No. 42224-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

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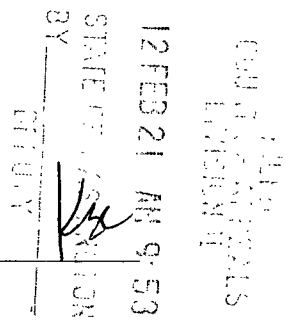
STATE OF WASHINGTON,

Respondent,

v.

BRANDON MCWILLIAMS,

Appellant.



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ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

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The Honorable Stephanie A. Arend (trial) and the Honorables Linda C.J. Lee, Frank Cuthbertson and Ronald Culpepper (motion), Judges

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT



WASHINGTON COURT OF APPEALS

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. ASSIGNMENTS OF ERROR

1. The prosecution's crucial main witness was improperly bolstered by and the court abused its discretion in allowing admission of evidence of prior consistent statements which did not meet the requirements of ER 801(d)(1)(ii).

2. The sentencing court violated McWilliams' state and federal due process rights in imposing as a condition of the sentences that McWilliams forfeit all property in evidence without following any of the mandatory statutory requirements for ordering such forfeiture.

3. The order of forfeiture violated RCW 9.92.110 by working a forfeiture based solely upon conviction of a crime.

4. McWilliams assigns error to the following conditions of sentence or of community supervision:

In section 4.4 of the judgment and sentence:

Conditions per DOC; CCO
Law abiding behavior
Forfeit all property seized

CP 334.

In section 4.6 of the judgment and sentence, he assigns error to the requirement to "comply with the following crime-related prohibitions: per DOC/CCO per Appendix F." CP 336.

He also assigns error to the portion of Appendix F which provided, in relevant part, that "[t]he Court may also order any of the following special conditions: _x_ (VII) Other: Per DOC; CCO." CP 441.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To be admissible, "prior consistent statements" must be made before the motive to fabricate arose, under circumstances indicating that the declarant did not foresee the potential legal consequences of the statement, and then only if there is a claim by the defendant that the witness had engaged in "recent fabrication."

Did the trial court err and abuse its discretion in admitting as "prior consistent statements" declarations made by a witness to an officer inculpating another when a) that

witness was himself accused in the crime and thus had a motive to fabricate, b) the statements were made after the witness had admittedly lied about his own involvement in the crime, c) the statements were made to police under circumstances where it was clear the witness knew the potential legal implications of what he was saying and d) there was no real claim of "recent fabrication" to rebut?

Further, was not error not harmless where the statements bolstered the crucial testimony of the prosecution's main witness?

2. The authority to forfeit property is wholly statutory and is granted to law enforcement agencies in certain cases, provided they follow the requirements of the relevant statute. Did the sentencing court act without statutory authority in ordering forfeiture of property as a condition of the sentences when there was no evidence the statutory procedures had been followed?

3. RCW 9.92.110 abolished the doctrine that a criminal defendant was subject to forfeiture of his property simply because of being convicted of a crime. Did the order of forfeiture, based solely upon conviction, violate this statute?

4. To be proper, conditions of a sentence or of community custody must be statutorily authorized. Further, it is the duty of the court to impose conditions of community custody as part of a criminal sentence. Were these principles violated and did the court improperly delegate its authority to DOC by ordering that DOC could define the conditions with which McWilliams must comply?

## C. STATEMENT OF THE CASE

### 1. Procedural Facts

Appellant Brandon McWilliams was charged by information with two counts of first-degree assault, each charged with a firearm enhancement and a "gang motivation" aggravator; a count of second-degree assault with the same "gang motivation" aggravator; and first-degree unlawful possession of a firearm. CP 1-3; RCW 9.41.010(12); RCW 9.41.040(1)(a); RCW 9.94A.510; RCW 9.94A.530; RCW

9.94A.535(3); RCW 9A.36.011; RCW 9A.36.021.

After motion hearings before the Honorable Linda C.J. Lee on September 21, 2010, the Honorable Frank Cuthbertson on January 18, February 28 and April 11, 2011, and the Honorable Ronald Culpepper on April 4, 2011, jury trial was held before the Honorable Stephanie A. Arend on April 27, May 5, 9-12, 16-18, 2011, after which the jury found McWilliams not guilty of the first-degree assaults but guilty of three counts of second-degree assault with firearm enhancements, without finding the "gang motivation" aggravating factor. CP 318-27; RP 1102-1115.[1]

On June 10, 2011, Judge Arends ordered McWilliams to serve 156 months - more than 14 years in custody. CP 328-41.

McWilliams appealed and this pleading follows. See CP 344.

2. Testimony at trial

On July 25, 2010, a little before midnight, someone fired a gun at a 7-11 gas and grocery store in Tacoma. RP 282-83, 494-97, 502.

City of Tacoma police officer Brett Beall responded saw a "female" running through the parking lot who looked back as she ran and appeared to be taking off a white shirt. RP 282-84. When the officer got

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[1]The verbatim report of proceedings consists of 15 volumes, which will be referred to as follows:
September 21, 2010, as "1RP;"
January 18, 2011, as "2RP;"
January 28, 2011, as "3RP;"
April 4, 2011, as "4RP;"
April 11, 2011, as "5RP;"
the 9 chronologically paginated volumes containing the pretrial and trial proceedings of April 27, May 9-12, 16-18, 2011, as "RP;"
the sentencing of June 10, 2011, as "SRP."

closer to the store, he noted that one of the windows had holes in it, one about shoulder height and one about where a person's thigh would be. RP 285. The lower hole was "pretty small" and the other one was only about "fist size," even with the small amount of glass that had fallen out. RP 286.

The officer went inside and saw several people standing around who appeared to be bleeding. RP 285. A man named Lamar Reynald was holding his hand to his neck and had blood between his fingers, on his shoulders and on his shirt. RP 286. Reynald was "pretty freaked out," and was standing with a friend, Marquise Labee. RP 288.

TPD Officer Robert Denully, Jr., who saw Reynald's injury, said it appeared that Reynald had been struck by something like a piece of glass, rather than being shot. RP 316.

Another man, Paul Kimani, was wearing a uniform identifying him as working for the store. RP 287. He appeared to have been shot through his thigh. RP 287. Although Kimani's pant leg was bloody, he was still standing. RP 287. Medics were then called. RP 287.

An unfired 9mm bullet was found on the sidewalk outside the store and a bullet fragment was on a shelf inside the store. RP 289, 294. No casings were found. RP 289.

A search of the area, including the bushes, did not reveal a gun. RP 334. There were no fingerprints found on the bullet fragment. RP 529.

Nancy Pham, who testified through an interpreter, was working as a nurse across the street from the 7-11 that day. RP 580. She said she

heard a "boom" sound which drew her attention to the window. RP 586. She saw a woman in a black t-shirt and jeans coming out of an apartment complex and start "running around." RP 585. Pham also said she saw a man with a white cap, white t-shirt and white shorts with a gun, waving it around. RP 581, 586.

Pham could not tell what race the man was, nor could she tell the race of the woman. RP 582-89. The man was in the middle of the street with his face towards the store when she saw him. RP 582-83.

Paul Kimani testified that he was working at the 7-1-1 counter and heard "kind of a commotion" outside so he went towards the glass wall to look out. RP 632-33. Kimani then heard a bang and realized he had been shot in his right thigh. RP 632-635. It was only his sixth day on the job. RP 637.

Kimani did not see who fired the one shot he heard, nor did he see who was involved in the commotion. RP 646.

Lamar Reynald said he and his friend. Marquise Labee, were at the store, standing in front handing out compact discs of their music, "asking people for donations," while waiting for a ride to a party. RP 649-50. They had only been there about 8-10 minutes, Reynald said, when the incident occurred. RP 650.

According to Reynald, Labee told some guys to "check it out," apparently referring to the CD. RP 651. The men, one white and one black, said, "f you" and "we don't want to check it out." RP 651-52. Reynald said Labee then felt "disrespected" and told the men, "you could have came a little more respectfully," after which words started getting

"exchanged." RP 651. Reynald thought everyone felt "disrespected," admitting he was including himself. RP 651.

Marqise Labee said, in contrast, that the whole incident started when Reynald approached a white guy who said "no, fuck you" to buying one of their CDs. RP 592, 594. The white guy went into the store and Labee then confronted the black guy who had been with the white guy. RP 694. Labee said he told the black guy, "it's not even like that," and "we're just out here selling our music, you don't got to get an attitude." RP 594.

Labee said he and Reynald were trying to explain they were "not trying to disrespect" anyone, just to "get our music out there." RP 593. According to Labee, the white guy came back out of the store and then just hit Labee, who "blanked out" and a couple of seconds later opened his eyes. RP 593. Reynald and the other guy "got into it," Labee said, and the sound of the shot was what "woke" Labee. RP 594-95.

Reynald said that, at some point, the white guy said something like "I don't care if this is 96th", followed by something about "Piru," which is the name of a gang. RP 653-54. Reynald said he felt he was being "mistaken as a gang member." RP 654. He did not, however, try to correct the misimpression. RP 654.

Reynald said that fists "were thrown," Reynald saw Labee drop and then saw that a man had a gun, so Reynald hit that guy. RP 651. At that point, the gun went off. RP 651.

Reynald said he hit the guy because "it was me taking a bullet or me hitting him." RP 654. But he also said he and the white guy "was scuffling on the ground" and it was only when he got up from the ground

that he "seen a gun," also feeling it on his neck. RP 655. At that point, Reynald said, the white guy did not say anything. RP 656.

Reynald testified that he then just "swung" at the man. RP 656. Reynald also said he did not know if the gun went off due to the force of his punch. RP 656-57. He again maintained, however, "I hit him and then the gun went off." RP 659.

Reynald could not recall what the white guy was wearing, other than a hat. RP 657. He did not see which direction the two guys went when they ran away. RP 660.

At trial, Reynald did not recall seeing the man with the gun "rack the slide," although he had told police that he had. RP 663. Reynald said that all he knew was that after the scuffle, "there was a gun up to my neck" and he thought he heard a "click-clack" in his mind. RP 663. He maintained he "believed it was true at the time" but admitted he did not really recall. RP 664.

He summarized the events as follows:

> I seen my friend get hit. I hit the guy in front of me. We're swinging. We're scuffling on the ground. I get up, there's a gun to my neck, and, you know, there's yelling. . . So in order to protect myself, I hit the person in front of me. The gun goes off while I hit him.

RP 660.

Reynald testified that the event occurred at about 10 at night. RP 658. The 9-1-1 call, however, was received at 12:01 a.m. and the first officer arrived at 12:03. RP 494-502.

Reynald admitted he had not really talked to police about the incident later, explaining that he did not live in a stable home or get

messages. RP 660. He did not have a family or any concerns which were affecting his testimony, although the prosecutor asked. RP 667-69.

TPD Officer Zachary Koehnke also responded to the 9-1-1 call and decided to see if he could find the woman Beall had described crossing the street. RP 321-23. Koehnke said he saw a woman cross the street nearby and stopped her by yelling. RP 326. He then brought her back across the street to the store for questioning. RP 326, 333. The woman, identified as Amber Pacheco-Noel, appeared to be about 21 years old. RP 284, 326-27.

Pacheco-Noel lived at an apartment complex nearby. RP 284, 326-27. Koehnke said Pacheco-Noel was upset and appeared to be "somewhat impaired or intoxicated." RP 328.

Pierce County Sheriff's Department Deputy Seth Huber also responded to the dispatch and, as he was headed there, saw a man run across the street. RP 336-40. The man started running faster when he saw the officer. RP 340. Suspicions raised, the deputy cut the man off with his car. RP 340-41.

The man was named Alighwa Henderson. RP 341. Henderson was "[n]ervous, excited," immediately "wanted to deny anything," and said he did not know what was "going on." RP 432. Henderson had a little bleeding from what appeared to be a scratch on his left ear. RP 342.

TPD officer Tyler Meeds saw Huber speaking Henderson. RP 423-31. Meeds went to help Huber and saw a woman running in their direction, wearing just a t-shirt and underwear. RP 432. According to the officer, the woman was screaming and upset, saying "[o]h no, what did my baby do? Oh no, what did my babies do? Where's my daughter?

Where's my daughter?" RP 435.

The officer spoke with the woman and found out she was Kimberly Pacheco and lived at nearby apartments, known as the "Drake." RP 436.

The officers went to Pacheco's apartment and Brandon McWilliams answered the door. RP 438. He was shirtless but had on a pair of "white-type gym shorts." RP 438.

McWilliams was detained and the apartment was searched. RP 439. No firearms were found. RP 439-40. Someone "observed" a white hat on the kitchen table. RP 439-40. In the kitchen, in the cupboard on top of the fridge was a candy dish with five 9 mm rounds which were not spent. RP 441, 464. Meeds testified that the rounds were under some candy but admitted that this information was not in his report. RP 464. Two other 9 mm rounds were found on top of the cupboards in the kitchen. RP 441.

Meeds did not know when they were placed there. RP 464. No fingerprints were found on any of the rounds. RP 529.

Henderson admitted that he had been staying at that same apartment, at the same time as McWilliams. RP 789.

Pacheco-Noel's mom, Kimberly Pacheco, testified about that evening, when there were 10-12 people at her apartment, drinking, including McWilliams and Henderson. RP 775. Pacheco had consumed more than her "fair share" of alcohol and was very drunk. RP 776-77.

Pacheco's daughter, Pacheco-Noel, came up to her mom at some point in the evening, and said she was going to the store. RP 778. Pacheco thought it was about 1:45 in the morning, and she thought

McWilliams, who had a child with Pacheco-Noel, was still around, but also said everyone was "kind of scattered around," outside on the back porch or by the pool. RP 778.

Pacheco admitted the neighborhood was "rough" and there were always a lot of kids hanging out in front of the 7-11, but she did not warn her daughter to be careful or anything when her daughter said she was going out. RP 780. Pacheco said she "didn't think twice" about her daughter's safety at the time, because she was "highly intoxicated" and "wasn't probably really making responsible choices." RP 780-82.

A little later, Pacheco was outside by the pool and heard "thousands of sirens going down the street." RP 783. Although the sound of sirens was not unusual in the neighborhood, there were enough sirens going off that Pacheco became concerned. RP 783. She jumped out of the pool and asked a neighbor to stay while she tried to "run up" to the store to make sure nothing had happened to her daughter. RP 783.

Pacheco, who was wearing a swimsuit and long camisole, testified that she got as far as the parking lot of her apartments when she was arrested and thrown in the back of a police car "with no explanation of what was going on." RP 783-87.

Pacheco said she did not scream anything as she ran, like "[w]hat did they do," but only told her neighbors that she was going to see if her daughter was okay. RP 786.

Neither Pacheco nor Pacheco-Noel kept weapons or had ammunition or had seen any thing like that in the home. RP 789. Pacheco did not recall telling an officer that, if there were bullets found, they likely

belonged to McWilliams. RP 789. Although the officer who interrogated Pacheco remembered to the contrary, that officer ultimately admitted that Pacheco had only said they "likely" belonged to him, not that she knew. RP 882.

The officer, TPD office Julie Popkov, testified that Pacheco had said her daughter and daughter's boyfriend had gone to 7-11 and that Pacheco had gone out looking for her daughter, who had been gone "longer than she was supposed to be." RP 795-97. The officer noted that Pacheco "smelled heavily of alcohol and appeared to be intoxicated" at the time. RP 798.

Amber Pacheco-Noel testified that, when she told her mother where she was going, her mom said "hurry and get home." RP 819. Pacheco-Noel testified that she left the apartment alone, went to the store alone, went inside and went to the front of the store with "two beers" she wanted to buy, then heard a "commotion" outside. RP 822. Several customers walked outside and the store clerk was getting ready to call police so no one was ringing people up. RP 824. Pacheco-Noel left her beer and debit card on the counter and went outside, seeing a fight. RP 822. She did not recall who was fighting, just that it was some black guys. RP 825.

Pacheco-Noel tried to get through on the sidewalk and had almost made it to the end of the parking lot when she heard a gunshot. RP 822. She testified that she ran across the street towards an "old folk's" home and took her jacket off because she realized she had left her debit card inside the store. RP 823. She wanted to hide the jacket so people would

not recognize her when she went back to get the debit card, because she had a warrant out for her arrest. RP 823.

Pacheco-Noel said she went to the store, saw that a clerk was shot and asked if he was okay, walked out of the 7-11 and across the street and was walking away when an officer brought her back up to the store. RP 823.

Pacheco-Noel did not recall telling police that she heard arguing in front of the store, tried to break up the argument and started running when others ran, but did not hear any gunshots. RP 827. She reiterated that she was "highly intoxicated" at the time and so her memory was probably better now. RP 827.

An officer remembered Pacheco-Noel saying she did not hear any gunshots, that there were four or five guys involved and that they were all black. RP 884-85.

A surveillance video was introduced, showing what happened outside but not clearly identifying the participants. RP 365. TPD Detective Frederick Pavey, Jr., testified about security systems and how inferior the quality of the images often are. RP 385-95. He personally downloaded the video from outside the store and said it did not really produce images which could be "blown up" without becoming too blocky to be useful. RP 395-401.

The officer said when someone shoots a gun, there would usually be a "muzzle flash" recorded. RP 401. There was not one on the tape of the incident. RP 401.

When shown the video, Pacheco-Noel agreed that it appeared to

show her walking to the store, followed by by someone in black pants, a blue shirt and blue hat, as well as someone wearing white who appeared to be caucasian. RP 830. In the video, she was shown running out of the store towards the altercation going to the man in the white hat. RP 833. Pacheco-Noel said she remembered trying to run but not being able to get through. RP 833. She admitted that a part of the video showed what appeared to be her not being blocked but still "sticking around." RP 837. When she walked away in the video she was holding the man with the black pants. RP 839. She was also seen coming back to the store with her white coat on. RP 848-50.

Pacheco-Noel agreed that it appeared in the video she was close up with the man in the black pants. RP 852-54. She said, however, that she did not recall seeing Henderson at the store that night. RP 852-53.

Henderson was wearing a blue shirt that night. RP 820.

A white shirt was found just behind the apartment. RP 367. The video of the incident showed someone wearing a long white shirt which an officer opined looked similar. RP 368. That shirt was not on a porch or hidden but was instead plain view and could have been left there by anyone walking down the alley. RP 375. It was also near a swimming pool. RP 388. The officer admittedly could not say if the shirt had been left there earlier by someone using the pool, given that it was the middle of summer. RP 380.

Alighwa Henderson testified that he was at a "little gathering" which included McWilliams that night. RP 539. Henderson confessed to having a lot to drink, both beer and hard alcohol, so that he was

"impaired" when he said he and Brandon McWilliams followed Pacheco-Noel to the 7-11 store. RP 540-41.

Henderson said that, when they got to the store, two black guys tried to sell them CDs out front but Henderson said he was not interested, then went into the store. RP 541.

Henderson admitted he did not, however, buy anything inside. RP 543. When he came back outside, Henderson claimed, he heard an argument going on with the two guys and McWilliams. RP 543. Henderson went over and said to McWilliams, "F these guys, let's go." RP 543. The big guy asked who Henderson was and Henderson said, "don't worry about it." RP 544. The man responded, "F you bitch." RP 544.

At that point, Henderson said, he asked the man, "what's up; is there a problem?" RP 544. They kept having "dialogue" until Henderson decided to throw the first punch, explaining he did it because he was "[d]runk, felt like I had to," and "[b]ecause i wanted to." RP 544.

Henderson first denied remembering what was said between the men and McWilliams. RP 543. On cross-examination, however, Henderson admitted the men were using some "derogatory terms," including the racial slur "n" word. RP 543. As Henderson is black and McWilliams is white, Henderson conceded, those slurs were directed at him, not McWilliams. RP 563-64.

Ultimately, Henderson said, the comments made him mad and that was why he started the physical part of the fight. RP 564. Henderson said he did not connect with the man he tried to hit but that man hit him back.

RP 544. Henderson testified that he then fell to the ground, "out." RP 545. When he recovered after a couple of minutes, Henderson said, he "[g]ot back up, tried fighting back" again. RP 545.

Henderson did not remember telling police that when he fell to the ground the guy who hit him was on top of him still hitting him. RP 569.

Henderson claimed to have seen McWilliams pull a gun out from the front of his waistband. RP 568. He could not, however, say which hand McWilliams used. RP 568. Henderson also said he saw McWilliams point the gun but did not see him pull the trigger. RP 568.

To one officer, Henderson said nothing about seeing McWilliams point a gun or pull one out. RP 569. To another, he made such statements. RP 569, 573.

Henderson testified that he heard only one shot. RP 547. He told police, however, that when he got up again, he turned around and heard gunshots, "bang, bang." RP 569. He admitted that meant two shots. RP 547. Henderson testified he decided to "flee" when he heard the sound and did not know where McWilliams went. RP 547-48.

Henderson testified that he did not know anybody had brought weapons that night. RP 546. In talking to police, however, he made some claim that McWilliams "goes everywhere" with a gun. RP 555.

Henderson also claimed he told the deputy McWilliams was "just crazy" and Henderson did not know why McWilliams began to shoot when it was only a fistfight. RP 555-56. Henderson also told police that McWilliams probably hid the gun in the bushes, where no gun was found. RP 334, 556.

Henderson could not explain how, given that he did not know which direction McWilliams had traveled, Henderson could have any idea where McWilliams might have left the gun. RP 556. Henderson admitted, "I did not have any idea. I just said some bushes. It's the only bushes in the area so I just said it." RP 556.

Henderson has multiple prior convictions for crimes of dishonesty. RP 550.

Henderson's nose was broken during the fight. RP 545. When prompted, he recalled that he had an earring that was ripped out, but he did not recall if he was bleeding or not. RP 553.

Initially, Henderson told officers he did not know what was going on, he heard some gunshots and ran. RP 554. Henderson admitted he had lied to the deputy in order to try to "get away." RP 554, 562.

Henderson also told the deputy he thought McWilliams had made it back to the apartment. RP 554. Henderson could not explain, however, why he thought that when he never saw which direction McWilliams had gone. RP 554.

TPD Detective Louise Nist spoke to Henderson about a week later at jail and said that Henderson told her that McWilliams went with him to the 7-11 and was involved in a "physical altercation" with Henderson and the other men. RP 657-702. The detective said Henderson claimed he had only "heard shots" but was not the shooter himself, that McWilliams was wearing a white hat, t-shirt and shorts, and that Henderson had not known McWilliams had a gun. RP 702-714.

To Nist, Henderson claimed he had *never* seem McWilliams with a

gun. RP 721. This was inconsistent with what he had previously said to police. RP 724.

In the video shown to the jury, the moment the shot was fired, the white guy is shown throwing a punch. RP 1076.

McWilliams was found not guilty of counts of first-degree assault for Kimani and Reynald, but guilty of three counts of second-degree assault (for Kimani, Reynald and Labee), all with firearm enhancements, without finding the "gang motivation" aggravating factor. CP 318-27.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING IMPROPER REPEATED BOLSTERING OF THE STATE'S CRUCIAL WITNESS WITH INADMISSIBLE EVIDENCE

Improper admission of evidence compels reversal and remand for a new trial when "the error, within reasonable probability, materially affected the outcome of the trial." State v. Halstein, 122 Wn. 2d 109, 127, 857 P.2d 270 (1993). Error in admitting evidence will meet that standard where it is important in corroborating the claims of the state's main witness. See State v. Sweeney, 45 Wn. App. 81, 86, 723 P.2d 551 (1986).

In this case, that standard is met and reversal is required, because the trial court erred in admitting certain evidence as "prior consistent statements," when that evidence did not meet the requirements for such statements and when it bolstered the testimony of a former co-defendant which formed the base for the convictions.

a. Relevant facts

At trial, the prosecutor began to ask Detective Nist what

Henderson had said about McWilliams' involvement in the crime when the detective interviewed Henderson a week or more after the incident. RP 683. After objection, the jury was excused. RP 683. The prosecutor then argued two theories: 1) that the statements were admissible "to rebut an express or implied charge against the declarant of recent fabrication or improper motive," and 2) that the statements were "identification" of McWilliams as the shooter and thus "outside hearsay." RP 684. For the argument about "recent fabrication," the prosecutor focused on the fact that Henderson had testified and thus been cross-examined about his statements. RP 684-90.

The prosecutor admitted that Henderson's statements had "changed with respect to what exactly went on" from the time Henderson spoke to Officer Huber the night of the incident, to the time he spoke to Officer Nist, about a week later. RP 689-90. The prosecutor also admitted that "the only eye witness I've got identifying Mr. McWilliams is Mr. Henderson." RP 690-91. The prosecutor argued, however, that the statements in question were made before Henderson had reached an agreement with the state. RP 690-91. At "best," the prosecutor claimed, Henderson had made his statements to Nist when Henderson was facing only "booking charges" for the assault. RP 700.

Counsel argued that he was not claiming "recent fabrication" from the date of the "deal" but rather that Henderson had a motive to implicate McWilliams because of Henderson's desire to avoid culpability himself. RP 691-92. Counsel pointed out that Henderson had obviously had a motive to lie because he had done so, telling police he had not been at the

store that night when originally asked. RP 691-92. Counsel said Henderson thus had the motive to fabricate regarding his culpability all along, before Henderson had made the relevant statements. RP 691-92.

The court disagreed with the prosecutor, finding that the statements claiming that McWilliams was the shooter were not admissible as "identification." RP 694. Instead, the court held that, if the statement was going to be admissible, it would have to be under the theory of rebutting a claim of recent fabrication. RP 694-96. The court thought the admissibility depended upon the timing of the statement and whether Henderson was already facing charges at the time he made the statement. RP 694-95.

At that point, the court allowed the prosecutor to "lay a better foundation" about whether "the motive to falsify was present or not" at the time the statements were made. RP 696. With the jury still out, the officer admitted that Henderson had been arrested for the incident and brought to jail on charges of assault days before the interview in which the purported prior consistent statements were made. RP 697-702.

The officer also said that Henderson was read his rights before the interrogation. RP 698.

In ruling that the statements were admissible, the court based its decision "on a finding that there was insufficient time or reason to fabricate the story." RP 702-703.

Nist then was allowed to testify about what Henderson said in her interview of him about a week after the shooting, at the jail. RP 703. She detailed his claims about where he was, who went with him, that

McWilliams was involved and that he had heard shots, that Pacheco-Noel had tried to break up the fight, that McWilliams was dressed in white, and that McWilliams had been involved but Henderson was not the "shooter." RP 704-721. In closing argument, the prosecutor relied on Henderson's "insider testimony" in arguing guilt, pointing out that his first statements were made the night of the incident and the other statements were made before he entered into the "deal." RP 1023-25, 1091.

b. The statements were inadmissible as "prior consistent statements" under ER 801(d)(1)(ii) and were not statements of "identification" but rather accusation

Under ER 801(d)(1)(ii), statements are admissible - and deemed "not hearsay" if:

> The declarant testifies at the trial or hearing and is subject to cross[-]examination concerning the statement, and the statement is . . . (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motivej[.]

Statements are not admissible as "prior consistent statements" under the rule, however, simply because they are prior, out-of-court statements made by the witness. See State v. Osborn, 59 Wn. App. 1, 4, 795 P.2d 1174, review denied, 115 Wn.2d 1032 (1990); State v. Bargas, 52 Wn. App. 700, 702, 763 P.2d 470 (1988), review denied, 112 Wn.2d 1005 (1989). Instead, as this Court has recognized,

> [t]he general rule is that a witness' testimony cannot be corroborated or bolstered by presenting to the factfinder evidence that the witness made the same or similar statements out-of-court - for the simple reason that repetition is not generally a valid test for veracity.

State v. Harper, 35 Wn. App. 855, 857, 670 P.2d 296 (1983), review

denied, 100 Wn.2d 1035 (1984).

As a result, there are very specific requirements which must be met before a statement can be admitted as a "prior consistent statement." See Thomas v. French, 99 Wn.2d 95, 103, 659 P.2d 1097 (1983). The requirements are designed to establish the reliability of the statements and ensure their relevance to answer a claim of recent fabrication by showing that consistent statements were made before the motive to fabricate arose. See Harper, 35 Wn. App. at 857; see Bargas, 52 Wn. App. at 702-703 (such evidence is admissible only "to rehabilitate testimony that has been impugned by a suggestion of recent fabrication").

Here, the prerequisites for a "prior consistent statement" were not met, in multiple ways.

First, the trial court's was improperly based on the theory that there had been "insufficient time or reason for fabrication." See RP 702-703. However, that is neither factually nor legally correct. The statements made to Nist were made about a week after the incident, after Henderson had himself been arrested and booked for his involvement in the crimes and had more than ample time and motive to blame McWilliams.

Further, the statements made to Huber on the night of the incident were clearly made after there had been sufficient time and reason for fabrication - because Henderson **engaged in such fabrication**, admittedly lying when he said he did not know what had happened and was not involved. RP 554, 562. Where, as here, the declarant is aware that he faces potential charges or investigation by police, he has "a motive to

fabricate an explanation" for his conduct and statements made after that are "not admissible as prior consistent statements." See, e.g., State v. Stubsjoen, 48 Wn. App. 139, 146-47, 738 P.2d 306, review denied, 108 Wn.2d 1033 (1987).

As the Supreme Court has noted in another context, the question of whether someone's statement was made before that person had the opportunity to fabricate is clearly answered by the existence of admitted fabrication in that statement. See, State v. Brown, 127 Wn.2d 749, 758-59, 903 P.2d 459 (1995). Where a declarant "had the opportunity to, and did in fact, decide to fabricate a portion of [his] story," that is clear evidence that the declarant had the opportunity to decide to lie in self-interest. Id.

Here, Henderson already had a strong motive to deny his involvement and place the blame on another. Not only was he aware that he was facing legal jeopardy, he had **already been arrested** for a serious felony based upon the belief of police about his involvement. He thus already had the motive to lie about his involvement and implicate someone else - and he admitted to having **acted** on his motive, by lying the night of the incident, when he spoke to police.

The trial court's finding that there had been "insufficient time or reason for fabrication" simply does not withstand review.

In any event, contrary to the trial court's apparent belief, the question of how long it had been since the incident (i.e. whether there was "insufficient time. . .for fabrication") is not, in fact, relevant to whether a

prior consistent statement is admitted; instead, that is a question which often comes up when there is a statement claimed to be an "excited utterance." See, e.g., Bargas, 52 Wn. App. at 703; see also, State v. Woodward, 32 Wn. App. 204, 206-207, 646 P.2d 135, review denied, 97 Wn.2d 1034 (1982). And even in that context it is not dispositive. See Bargas, 52 Wn. App. at 704. The trial court's focus on whether there was "time" to form a motive to lie was improper, as was its determination that there was no motive for Henderson to fabricate after Henderson had already been arrested and booked as responsible for the very same incident he then pinned on McWilliams. The statements to both officers were clearly made after the motive and opportunity to fabricate arose, and thus they were not admissible as "prior consistent statements."

Most significant, however, the statements to the officers were made by Henderson at a time when he clearly knew the potential legal consequences of what he was saying. Statements are not admissible as "prior consistent statements" unless they are made under circumstances which indicate that the declarant was unlikely to have known that potential. See State v. Makela, 66 Wn. App. 164, 169, 831 P.2d 1109, review denied, 120 Wn.2d 1014 (1992); see Osborn, 59 Wn. App. at 5. As one noted authority has explained, statements are not admissible as "prior consistent statements" unless their proponent proves that the declarant spoke "under circumstances minimizing the risk that the declarant foresaw the legal consequences of the statement[.]" 5B Karl B. Tegland, Washington Practice: Evidence Law & Practice, § 342(4) at 57 (3rd ed 1989).

Here, of course Mr. Henderson foresaw the legal consequences of his statement. For the statements made the night of the incident, Henderson was in police custody at the time, having been apprehended for suspicion of committing the very crimes he would later pin on McWilliams. It is impossible to dispute that Henderson was aware of the potential legal consequences of what he said in that context, given that he admitted to lying during the statement to try to get himself "away." See RP 554, 562. And it is further impossible to dispute Henderson's awareness of the potential legal consequences for his later statement to Nist, when Henderson had already been booked on charges for the incident and was read his rights before the statement was made.

Finally, it is questionable whether there was actually a claim of "recent fabrication" in this case at all. A defendant does not make such a claim by challenging the declarant's credibility and arguing that the declarant had been lying all along. Bargas, supra, is instructive. In that case, this Court held that cross-examination raising the inference that a witness is "not being completely truthful" was insufficient to support admission of statements made to police the night of the incident as "prior consistent statements." Bargas, 52 Wn. App. at 703. The defendant in Bargas had pointed out that the various statements of the victim were inconsistent, and had argued that the victim was making up the claims against him. Id. Those arguments did not claim that the story against the defendant was made up *after* the initial statements to police but rather *before*, so that the initial statements were inadmissible as there was no claim of "recent fabrication." Id.

Similarly, here, there was no argument of "recent fabrication," i.e., that Henderson made up a story in order to get a "deal" from police. Instead, while counsel argued that the "deal" provided incentive to continue to implicate McWilliams, counsel also argued that Henderson *had lied from the beginning* to police, starting with minimizing his own involvement at the time he was in custody right after he had been caught. The claim was not that Henderson had not pointed the finger at McWilliams until after the deal was offered: the claim was that Henderson had a vested interest in getting off from day one by pointing the finger at someone else - and the deal was icing on the cake.

Notably, the evidence was also inadmissible under the other theory advanced by the state. Where there has been some type of out-of-court identification procedure, evidence that a witness has identified the defendant may be admissible as non-hearsay under ER 801(d)(1)(ii). See State v. Grover, 55 Wn. App. 923, 780 P.2d 901 (1989), review denied, 114 Wn.2d 1008 (1990). These were not statements of "identification;" they were statements of accusation, made by someone who knew the person he was accusing. As the trial court properly found, the statements were not admissible to bolster the claims Henderson made against McWilliams at trial on the theory that the statements were of "identification."

The trial court erred in admitting the evidence under the rule allowing "prior consistent statements," and this Court should so hold.

c. There is more than a reasonable probability that the error affected the outcome of trial

Reversal and remand for a new trial is required. Where there is error in admitting evidence, reversal will be granted when the error, "within reasonable probability, materially affected the outcome of the trial." Halstein, 122 Wn. 2d at 127. Here, that standard is more than met.

The evidence improperly admitted bolstered the most important state's witness against McWilliams. Further, the state's evidence against McWilliams was not particularly strong. As the prosecutor himself admitted, the only "eye-witness" accusing McWilliams was Henderson. RP 690-91. None of the victims nor anyone else was able to identify McWilliams as being involved.

As such, the evidence bolstering Henderson's claims was higly prejudicial and highly likely to materially affect the outcome of the case, because it corroborated Henderson's claims which formed the bulk of the case against McWilliams. See Sweeney, 45 Wn. App. at 86.

It must be remembered that the jury did not, in fact, believe the state's evidence supported the accusations the prosecution had brought. McWilliams was acquitted of both counts of first-degree assault, and rejected the "gang motivator" aggravating factors.

And indeed, the jury had already been inflamed against McWilliams by the extensive testimony about gangs, gang culture, "gang homicides," gang cooperation to commit drug crimes, how people get "beat in" to gangs and how gang members will react with violence if they were "not getting the respect" they thought was due them, etc. ostensibly

admitted to prove the "gang motivation" aggravators. RP 729-64.

Given the serious weakness in the evidence against Mr. McWilliams and the importance of Henderson's testimony to the state, admission of the improper bolstering evidence cannot be deemed to have been "harmless" in this case. This Court should so hold and should reverse.

2. THE SENTENCING COURT ERRED AND VIOLATED MCWILLIAMS' DUE PROCESS RIGHTS WHEN THE COURT ORDERED FORFEITURE OF PROPERTY AND IMPOSED IMPROPER CONDITIONS OF COMMUNITY CUSTODY WITHOUT STATUTORY AUTHORITY AND IN VIOLATION OF ITS DUTIES AND THE DOCTRINE OF SEPARATION OF POWERS

Even if reversal and remand for a new trial was not required based on the improper bolstering in this case, Mr. McWilliams is still entitled to relief, because the sentencing court acted without statutory authority and violated due process in imposing conditions of the sentences. Further, the court improperly delegated its sentencing authority to the Department of Corrections (DOC), implicating the constitutional mandate of separation of powers.

First, the order that McWilliams forfeit all property in evidence as a condition of his felony sentence was in violation of those rights. A sentencing court's authority to impose conditions of a sentence is limited by statute. See State v. Zimmer, 146 Wn. App. 405, 414, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009). The legislature is the only body which "may establish potential legal punishments" under the Sentencing Reform Act, so that only those punishments authorized by that body may be imposed by a sentencing court, or it is reversible error. Id.;

see State v. Hale, 94 Wn. App. 46, 53, 971 P.3d 88 (1999). This is in contrast to the pre-SRA situation, where judges were given virtually unlimited discretion to craft the sentence they deemed proper. See State v. Shove, 113 Wn.2d 83, 88-89, 776 P.3d 132 (1989). The change to a statute-focused rather than judge-focused sentencing system was made by the Legislature in order "to establish guidelines for sentencing judges' discretion, thereby making the exercise of that discretion more principled and providing criteria for review by appellate courts." Id.

As a result, under the SRA, a court may only order a sentence or sentencing condition which is statutorily authorized.

Here, the order of forfeiture did not meet those requirements. At the outset, the language of the judgment and sentence is confusing because it appears to be contradictory. In the judgment and sentence, section 4.4 provided:

> Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

CP 334. However, someone also wrote in the following on the judgment and sentence:

> Conditions per DOC; CCO
>
> Law abiding behavior
>
> Forfeit all property seized

CP 334. Thus, it appears that the court ordered both 1) that Mr. McWilliams could make a claim for return of property if he was the rightful owner and 2) that he was required not to make such a claim, i.e.,

"[f]orfeit all property seized."

The court did not have authority to order these forfeitures. As a threshold matter, this issue is properly before this Court. When a sentencing court acts outside its statutory authority, it has entered an illegal sentence which may be reviewed for the first time on review. See State v. Bahl, 164 Wn.2d 739, 745, 193 P.3d 678 (2008).

On review, this Court should strike the forfeiture language, because there was no authority for the court to order forfeiture of property in such a fashion in this case. The authority to order forfeiture is wholly statutory. See Bruett v. Real Property Known as 18328 11th Ave. N.E., 93 Wn. App. 290, 296, 968 P.2d 913 (1998); see also, Espinoza v. City of Everett, 87 Wn. App. 857, 865, 943 P.2d 387 (1997), review denied, 134 Wn.2d 1016 (1998). As this Court has specifically held, there is no "inherent authority to order the forfeiture of property used in the commission of a crime." State v. Alaway, 64 Wn. App. 796, 800-801, 828 P.2d 591, review denied, 119 Wn.2d 1016 (1992). Instead, any such effort must be based upon "statutory authorization." Id.

As a result, for there to be authority for forfeiture of property, there must be a statute providing authorization. Further, the procedures set forth in the relevant statute must be followed, in order for the forfeiture to be permitted under law. Thus, in Alaway, where the state failed to follow the statutory requirements for forfeiture, the property was ordered returned to the defendant because following those requirements are "the exclusive mechanism for forfeiting property" in each particular type of case. Id. Similarly, in Espinoza, supra, the Court noted that, "when statutory

procedures are not followed, the government is estopped from proceeding in a forfeiture action." Espinoza, 87 Wn. App. at 866.

As Division Three recently noted, "[t]he power to order forfeiture is purely statutory and will be denied absent compliance with proper forfeiture procedure." City of Walla Walla v. $401.333.44, 164 Wn. App. 236, 237-38, 262 P.3d 1239 (2011). Further, because "[f]orfeitures are not favored," they are enforced only when they are consistent with the "letter" and "spirit" of the law. Walla Walla, 164 Wn. App. at 237-38, citing, Bruett, supra, 93 Wn. App. at 295.

Here, there was no authority to order forfeiture of all the property in evidence as ordered in the felony judgment and sentence. Even a cursory examination of the law proves this point. While RCW 10.105.010 authorizes law enforcement agencies to seize and forfeit certain items used in relation to or traceable in specific ways to the commission of a felony, the statutory requirements for those forfeitures were not followed here. The seizing agency - here, the police - must serve proper notice on all persons with a known right or interest in the property, who then have a right to a hearing where they can attempt to establish an ownership right. RCW 10.105.010(3), (4) and (5). The forfeiture proceedings are held as a separate civil matter, with the deciding authority **not** the superior court. RCW 10.105.010(6). RCW 10.105.010 thus does not support the sentencing court taking the step of ordering, as a condition of a sentence in a criminal case, the forfeiture of property without following any of the requirements of the statute for notice, proof, a possible hearing, etc.

Other forfeiture statutes similarly authorize a law enforcement

agency - rather than the sentencing court - to conduct forfeiture proceedings for property in relation to certain crimes. RCW 69.50.505 governs forfeitures related to controlled substances, allowing forfeiture of controlled substances, raw materials for such substances, properties used as containers for them, and other conveyances and items used in drug crimes. To have that authority, however, the "law enforcement agency" seeking the seizure has to provide notice of intent of forfeiture on anyone with known rights or interests in the property, who then have an opportunity to be heard, often at a civil hearing "before the chief law enforcement officer of the seizing agency," or, if the person exercises the right of removal, may be in a court of competent jurisdiction under civil procedure rules, at which the law enforcement agency must establish that the property is subject to forfeiture. See RCW 69.50.505; Smith v. Mount, 45 Wn. App. 623, 726 P.2d 474, review denied, 107 Wn.2d 1016 (1986) (upholding the constitutionality and propriety of having the chief officer presiding over a proceeding where his agency stands to financially benefit if he finds against the citizen).

Other forfeiture statutes again vest the authority for such proceedings in the law enforcement agencies or executive branch, not the court, as well, and further require certain procedures to be followed to establish, in separate civil proceedings, that property should be forfeited as a result of its relation to a crime. RCW 9A.83.030 governs forfeitures associated with money laundering and required that the attorney general or county prosecutor file a separate civil action in order to initiate those proceedings, provide notice to all persons with known rights, and gives the

person affected the right to a hearing under the same circumstances as in drug forfeiture cases and other rights, prior to forfeiture occurring. RCW 9.46.231 governs forfeitures associated with gambling laws, requiring notice within 15 days of the seizure to any with a known right or interest, the right to a hearing, the right to removal in certain cases, the right to appeal, and the concomitant right of the state and agency to reap financial benefits from selling the items seized, in various iterations. And CrR 2.3(e) governs property seized with a warrant supported by probable cause and issued by a judge which requires serving the person when the item is seized with a written inventory and information on how to get their property back if they believe their property was improperly seized under the warrant. But that rule is limited to items deemed "(1) evidence of a crime; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears to be committed[.]"

None of these statutes or rules provides any authority for a sentencing court in a criminal case to order forfeiture of the property of a defendant in evidence, based solely upon his criminal conviction, without at least a modicum of proof that the property was somehow involved in or the fruits of criminal activity. Nor do they authorize such a forfeiture without any of the process which is constitutionally due before the government may seize the property of a man, or without following the requirements the Legislature set on such seizures.

Thus, in Alaway, when the state failed to commence a statutory forfeiture proceeding under any statute but argued on appeal that the trial

court had inherent authority to order forfeiture of seized property under CrR 2.3(e), this Court disagreed. 64 Wn. App. at 797. The property involved included "a substantial amount of equipment and personal property," such as photos, saws, etc., which the state alleged was used in a marijuana "grow" operation for which Alaway was convicted. 64 Wn. App. at 797. After sentencing, the prosecution moved in court for an order forfeiting the property to the sheriff, but Alaway objected, asking for his property back. Id.

At the trial court, the prosecution argued that the court had "inherent power to order how property used in criminal activity should be disposed of," although conceding that it had not followed the statutory requirements of the forfeiture statute it claimed applied. Id. The trial court agreed with that theory, and entered an order of forfeiture for most of the property. Alaway, 64 Wn. App. at 798.

On appeal, this Court rejected that idea. Id. Noting that it was possible the evidence was used in a grow operation and thus it might be "derivative contraband," the Court nevertheless found that a defendant is not automatically divested of his property interests in something which is not clearly contraband but rather used to create contraband, simply by means of conviction. Alaway, 64 Wn. App. at 799. Instead, this Court declared, "the State cannot confiscate" a citizen's property "merely because it is derivative contraband, but instead must forfeit it using proper forfeiture procedures." Id.

Further, this Court was clear that the theory that trial courts have "inherent authority" to order forfeiture was simply wrong. "Every

jurisdiction that has considered the question has held that the power to order forfeiture is purely statutory," this Court said plainly, citing multiple cases from many jurisdictions. 64 Wn. App. at 800. Further, this Court noted "[s]cholarly authorities also establish that the United States has never had a common law of forfeiture, and that since colonial times, forfeiture in this country has existed only by virtue of statute." Id.

Put bluntly, this Court declared, "[i]n sum, there is **no authority anywhere** for the State's contention that the court had the inherent power to order forfeiture of Alaway's property because he used it in his marijuana growing operation." Alaway, 64 Wn. App. at 801 (emphasis added). Because the authority was wholly statutory, this Court held, and because the prosecution failed to comply with the requirements of the relevant forfeiture statute, the forfeiture was improper and the defendant entitled to have his property returned. Id.

Thus, there can be no question that forfeiture proceedings must be pursued through the proper means of an authorizing statute, not simply ordered off-the-cuff as part of a criminal conviction. And indeed, to the extent that the court assumed it had authority to order the forfeiture based upon the criminal conviction, that assumption runs directly afoul of the law.

RCW 9.92.110 specifically abolished the doctrine of forfeiture by conviction. That statute provides, in relevant part, "[a] conviction of [a] crime shall not work a forfeiture of any property, real or personal, or of any right or interest therein." Instead, before property can be taken away from someone by the government, there must be statutory authority for

that forfeiture and the statutory requirements for such forfeitures must be followed. That authority was not followed here and the blanket order that McWilliams forfeit all property in evidence was imposed without authority should be stricken.

This Court should also strike the improper conditions of the sentence and of community custody, which the sentencing court imposed without statutory authority, in violation of its own duties, and in a way which runs afoul of the doctrine of separation of powers.

In the section of the judgment and sentence regarding property and forfeiture, someone wrote in the following: "[c]onditions per DOC; CCO[.]" CP 334. A "box" was checked next to another condition, which was completed in handwriting so it read as follows: "comply with the following crime-related prohibitions: per DOC/CCO per Appendix F." CP 336. And Appendix F provided, in relevant part, that "[t]he Court may also order any of the following special conditions: x (VII) Other: Per DOC; CCO." CP 341.

None of these conditions were statutorily authorized, and all of them were improper.

At the outset, again the trial court's ruling was unclear. The court not only repeatedly delegated to DOC and the CCO the ability to impose "conditions;" it also ordered that McWilliams must "abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706[.]" CP 336.

To the extent the broad requirement of following "crime-related prohibitions: per DOC/CCO," "special conditions. Per DOC; CCO" and

all other "[c]onditions per DOC/CCO" may be deemed to be modified by the limits of the statutory requirements of RCW 9.94A.704 and RCW 9.94A.706, the language of the judgment and sentence is not clear. If that was indeed the court's intent, this Court should reverse and remand with orders for the lower court to so indicate, so that DOC is put on clear notice that it must follow the procedures set forth in those statutes before imposing additional conditions.

But even such language would be insufficient to remedy the error of the court delegating to DOC the authority to decide and impose "crime-related prohibitions," because RCW 9.94A.704 and RCW 9.94A.706 do not authorize such authority. RCW 9.94A.706 has to do with firearms, and RCW 9.94A.704 only authorizes DOC to impose conditions requiring participation in rehabilitative programs or other "affirmative conduct," unless the condition is based upon an assessed risk to community safety. RCW 9.94A.704. Thus, even a prohibition condition which is "crime-related" cannot be imposed by DOC under the statute unless there is some evidence tying the prohibition to community safety.

Further, to the extent the court was simply delegating to DOC its authority to impose conditions of the sentence outside of that statutory scheme, that delegation was wholly improper. The sentencing court is prohibited from delegating its authority to DOC in a way which "abdicates its judicial responsibility" for setting the terms of community custody. See State v. Sansone, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005); see State v. Autrey, 136 Wn. App. 460, 466, 150 P.3d 580 (2006). Such improper delegation runs afoul of the constitutional mandate of the separation of

powers. See Sansone, 127 Wn. App. at 638.

Notably, our appellate courts have had to repeatedly address the scope of what is "crime-related" or statutorily authorized even when conditions are imposed by learned judges, because of overreaching and imposition of improper conditions. See, e.g., Zimmer, 146 Wn. App. at 413 (striking down condition as not authorized).

The sentencing court erred in ordering forfeiture and conditions without statutory authority, as well as in apparently delegating its authority to DOC. Even if this Court does not reverse and remand for a new trial, it should grant Mr. McWilliams relief from the improper provisions of the judgment and sentence.

## E. CONCLUSION

This Court should reverse and remand for a new trial, at which the prosecution should be precluded from bolstering its crucial witness. In the alternative, the improper forfeiture and other conditions should be stricken.

DATED this 17th day of February, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING AND MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at the Pierce County Prosecutor's office via portal upload this date and to Mr. Brandon McWilliams, DOC 892937, Coyote Ridge CC, P.O. Box 769, Connell, WA. 99326.

DATED this 17th day of February, 2012.

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