Supreme Court No. 90782-0
(Court of Appeals No. 44175-6-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

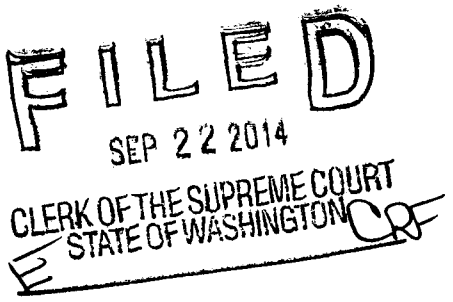
Respondent,

v.

TIMOTHY CONOVER,

Petitioner.

PETITION FOR REVIEW



LILA J. SILVERSTEIN
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

FILED IN COA ON SEPTEMBER 17, 2014

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Timothy Conover asks this Court to review the opinion of the Court of Appeals in *State v. Conover*, No. 44175-6-II, filed August 26, 2014. A copy is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals wrongly held that an inadvertent locking of a courtroom during trial – no matter how long – does not constitute a "closure" implicating the constitutional right to a public trial. RAP 13.4(b)(3).

2. Whether this Court should discourage the use of the bracketed language in WPIC 4.01, which tells jurors they should convict if they have "an abiding belief in the truth of the charge," because a jury's job is not to find the truth but to determine whether the State has proved its case beyond a reasonable doubt. RAP 13.4(b)(4).

3. Whether the sentencing court erred in running the bus-zone enhancements for each count consecutively rather than concurrently, where the legislature did not amend the relevant statute the way it amended the weapons enhancement statute, which mandates that such enhancements run "consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter." RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Police arrested Virgil Kell for delivering drugs. 1 RP 33.[1] He wanted to "work off" the charges, so he agreed to arrange drug transactions with other people, including Timothy Conover. 1 RP 33-34. Police used Kell for "controlled buys" with Mr. Conover on May 13, May 31, and July 7, 2011. 1 RP 35, 71, 79. Each time, Kell said he purchased a quarter-ounce of heroin from Mr. Conover for $350-$400. 1 RP 35, 71, 79.

The State charged Mr. Conover with three counts of delivering a controlled substance. The State alleged that a zone enhancement applied to each count, because each occurred within 1,000 feet of a school bus stop. CP 12-13.

At trial, Virgil Kell and multiple police officers testified that Mr. Conover delivered a quarter-ounce of heroin to Kell on three occasions. 1 RP 28-100; 2 RP 8-112. After both sides rested their cases, the court instructed the jury. 2 RP 112-26.

Just as the court finished instructing the jury, it became apparent that the main door to the courtroom had been locked for approximately

[1] 1RP refers to the volume of proceedings from 10/11/12. 2 RP refers to the volume of proceedings from 10/12/12 and 10/15/12. 3 RP refers to the small volume consisting of short pretrial hearings on 12/14/11, 6/6/12, and 8/23, 12, as well as sentencing on 10/24/12.

half an hour while the proceedings were on the record. 2 RP 175-77. Security had locked the doors during the lunch break and forgotten to unlock them when trial started again. 2 RP 176-77. It was not until someone rattled the door that the participants realized there was a problem. 2 RP 176. The door had been locked the entire time the court instructed the jury. 2 RP 177.

The court was disinclined to cure the error, stating it was "an inadvertent closure of the court and it was for a limited amount of time." 2 RP 176. The court also stated that the ideals furthered by the public-trial right were not harmed by having the doors locked while the court instructed the jury, since no testimony was taken during that time. 2 RP 177-78. Thus, the court did not reinstruct the jury in an open courtroom.

The jury convicted Mr. Conover as charged. CP 49-58. The sentencing court concluded Mr. Conover's offender score was five, and that the standard range was 20-60 months for each count. CP 61-62.

The court imposed an enhanced sentence because the jury found Mr. Conover committed each count within 1000 feet of a school bus zone. CP 60-65. At the prosecutor's urging, the court imposed the two-year enhancements consecutively. It ruled that for each count, the base sentence was 48 months and the enhancements totaled 72 months. 3 RP 19. The court ruled the base sentences would be served concurrently, but

stacked the enhancements and ordered Mr. Conover to serve ten years in prison. CP 65.

Mr. Conover appealed, raising several issues. The State conceded error on one sentencing issue, and the Court of Appeals accepted the concession. However, the Court of Appeals rejected all other issues Mr. Conover raised. As to the violation of the right to an open court, the Court of Appeals held that because the trial court did not mean to lock the doors, "no courtroom closure occurred" – even though the courtroom was, in fact, locked for 30 minutes while the court instructed the jury. Slip Op. at 9. The court held that the trial court properly rejected the defense proposed instruction on the reasonable doubt standard, and did not agree that the instruction misstates the jury's role by equating proof beyond a reasonable doubt with "an abiding belief in the truth of the charge." Slip Op. at 9-10. The Court of Appeals also disagreed with Mr. Conover's statutory construction argument with respect to the bus zone enhancements. It held that such enhancements must be run consecutively to the base sentences and to each other. Slip Op. at 11-13.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals held that the right to a public trial is not implicated if the courtroom is locked inadvertently – no matter how long – raising a significant question of constitutional law.

The First and Sixth Amendments to the United States Constitution and article I, sections 10 and 22 of the Washington Constitution guarantee the right to a public trial. U.S. Const. amends. I, VI; Const. art. I, §§ 10, 22; *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). Thus, before closing a courtroom during proceedings, the trial court must:

1. identify a compelling interest that the closure is essential to protect and show a "serious and imminent threat" to that compelling interest;

2. provide anyone present with the opportunity to object;

3. ensure that the method for curtailing open access is the least restrictive means available for protecting the threatened interests;

4. weigh the competing interests of the proponent of the closure and the public; and

5. ensure that the closure is no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

In this case, the courtroom doors were locked for almost half an hour while the court instructed the jury. Security officers had locked the doors over the lunch break and forgotten to unlock them before

proceedings recommenced. It was not until an assertive person rattled the door that the participants realized the error and unlocked the doors.

The court had not evaluated the *Bone-Club* factors because it had not planned to lock the courtroom during the trial. Upon discovering the problem, though, the court chose not to cure the constitutional violation. The judge said the violation was "harmless" because it was "an inadvertent closure of the court and it was for a limited amount of time" during which no testimony was taken. 2 RP 176-78. Thus, the court did not reinstruct the jury in an open courtroom.

The trial court erred because public-trial violations cannot be deemed "harmless" or "de minimis". To begin with, the fact that the closure occurred while the court was instructing the jury as opposed to taking testimony is irrelevant. "The public trial right extends beyond the taking of a witness's testimony at trial." *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). *Every* part of the trial is subject to the open-courtroom guarantee. *Id.* at 178 (because of our interest in protecting the transparency and fairness of criminal trials, "all stages of courtroom proceedings [must] remain open unless the trial court identifies a compelling interest to be served by closure") (emphasis added); Const. art. I, §§ 10, 22. Indeed, even pre-trial proceedings like voir dire and suppression hearings must be open to the public. *See Orange*, 152 Wn.2d

at 812; *Bone-Club*, 128 Wn.2d at 257. Clearly, the constitutional right to a public trial includes the right to an open courtroom while the judge instructs the jury. *Commonwealth v. Patry*, 48 Mass. App. Ct. 470, 474, 722 N.E.2d 979 (2000) (reversing where judge gave supplemental instruction to jury in jury room instead of in open courtroom).

The Court of Appeals affirmed on the basis that the closure was inadvertent – holding that in such circumstances the constitution is not implicated because "no courtroom closure occurred." Slip Op. at 9. This makes no sense. The fact that the trial judge did not intend for something to happen does not mean that it did not, in fact, happen. *See State v. Vanness*, 304 Wis. 692, 699, 738 N.W.2d 154 (Wis. 2007) ("the court's intent is irrelevant to determining whether the accused's right to a public trial has been violated"). Imagine if the bailiff had locked the courtroom doors without the judge's knowledge for the entire trial instead of for half an hour. Could one really claim "there was no closure"?

Other courts have held that "a courtroom closure can occur even in the absence of an explicit court order." *State v. Njonge*, 161 Wn. App. 568, 575, 255 P.3d 753 (2011), *rev. granted* 176 Wn.2d 1031 (2013). Even under the federal constitution, "[w]hether the closure was intentional or inadvertent is constitutionally irrelevant." *Walton v. Briley*, 361 F.3d 431, 433 (7th Cir. 2004). It should certainly be irrelevant under our more-

protective state constitution, which has no "de minimis" exception to the open courts requirement. *Easterling*, 157 Wn.2d at 181 n.12; *State v. Paumier*, 176 Wn.2d 29, 32-37, 288 P.3d 1126 (2012) (reversing for public trial violation even though only four jurors were briefly questioned during voir dire outside public courtroom).

The courtroom in this case was locked for approximately half an hour during a portion of proceedings that is presumptively open to the public. Whether the closure was purposeful or inadvertent should be irrelevant to the question of whether the constitutional right to open courts is implicated. This Court should grant review. RAP 13.4(b)(3).

2. **This Court should take the opportunity to disapprove of the final, bracketed language in WPIC 4.01, because it is inconsistent with this Court's holding that the jury's job is not to find the truth but to determine whether the State proved its case.**

A jury's role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *see also State v. Berube*, 171 Wn. App. 103, 286 P.3d 402, 411 (2012) ("truth is not the jury's job. And arguing that the jury should search for truth and not for reasonable doubt both misstates the jury's duty and sweeps aside the State's burden"). Instead, the job of the jury "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760.

Over Mr. Conover's objection, the trial court instructed the jury that proof beyond a reasonable doubt means that, after considering the evidence, the jurors had "an abiding belief in the truth of the charge." CP 29 (Instruction 3); CP 20 (defense proposed instruction without this language); 2 RP 3-4. By equating proof beyond a reasonable doubt with a "belief in the truth" of the charge, the court confused the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in *Emery*.

The presumption of innocence may be diluted or even "washed away" by confusing jury instructions. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). It is the court's obligation to vigilantly protect the presumption of innocence. *Id.* In *Bennett*, this Court found the reasonable doubt instruction derived from *State v. Castle*, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), was "problematic" as it was inaccurate and misleading. 161 Wn.2d at 317-18. Exercising its "inherent supervisory powers," the Court directed trial courts to use WPIC 4.01 in all future cases. *Id.* at 318.

That pattern instruction reads:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime

> beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt].

11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 4.01, at 85 (3rd ed. 2008) ("WPIC").

The *Bennett* Court did not comment on the bracketed "belief in the truth" language. However, recent cases show the problematic nature of such language. In *Emery*, the prosecution told the jury that "your verdict should speak the truth," and "the truth of the matter is, the truth of these charges, are that" the defendants are guilty. 174 Wn.2d at 751. These remarks misstated the jury's role, but because they were not part of the court's instructions, and the evidence was overwhelming, the error was harmless. *Id.* at 764 n.14.

In *Pirtle*, the Court held that the "abiding belief" language did not "diminish" the pattern instruction defining reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 657-58, 904 P.2d 245 (1995). The Court ruled that the "[a]ddition of the last sentence [regarding having an abiding belief in

the truth] was unnecessary but was not an error." *Id.* at 658. The *Pirtle* Court did not focus its attention on whether this language encouraged the jury to view its role as searching for the truth. *Id.* at 657-58. Instead, it was addressing whether the phrase "abiding belief" was different from proof beyond a reasonable doubt. *Id.*

The *Pirtle* Court concluded that this language was unnecessary but not erroneous, which is far from an endorsement of the language. Yet *Emery* demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. This language invites the jury to be confused about its role and serves as a platform for improper arguments about the jury's role in looking for the truth, as explained in *Emery*. 174 Wn.2d at 760.

This Court has a supervisory role in ensuring the jury's instructions fairly and accurately convey the law. *Bennett*, 161 Wn.2d at 318. This Court should grant review and hold that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge" misstates the prosecution's burden of proof, confuses the jury's role, and denies an accused person his right to a fair trial by jury as protected by the state and federal constitutions.

3. This Court should address whether zone enhancements must be run consecutively to each other because it is an important issue of statutory construction.

As noted above, the sentencing court calculated Mr. Conover's offender score as a five, which resulted in a standard range of 20-60 months. CP 62; RCW 9.94A.517, .518. The jury had also found that Mr. Conover committed each of the three current offenses within a school-bus zone, resulting in a two-year enhancement for each count. CP 50, 53, 56; RCW 9.94A.533(6). However, instead of increasing the standard range for each count to 44-84 months and imposing concurrent sentences within that enhanced range, the sentencing court ruled that the enhancements were supposed to run *consecutively* to one another. At the prosecutor's urging, the court imposed 10 years on each count, consisting of "48 months on each ... plus 72 months in enhancements on each for a total of 120, all concurrent." 3 RP 19. Mr. Conover submits was error.

The issue is one of statutory construction, a question of law this Court reviews de novo. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). In determining the meaning of a statute, courts look first to the text; if the statute is clear on its face, its meaning is to be derived from the language alone. *State v. Moeurn*, 170 Wn.2d 169, 174, 240 P.3d 1158 (2010). If the statute is susceptible to more than one reasonable interpretation, "we may resort to statutory construction, legislative history,

and relevant case law for assistance in discerning legislative intent." *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (internal citation omitted). Where a statute is ambiguous, the rule of lenity requires it be interpreted strictly against the State and in favor of the accused. *State v. Mullins*, 128 Wn. App. 633, 642, 116 P.3d 441 (2005).

The statute governing enhancements is RCW 9.94A.533. Subsection (3) imposes additional time for crimes committed with a firearm; subsection (4) does the same for other deadly weapons; and subsection (5) deals with crimes committed in jail or prison. Other sections address enhancements for prior DUIs, for crimes committed with sexual motivation, for offenders who involved minors in gang crimes, and for other conduct. *See id.* The enhancement at issue here is listed in subsection (6):

> An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435[2] or 9.94A.827. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

RCW 9.94A.533(6).

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[2] RCW 69.50.435 includes the enhancement applicable here, for delivering drugs "within one thousand feet of a school bus route stop designated by the school district." RCW 69.50.435(1)(c).

The Court of Appeals relied on the portion stating that the enhancements "shall run consecutively to all other sentencing provisions." Slip Op. at 12 (quoting RCW 9.94A.533(6)). But the Court of Appeals ignored the important differences among the sections of RCW 9.94A.533. The firearm-enhancement section, unlike the drug-zone enhancement section, explicitly mandates that multiple enhancements are to run consecutively to each other, not just the base sentence:

> Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, **including other firearm or deadly weapon enhancements,** for all offenses sentenced under this chapter.

RCW 9.94A.533(3)(e) (emphasis added). Subsection (e) thus has the language the Court of Appeals here referenced, *plus* a clause mandating that the enhancements must run consecutively to each other. Under the Court of Appeals' reasoning in this case, the two clauses are redundant. But "a court must not interpret a statute in any way that renders any portion meaningless or superfluous." *State v. K.L.B.*, 180 Wn.2d 735, 742, 328 P.3d 886 (2014).

A prior version of the firearm-enhancement section looked more like the current drug crimes enhancement section:

> Notwithstanding any other provision of law, any and all firearm enhancements under this section are mandatory, shall be served in

> total confinement, and shall not run concurrently with any other sentencing provisions.

In re the Postsentence Review of Charles, 135 Wn.2d 239, 247, 955 P.2d 798 (1998) (quoting former RCW 9.94A.310(3)(e)). This Court held that under this prior version of the statute, firearm enhancements did *not* run consecutively to each other, but only to the base sentence. *Charles*, 135 Wn.2d at 253-54. The only time enhancements were to run consecutively to each other is if the underlying sentences themselves were consecutive. *Id.* at 254. This makes sense, because "[a]n enhancement is not a separate sentence; rather, it is a statutorily mandated increase to an offender's sentence range because of a specified factor in the commission of the offense." *Id.* at 253.

In response to *Charles*, the Legislature amended the statute to add the language emphasized above: "...shall run consecutively to all other sentencing provisions, **including other firearm or deadly weapon enhancements**." *State v. DeSantiago*, 149 Wn.2d 402, 415-16, 68 P.3d 1065 (2003) (citing RCW 9.94A.510(3)(e); RCW 9.94A.510(4)(e); Laws of 1998, ch. 235 § 1)). Following the amendments, "all firearm and deadly weapon enhancements are mandatory and, where multiple enhancements are imposed, they must be served consecutively to base

sentences and to any other enhancements." *DeSantiago*, 140 Wn.2d at 416.

Critically, the Legislature did *not* add this language to the section at issue here. Although subsection (6) mandates that a drug-crime enhancement run consecutively to the base sentence (and to other enhancements applied to the same count), it does not state that it runs consecutively to enhancements on other counts. *Compare* RCW 9.94A.533(6) *with* RCW 9.94A.533(3)(e). It is clear that the Legislature knew how to state that enhancements must run consecutively to each other, because it said so in the firearm and deadly weapon enhancement sections. RCW 9.94A.533(3)(e). The fact that the legislature explicitly provided for consecutive enhancements in one section of the statute shows it did not intend for courts to impose consecutive enhancements in the section in which it omitted such language. *See State v. Roberts*, 117 Wn. 2d 576, 586, 817 P.2d 855 (1991) ("Where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent").

Thus, as to the drug-zone enhancements, the reasoning of *Charles* controls, and the enhancements do not run consecutively to each other. Rather, for each count, the enhancement increases the standard range by two years. The court then sentences the defendant within the enhanced

range for each count. The question of whether the sentences run concurrently or consecutively is determined by reference to RCW 9.94A.589. *See Charles*, 135 Wn.2d at 254 (citing former RCW 9.94A.400, since recodified at 9.94A.589). The crimes at issue here are not serious violent offenses; therefore, the sentences are concurrent, not consecutive. RCW 9.94A.589.

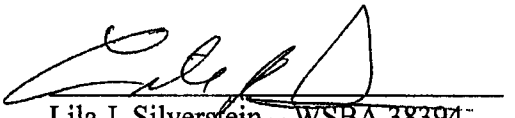
Because the above issue is an important question of statutory construction, this Court should grant review. RAP 13.4(b)(4).

E. CONCLUSION

Timothy Conover respectfully requests that this Court grant review.

DATED this 17th day of September, 2014.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TIMOTHY ALLEN CONOVER, Appellant.	No. 44175-6-II UNPUBLISHED OPINION

HUNT, J. — Timothy Allen Conover appeals his jury convictions and standard range sentences for three counts of delivering heroin within 1,000 feet of a school bus route stop. He argues that the trial court (1) violated his right to a public trial by locking the courtroom door for a half hour during jury instructions; (2) erred in overruling his objection to the reasonable doubt instruction, which included "an abiding belief in the truth of the charge," Br. of Appellant at 13; (3) erred in calculating his offender score when the State failed to present any evidence of Conover's prior criminal history, which error the State concedes; and (4) erred in running Conover's bus route stop enhancements consecutively rather than concurrently under RCW 9.94A.533. For the first time on appeal, Conover also challenges the jury instruction on the violation of the Uniform Controlled Substances Act (VUCSA)[1] as unconstitutionally vague and asks us to strike the jury's aggravating factors findings, even though the trial court did not

[1] Ch. 69.50 RCW.

impose an exceptional sentence. We affirm Conover's convictions. Accepting the State's concession of error in failing to prove Conover's prior convictions, we vacate the sentences and remand for resentencing.

FACTS

I. CONTROLLED BUYS

On May 13, 2011, Cowlitz-Wahkiakum County Drug Task Force Detective Russell Hanson and Detective Michael Meier organized a controlled buy using a confidential informant (CI). The CI called Timothy Conover to arrange to purchase heroin and told Hanson that Conover had a quarter-ounce of heroin for sale for $400. Hanson and Meier gave the CI $400 for the transaction. The CI met Conover in a motor home at Seventh and California Way, which was located within 1,000 feet from a school bus route stop for the Longview School District. The CI gave the money to Conover, who gave the CI a clear plastic bag containing tar heroin. The CI turned over the heroin to the detectives.

On May 31, Meier again worked with the CI to arrange another controlled buy from Conover, this time, a quarter-ounce of heroin for $350. The CI went to Conover's apartment, chatted a little, and "completed the deal." Report of Proceedings (RP) (Oct. 12, 2012) at 22.

On July 7, Meier organized a third controlled buy for the CI to purchase a quarter-ounce of heroin from Conover for $350. This transaction was recorded with a wire and a video camera. Again, the CI went into Conover's home, talked, and "made the deal." RP (Oct. 12, 2012) at 23. The State arrested Conover.

II. PROCEDURE

The State charged Conover with three counts of selling heroin within 1,000 feet of a school bus route stop.[2] The case proceeded to a jury trial.

A. Trial

Detectives Hanson and Meier testified to the facts previously set forth. Hanson also testified that, based on his experience with narcotics, (1) individuals could pay as low as $20 for a "hit," a tenth of a gram, of heroin; (2) heroin users did not tend to "stockpile" heroin, RP (Oct. 11, 2012) at 60; (3) users would usually buy enough heroin for only a day's use, spending about 10 to 20 dollars at a time; (4) a quarter-ounce of heroin was more than anyone would use in a day; (5) someone who bought a quarter-ounce would probably break it up and sell it, keeping "a little bit of that for their own usage." RP (Oct. 11, 2012) at 38.

The CI testified about his three heroin purchases from Conover. During the CI's testimony, the State played the audio recording of the July 7 transaction, which included discussion of the $350 purchase price and to whom the CI would resell the drugs. Victoria Giles, dispatcher, driver, and trainer for the Longview School District, testified that the May 13 controlled buy location was on a school bus route stop for the Longview School District.

Longview Police Corporal Timothy Watson, assigned to surveil all three transactions, testified that the May 31 and July 7 transactions took place on Niblett Way, within 1,000 feet from a school bus route stop. He also testified that a typical dose of heroin for "maintenance" users was about 0.2 to a half-gram or less if they were not "getting high" but "just maintaining" to "stay well." RP (Oct. 12, 2012) at 75-76. People who "abuse the drug" to get high typically

[2] VUCSA, ch. 69.50 RCW.

inject up to a gram or a gram and a half. RP (Oct. 12, 2012) at 76. Watson explained that informants would generally not be sent to buy large quantities, such as a pound, because "[r]ed flags would go up." RP (Oct. 12, 2012) at 77. Watson also testified that (1) dealers who would buy an ounce, half-ounce, or quarter-ounce, would "[break] it down further to sell to street dealers," RP (Oct. 12, 2012) at 79; (2) dealers who purchased quarter-ounces would likely break them down into "eighth amounts, cut this in half . . . an eighth of an ounce," equivalent to three-and-a-half grams, and then break them down even further to a sixteenth of an ounce, a "teener," about 1.7 grams, closer to what an "end user might be using," RP (Oct. 12, 2012) at 79-80; and (3) a maintenance user would break down a "teener" into even smaller amounts, called a "point one, point two and so on." RP (Oct. 12, 2012) at 80. Watson opined that an "end user" would not be expected to buy a quarter-ounce at a time and that it was not common for end users to save their money to buy larger quantities at once. RP (Oct. 12, 2012) at 80.

B. Jury Instructions

Outside the presence of the jury, the parties discussed the jury instructions with the trial court. Conover had earlier objected to the State's proposed reasonable doubt instruction on grounds that the definition was sufficient without the "abiding-belief" language. RP (Oct. 12, 2012) at 3. He did not object to any of the other jury instructions. Overruling Conover's objection, the trial court gave the State's reasonable doubt instruction that included the "abiding-belief" language. RP (Oct. 12, 2012) at 4.

The trial court also instructed the jury to consider that a separate crime was charged in each count and that the State had to prove each count beyond a reasonable doubt. For the special verdicts, the trial court instructed the jury to determine (1) whether Conover's offenses took

place within a school bus route stop, and (2) whether the State had proved the aggravating circumstances beyond a reasonable doubt (whether the offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so and whether the offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use).

C. Courtroom Locked Half Hour beyond Lunch Break

After the jury was instructed, Conover's counsel informed the trial court that the main entry door to the courtroom had been locked and a "Mr. Morgan" had tried to enter.[3] RP (Oct. 12, 2012) at 175-76. The prosecutor responded that (1) the main entry door to the courtroom had been locked over the lunch hour because (a) there were valuable items left in the courtroom and (b) they closed the courtroom during the lunch hour as a safety precaution when there were no courtroom proceedings; and (2) it "seemed to be like about 15—maybe 15 minutes" that the door was locked and that when Mr. Morgan had tried to enter the courtroom, he "was let in almost immediately once [they] discovered that it was locked." RP (Oct. 12, 2012) at 176. The trial court found no harm in the inadvertent locking of the courtroom door, especially when as soon as it was known that Mr. Morgan was trying to enter, the door was immediately opened. Conover neither objected nor moved for a mistrial based on this incident.

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[3] More specifically, Conover's counsel explained:

> We should probably just put on the record the issue with respect to—and I can't recall specific times, your Honor, but with respect to the main entry door that was locked. I don't know what your Honor recalls, but the jury was seated, your Honor was reading jury instructions. If I recall correctly, the individual was trying to open the door right about the time you had completed reading jury instructions, I don't recall specifics on that, but the door was locked.

RP (Oct. 12, 2012) at 175.

D. Verdict and Sentencing

The jury found Conover guilty of three counts of delivery of a controlled substance. It also returned special verdicts finding that (1) Conover had delivered the controlled substances within 1,000 feet of a school bus route stop designated by a school district and (2) Conover's crime was a major violation of the VUSCA, involving the attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use.

At sentencing, other than Conover's mentioning that he might have three or four prior convictions, there was no further discussion about Conover's offender score or criminal history. The State told the trial court that (1) Conover's initial standard sentencing range was 20 to 60 months of confinement for each delivery count; (2) the three school bus route stop enhancements would add 24 months to the standard range sentence for each count, running consecutively for a total of 72 additional months; and (3) because the jury had found four different aggravating factors (three of which were that Conover had delivered substantially more controlled substances than an amount for personal use), the State recommended that the trial court also impose exceptional 10-year sentences for each count to run consecutively.

The trial court sentenced Conover to a total of 120 months of confinement: 48 months for each of his three delivery convictions, to run concurrently with each other; and an additional 24 months (school bus route stop enhancement) on each count, to run consecutively to each 48-

month sentence for the underlying convictions.[4] The trial court, however, did not impose an exceptional sentence based on the VUCSA aggravating factors under RCW 9.94A.535 as the State had recommended. Although the State introduced no documentation and Conover did not stipulate to his prior convictions, Conover's judgment and sentence included a list of his prior criminal history. Conover did not object.

Conover appeals.

ANALYSIS

I. COURTROOM DOORS LOCKED DURING AND HALF HOUR BEYOND LUNCH BREAK

For the first time on appeal, Conover argues that the trial court violated his First and Sixth Amendment rights to a public trial, asserting that the trial court locked the courtroom doors for half an hour "while the court instructed the jury" without first evaluating the *Bone-Club*[5] factors. Br. of Appellant at 8-9. Neither the law nor the record supports this argument.

Whether a defendant's right to a public trial has been violated is a question of law, which we review de novo. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). A trial court violates a defendant's right to a public trial if it closes the courtroom during a public proceeding

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[4] RCW 9.94A.533(6) provides:

> An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.827. *All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.*

(Emphasis added.)

[5] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

without first determining if such closure is warranted under *Bone-Club*.[6] *Bone-Club*, 128 Wn.2d at 258-59. The closure of a courtroom "occurs when the courtroom is *completely and purposefully* closed to spectators so that no one may enter and no one may leave." *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011) (emphasis added). These rules come into play when the public is *fully excluded* from proceedings within a courtroom. *State v. Easterling*, 157 Wn.2d 167, 172, 137 P.3d 825 (2006) (all spectators, including defendant and his counsel, excluded from the courtroom while codefendant plea-bargained); *Brightman*, 155 Wn.2d at 511 (entire voir dire closed to all spectators); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 808, 100 P.3d 291 (2004) (entire voir dire closed to all spectators); *Bone-Club*, 128 Wn.2d at 257, (no spectators allowed in courtroom during a suppression hearing).

Such a closure occurs only when the courtroom is "completely and purposefully closed to spectators so that no one may enter and no one may leave"; thus, the inadvertent exclusion of only one person from a courtroom does not constitute a "closure" for *Bone-Club* purposes. *Lormor*, 172 Wn.2d at 93 (exclusion of defendant's terminally ill daughter for fear of distraction

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[6] Before a trial court closes a proceeding to the public, it must consider the following factors and enter specific findings on the record:

> 1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
> 4. The court must weigh the competing interests of the proponent of closure and the public.
> 5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59.

was not courtroom closure). *See also State v. Berg*, 177 Wn. App. 119, 126-27, 310 P.3d 866 (2013) (exclusion of defendants' friend from courtroom observation did not constitute courtroom closure), *review denied*, 179 Wn.2d 1028 (2014).

Here, the courtroom was not "*completely and purposefully*" closed to the public. *Lormor*, 172 Wn.2d at 93 (emphasis added). The trial court never "purposefully" locked the courtroom doors or excluded anyone from court proceedings. Rather, the courtroom was locked over the lunch hour for security purposes, when there were no proceedings; and it remained locked inadvertently for about 30 minutes after the lunch break. Moreover, once the trial court realized that the courtroom was locked, it immediately opened the doors, thereby remedying the problem. We hold that no courtroom closure occurred and, thus, the trial court did not violate Conover's right to a public trial.

II. Reasonable Doubt Jury Instruction

Conover next argues that the trial court erred in overruling his objection to the reasonable doubt instruction.[7] He contends that the reasonable doubt instruction confused the jury because it stated that the jurors had to have an "abiding belief in the truth of the charge." Br. of

[7] Jury Instruction 3 on reasonable doubt read:

> The defendant has entered a plea of not guilty. . . The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP at 29.

Appellant at 13. Our Supreme Court has already reviewed and upheld this instruction in *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007), which controls here. Thus, Conover's challenge fails.

The trial court's reasonable doubt instruction mirrored 11 *Washington Practice: Pattern Jury Instructions: Criminal* 4.01, at 85 (3d ed. 2008) (WPIC 4.01), which contains the "abiding belief" language that Conover challenges. Our Supreme Court expressly approved the use of WPIC 4.01 in *Bennett*, 161 Wn.2d at 318. *See also State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245 (1995) (holding that the "abiding belief" language did not diminish the pattern instruction defining "reasonable doubt"), *cert. denied*, 518 U.S. 1026 (1996). Moreover, in a recent Division One opinion, the defendant raised the same challenge that Conover raises here to the "abiding belief" language; and, like Conover, he argued that the language was similar to the impermissible "speak the truth" remarks in *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). *State v. Fedorov*, ___ Wn. App. _____, 324 P.3d 784, 790 (2014). Relying on *Bennett* and *Pirtle*, Division One distinguished *Emery*, asserting that Emery's "speak the truth" language was improper because it expressly misstated the jury's role, whereas the "abiding belief" language accurately informed the jury that its job is to determine whether the State proved the charged offenses beyond a reasonable doubt. *Fedorov*, 324 P.3d at 790. We find the *Fedorov* rationale persuasive and adopt it here.

We hold that the trial court did not err in giving the reasonable doubt instruction containing the "abiding belief" language.

III. SENTENCING

A. Offender Score—No Proof of Criminal History

For the first time on appeal, Conover challenges the trial court's calculation of his offender score. He contends that the trial court erred by calculating his offender score based on the State's statement of criminal history submitted with no supporting evidence. The State concedes this error and agrees that we should remand the case to the trial court for resentencing, at which the State will have the opportunity to prove Conover's prior convictions under *State v. Hunley*, 175 Wn.2d 901, 287 P.3d 584 (2012). We accept the State's concession and proposal for remand.

B. Running School Bus Route Stop Enhancements Consecutively to Underlying Sentences

Conover next argues that the trial court erred in running his school bus route stop enhancements consecutively to his sentences for his underlying crimes, rather than concurrently under RCW 9.94A.533. This challenge also fails.

Conover's challenge requires us to look at the statute's plain language to give effect to legislative intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). We determine a statute's plain meaning from the ordinary meaning of its language, as well as from the statute's general context, related provisions, and the statutory scheme as a whole. *Jacobs*, 154 Wn.2d at 600. We also interpret statutes to give effect to all language in the statute, to render no portion meaningless or superfluous, and to avoid absurd results. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003); *State v. Neher*, 112 Wn.2d 347, 351, 771 P.2d 330 (1989).

Our legislature has expressly and unequivocally provided mandatory *enhanced* sentences for certain drug offenses:

> An additional twenty-four months *shall be added to the standard sentence range* for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.827. All enhancements under this subsection *shall run consecutively to all other sentencing provisions*, for all offenses sentenced under this chapter.

RCW 9.94A.533(6) (emphasis added). Conover's three counts of delivering drugs occurred "[w]ithin one thousand feet of a school bus route stop designated by [a] school district," offenses that were also violations of RCW 69.50.435(1)(c), which the above RCW 9.94A.533(6) enhancement provision expressly includes.

We reject Conover's argument that only other types of "drug-crime" enhancements listed in RCW 9.94A.533 run consecutively with his base sentences for his underlying criminal convictions, not enhancements such as his school bus route stop enhancements. Br. of Appellant at 23. The plain language of the statute unambiguously requires the sentencing court to add 24 months to a criminal defendant's standard range sentence for any offense under chapter 69.50 RCW if the offense also violates RCW 69.50.435. RCW 9.94A.533(6). The statute also plainly states that all enhancements under RCW 9.94A.533(6) *shall run consecutively* to all other sentencing provisions. RCW 9.94A.533(6). In addition to the plain meaning of this enhancement statute, the legislature amended RCW 9.94A.533(6) in 2006 to require drug-related sentencing enhancements to be served *consecutively* "to all other sentencing provisions." *See* LAWS OF 2006, ch. 339, § 301.

Here, the jury found Conover guilty of three counts of delivery of a controlled substance, heroin, under RCW 69.50.401, and that these three offenses took place within 1,000 feet of a school bus route stop designated by a school district, in violation of RCW 69.50.435(1)(c). Thus, RCW 9.94A.533(6) required the trial court to run his school bus route stop enhancements

"consecutively" to his base sentences and to each other. *See* CP at 65, RP (Oct. 24, 2012) at 19. We hold that the trial court did not err in running these sentencing enhancements consecutively.

C. VUCSA Aggravating Factor Findings, "Major Violations"

Conover next argues that we should strike the jury's aggravating VUCSA factor findings[8] from his record because his convictions were not "major violations of the Uniform Controlled Substances Act." Br. of Appellant at 24. He asserts that this aggravator does not apply to his heroin sales because (1) each of the three convictions was a separate "offense" that did not involve three transactions, and (2) the State failed to prove that the quantities of heroin involved were "substantially larger than for personal use." Br. of Appellant at 26. Conover acknowledges that the trial court did not impose an exceptional sentence based on the jury's finding of aggravating factors. Instead, he challenges these aggravator findings because "they are on his record." Br. of Appellant at 24. These challenges fail.

1. Three separate transactions

Conover argues that the first challenged statutory aggravating factor does not apply under a plain reading of RCW 9.94A.535(3)(e)(i) because (1) this statutory factor requires a "current offense" that "involved at least three separate transactions," and (2) the State chose to charge him with three separate "current offenses" rather than a single offense comprising three separate

[8] RCW 9.94A.535 lists aggravating circumstances that constitute substantial and compelling reasons for an upward departure from the standard range sentencing guidelines. One of those circumstances is when the defendant's current offense is a "major VUCSA." RCW 9.94A.535(3)(e). The presence of any of the six statutory factors may identify a current offense as a "major VUCSA." RCW 9.94A.535(3)(e)(i)-(vi). Conover challenges two of these six statutory factors that the jury considered in determining that his current offense was a "major VUCSA": (1) that his current offense involved at least three separate transactions, and (2) that the quantities involved were substantially larger than for personal use.

transactions. Br. of Appellant at 25 (citing RCW 9.94A.535(3)(e)(i)). Because Conover cites no authority to support his "plain meaning" argument, we need not consider it. RAP 10.3(a)(6).

Nevertheless, we note that a plain reading of the statute shows RCW 9.94A.535(3)(e)(i) applies when there are three separate transactions involving a controlled substance. *See State v. Reynolds*, 80 Wn. App. 851, 856, 912 P.2d 494 (1996).[9] Here, Conover was charged with and the jury heard evidence of three "separate transactions in which controlled substances were sold"[10]: twice in May 2011 and once in July 2011. Thus, the trial court did not err in instructing the jury to consider whether Conover's offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so.

2. Quantity "substantially larger than for personal use"

Conover argues that the second challenged aggravator does not apply because the State failed to prove that the quantities of heroin he sold were "substantially larger than for personal use." Br. of Appellant at 26 (quoting RCW 9.94A.535(3)(e)(ii)). We disagree.

In determining whether sufficient evidence supports a conviction, we consider "whether, after viewing the evidence in the light most favorable to the [State], any rational trier of fact could have found the essential elements of the [charged] crime beyond a reasonable doubt." *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting *Jackson v. Virginia*, 443 U.S.

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[9] Melina Reynolds was charged with two counts of delivery of a controlled substance and one count of delivery of a material in lieu of a controlled substance. *Reynolds*, 80 Wn. App. at 853. The issue was whether Reynolds' third transaction constituted an actual "sale" because it did not involve an actual controlled substance. Noting that the plain language of former RCW 9.94A.533(3)(e)(i) required at least three separate transactions involving actual controlled substances, we held that Reynolds' third transaction did not count. Nevertheless, we affirmed her exceptional sentence based on a different qualifying factor that established a major violation of the controlled substances act. *Reynolds*, 80 Wn. App. at 856, 859.

[10] RCW 9.94A.535(3)(e)(i).

307, 339, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A claim of insufficient evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

Here, the record shows that the State presented sufficient evidence that the quantities of drugs he sold were substantially larger than for personal use. Detective Hanson testified that (1) a quarter-ounce of heroin was more than anyone would use in one day; (2) if an individual purchases a quarter-ounce it is probably for resale purposes, keeping "a little bit of that for their own usage," RP (Oct. 11, 2012) at 38; and (3) heroin *users* do not tend to "stockpile" heroin, instead buying enough for one or a few days at a time, spending about 10 to 20 dollars at a time. RP (Oct. 11, 2012) at 60. Corporal Watson testified that (1) a typical dose of heroin for maintenance users was about 0.2 to about 0.5, or a half gram or less if "they're just maintaining" and up to a gram or gram and a half for people who chose to abuse the drug, RP (Oct. 12, 2012) at 76; (2) dealers who buy an ounce, half ounce, or quarter-ounce usually "[break] it down further to sell to street dealers," RP (Oct. 12, 2012) at 79; (3) dealers who purchase quarter-ounces would likely break it down to an eighth of an ounce, about three-and-a-half grams, and break that down even further to a sixteenth of an ounce, a "teener," RP (Oct. 12, 2012) at 79, about 1.7 grams, closer to what an "end user might be using," RP (Oct. 12, 2012) at 80; (4) a maintenance user would break down a "teener" into even smaller amounts called a "point one, point two and so on," RP (Oct. 12, 2012) at 80; and (5) an end user would not be expected to buy

a quarter-ounce at a time and it was not common for end users to save their money to buy larger quantities at once. RP (Oct. 12, 2012) at 80.

Conover's three transactions involved quarter-ounce sales, more than the amount generally purchased for personal use: Conover was selling quarter-ounces of heroin, whereas an end user would likely possess about a sixteenth of an ounce. The State thus presented sufficient evidence to show that the quantities of heroin Conover sold were substantially larger than for personal use, for purposes of proving the RCW 9.94A.535(3)(e)(ii) aggravator and, thus, supporting the jury's finding.

3. Jury Instruction on "Substantially Larger than for Personal Use"

Conover also argues for the first time on appeal that the "substantially larger than for personal use" aggravating factor is unconstitutionally vague. Br. of Appellant at 27. Conover contends that the absence of "legally fixed standards" accorded the jury "standardless discretion" to decide this factor, violating due process. Br. of Appellant at 28. This argument fails; this aggravating factor is not unconstitutionally vague as applied here.

We may refuse to review a claim of error that the defendant did not raise below unless the error is manifest and affects a constitutional right. RAP 2.5(a)(3). The defendant must also show that the alleged error was not harmless beyond a reasonable doubt. *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1998). Due process principles are usually satisfied if a trial court instructs the jury on (1) each element of the charge, and (2) that the State must prove each element beyond a reasonable doubt. *Scott*, 110 Wn.2d at 690.

The constitution does not require that the meanings of particular terms used in an instruction be specifically defined. *Scott*, 110 Wn.2d at 691. Accordingly, jury instructions that

do not define particular terms are not "manifest" constitutional errors that can be raised for the first time on appeal. *Scott*, 110 Wn.2d at 688; *see also State v. O'Hara*, 167 Wn.2d 91, 107, 217 P.3d 756 (2009) (failure to provide statutory definition of malice when jury was instructed on all elements of the crime did not constitute manifest constitutional error).

Conover did not object to any jury instruction other than the reasonable doubt instruction. Because the trial court instructed the jury about each element of the crime charged, including the aggravating factors, its failure to provide a specific definition of "substantially larger than for personal use" does not amount to constitutional error. Thus, Conover cannot raise this vagueness issue for the first time on appeal. RAP 2.5(a)(3).

We affirm Conover's convictions, vacate his sentence, and remand for resentencing.[11]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Bjorgen, A.C.J.

Bjorgen, A.C.J.

Lee, J.

Lee, J.

[11] At the resentencing hearing, the State may prove Conover's criminal history for purposes of establishing his correct offender score.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 44175-6-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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[pheland@co.cowlitz.wa.us]
Cowlitz County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

Nina Arranza Riley

NINA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

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