act is a felony punishable by imprisonment for not less than two (2) years nor more than ten (10) years.
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> (See Title 63 O.S. § 2-402 (B) (2))

Under the reasoning of the *Faubion* case counsel believes that the present case carries a punishment range of from two to ten years.

In the *Clopton v. State, 1987 OK CR 189, 742 P.2d 586, 587* the defendant was charged under the same section of Title 63 that Mr. Dorsey is charged under in the present case. However, in the *Clopton* case the defendant was charged under subsection B (1) and Mr. Dorsey is charged under subsection B (2).

> ¶4 Appellant asserts under his first assignment of error that the trial court erred when it instructed the jury under the Habitual Criminal Act rather than the provisions provided by the Uniform Controlled Substance Act.
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> ¶5 The Information filed against the appellant specifically alleged that he committed a violation of Title 63 O.S. 1981 § 2-402 [63-2-402](B)(1) after prior Uniform Controlled Substance Act Conviction. Title 63 O.S. 1981 § 2-402 [63-2-402](B)(1) provides that a violation of that section is punishable by imprisonment for not less than four (4) years nor more than (20) years. Clearly, Section 2-402(B)(1) of the Uniform Controlled Substance Act makes specific provision for enhancement of punishment and 21 O.S. 1981 § 11 [21-11] provides that specific provisions for punishment control over general provisions.
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> ¶6 Considering these statutes, it was plainly error for the trial court in this case to instruct the jury under the Habitual Criminal Act. The jury returned a verdict of guilty and recommended a sentence of twenty years, which is the minimum sentence permitted under the Habitual Criminal Act. We must, therefore modify appellant's sentence to the minimum provided under the enhanced punishment provision of the Uniform Controlled Substance Act, which is four (4) years. Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980). See also, Faubion v. State, 569 P.2d 1022 (Okl.Cr. 1977).
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> See *Clopton v. State, 1987 OK CR 189, 742 P.2d 586, 587.*

Once again in the *Clopton* case the Court of Criminal Appeals cited Title 21 O.S. § 11 in determining that the specific punishment provision of the statute controlled over the general punishment provision of the Habitual Offender Act. Just as in the *Clopton* case Mr. Dorsey stands accused of violating Title 63 O.S. § 2-402 after a prior Uniform Controlled Substance Act

Conviction. Counsel believes that it should be pointed out that but for the prior conviction, that what Mr. Dorsey is accused of would be a misdemeanor. Counsel believes that just as stated in the *Clopton* case that it would be "plainly error for the trial court in this case to instruct the jury under the Habitual Criminal Act." *Clopton v. State, 1987 OK CR 189, 742 P.2d 586, 587.*

In *Jones v. State, 1990 OK CR 17, 789 P.2d 245* the Court of Criminal Appeals offered further guidance on this issue. In the *Jones* case the Defendant was charged with Possession of a Controlled Dangerous Substance (Marihuana) With Intent to Distribute, After Former Conviction of One Felony. Mr. Jones had both prior convictions for a controlled substance offense and for a non-controlled substance offense. In the *Jones* case the Defendant was sentenced under the Habitual Offender Act and the Defendant complained that the State should have been required to sentence under the enhancement found in Title 63. The Court disagreed with the Defendant and ruled that when a Defendant had both controlled substance offenses and non-controlled substance offenses that the state could elect which offense it seeks to enhance under. The relevant portion of the *Jones* case is listed below;

> ¶8 We next turn to appellant's assertion that the prosecution elected to use his prior conviction for distribution as the predicate offense for enhancement, thus mandating an instruction under § 2-401(C). This Court has held that when both the predicate and the new offense are drug offense, any enhancement must be made pursuant to the provisions of the Uniform Controlled Dangerous Substances Act, 63 O.S.Supp. 1985 § 2-201 [63-2-201] et seq. Faubion v. State, 569 P.2d 1022, 1025 (Okl.Cr. 1977). We have also held that when the new offense is a drug offense, but the predicate offense is non-drug, it is proper to enhance under the general habitual offender statute, 21 O.S.Supp. 1985 § 51 [21-51]. Hayes v. State, 550 P.2d 1344, 1348 (Okl.Cr. 1976). However, where an appellant is charged with both drug and non-drug predicate offenses, it is permissible to provide for enhancement under either statute. Novey v. State, 709 P.2d 696, 699 (Okl.Cr. 1985). Under such circumstances, the prosecution must make an election as to which enhancement it wishes to pursue. Id.

> ¶9 In the present case, appellant contends that the State effectively elected to use his prior conviction for Distribution of a Controlled Dangerous Substance as the predicate felony for enhancement. He bases this argument on the fact that the prosecutor emphasized to the jury that appellant had previously been convicted of a substantially similar drug offense. We note, however, that the prosecutor also continually stated that appellant had a prior conviction for possession of a firearm. In determining which of these prior convictions the State relied upon as the predicate offense, we find it unnecessary to look beyond the enhancement instruction submitted to the [789 P.2d 248] jury. A review of that instruction makes it clear that the State elected to seek enhancement under the general habitual offender statute. Because such was permissible under the circumstances of this case, we hold that appellant was properly sentenced.
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> *Jones v. State, 1990 OK CR 17, 789 P.2d 245, 247.*

Counsel included the *Jones* case in this brief because it stands for the proposition that sometimes it is appropriate for the state to enhance a Title 63 offense under the Habitual Offender Statute. However, as stated by the Court in the *Jones* case; "Under such circumstances, the prosecution must make an election as to which enhancement it wishes to pursue." *Jones v. State, 1990 OK CR 17, 789 P.2d 245, 247.* In the present case the state cannot choose to enhance under the Habitual Offender Act because if the state so chose, the offense Mr. Dorsey is charged with would be a misdemeanor.

As described in Title 63 O.S. § 2-402 (B)(2):

> Any Schedule III, IV or V substance, marihuana, a substance included in subsection D of Section 2-206 of this title, or any preparation excepted from the provisions of the Uniform Controlled Dangerous Substances Act is guilty of a misdemeanor punishable by confinement for not more than one (1) year. A second or subsequent violation of this section with respect to any Schedule III, IV or V substance, marihuana, a substance included in subsection D of Section 2-206 of this title, or any preparation excepted from the provisions of the Uniform Controlled Dangerous Substances Act is a felony punishable by imprisonment for not less than two (2) years nor more than ten (10) years.
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> (See Title 63 O.S. § 2-402 (B) (2))

First offense possession of marijuana is a misdemeanor, a second or subsequent violation or possession of marijuana is a felony. As stated in the *Jones* case "This Court has held that when both the predicate and the new offense are drug offense, any enhancement must be made pursuant to the provisions of the Uniform Controlled Dangerous Substances Act". *Jones v. State, 1990 OK CR 17, 789 P.2d 24, 247.* The predicate offense for felony possession of marijuana is a prior drug offense; therefore, counsel believes that any enhancement must be made under the Uniform Controlled Substances Act. It is not permissible for the state to enhance under both Title 63 and Title 21. That is what the state would have to do to enhance a simple possession of marijuana charge under the Habitual Offender Act. The state would have to enhance once to get the offense to a felony and then enhance a second time under Title 21 O.S. § 51.1 to get the punishment range to 6 years to life as they are now stating the guideline range for Mr. Dorsey is.

Counsel believes that *Novey v. State, 1985 OK CR 142, 709 P.2d 696* supports the proposition that the state is not allowed to enhance under both statutes in dealing with a possession of marijuana charge. In *Novey* the Court stated:

> The instruction combined provisions from 63 O.S. 1981 § 2-401 [63-2-401](C), a drug offense enhancement statute, with provisions from 21 O.S. 1981 § 51 [21-51](B), the general felony enhancement statute. We have previously held that when both the predicate and the new offense are drug offenses, any enhancement must be made pursuant to the provisions of the Uniform Controlled Dangerous Substances Act. Faubion v. State, 569 P.2d 1022 (Okl.Cr. 1977). We have also held that when the new offense is a drug offense, but the predicate offense is nondrug, it is proper to enhance under section 51(B). Hayes v. State, 550 P.2d 1344 (Okl.Cr. 1976). Therefore, since the appellant was charged with both drug and nondrug predicate offenses, it would have been permissible to provide for enhancement under either statute. It is not permissible, however, to provide for enhancement under both, either by mixing their provisions or by instructing on both statutes separately. When it is proper to enhance under either statute, the district attorney must make an election as to which enhancement he wishes to pursue. In Gaines v. State, 568 P.2d 1290 (Okl.Cr. 1977), the trial court similarly mixed the provisions of the two statutes.

Novey v. State, 1985 OK CR 142, 709 P.2d 696, 699.

ARGUMENT FOR PUNISHMENT RANGE TO EXCEED TEN YEARS

Counsel can find no Oklahoma case law that supports the proposition that the second or subsequent possession of marijuana can ever carry more than ten years. However, counsel has located a Tenth Circuit Court of Appeals case that suggests that it can. The case that counsel found is a case involving a writ of habeas corpus involving 28 USC §2254 and a petitioner's claim that his attorney was ineffective for failing to object to the enhancement of an unlawful possession of marijuana-second or subsequent offense under Title 21 O.S. § 51. The issue in the Tenth Circuit case is not the same question as the question we are faced with in this case. In the Tenth Circuit case the question was whether or not the petitioner's counsel was ineffective, not whether or not the unlawful possession of marijuana second and subsequent could be enhanced under the habitual offender statute. In the case *Hickman v. Spears*, 160 F.3d 1269, 1274 the Court concluded;

> Based on the plain language of the Habitual Criminal Act and the lack of any clear authority prohibiting its use to enhance petitioner's drug offense, we find that a reasonable and competent counsel could have concluded that petitioner's second drug offense would constitute a "felony" for the purposes of the Habitual Criminal Act and that his client, with four prior felony convictions (three non-drug related), would be subject to sentence enhancement under the Act. Therefore, we conclude that counsel's failure to object to the enhancement of petitioner's sentence under Oklahoma's Habitual Criminal Act did not amount to constitutionally deficient performance. Cf. Jackson v. Shanks, 143 F.3d 1313, 1321 (10th Cir.1998) ("Absent counsel's omission of an obvious winner on appeal, we are not inclined to second-guess appellate counsel's decision to eliminate arguable but weak claims."). Consequently, having failed to satisfy the first prong of the Strickland test, petitioner's ineffective assistance claim is without merit.

Hickman v. Spears, 160 F.3d 1269, 1274.

CONCLUSION

Therefore, Counsel requests that the Court make a determination of the

appropriate punishment range in Mr. Dorsey's case. It is counsel's understanding that the Tulsa County District Attorney's office has repeatedly relied upon the *Hickman* case in taking the position that they are able to enhance unlawful possession of marijuana-second and subsequent under the Habitual Offender Act. It is counsel's understanding that not only has the state of Oklahoma taken this position on the present case but that they have taken this position on numerous other cases in the past. Counsel believes that this reliance is in error and places the District Attorney's office in an unfair position in plea negotiations.

Furthermore, counsel believes that any defendant who agreed to any sentence above two years, the minimum, for second and subsequent possession of marijuana because that defendant was given a punishment range enhanced by the Habitual Offender Act did not make a knowingly and voluntary plea.

Respectfully Submitted,

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CERTIFICATE OF HAND DELIVERY

I hear by certify that a copy of the foregoing instrument was hand delivered on July 16, 2008 to the office of the following:

Joy Mohorovicic
Tulsa County District Attorney's Office
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Tulsa, OK 74103

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Kevin D. Adams