No. 44175-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY CONOVER,

Appellant.

BRIEF OF RESPONDENT

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2. The trial court properly used WPIC 4.01 with the abiding belief language.

3. The State concedes error under *Hunley*, as it did not prove the prior convictions, nor did Appellant affirmatively acknowledge them.

4. School zone enhancements are required by statute to run consecutive to one another and each other.

5. The "three or more transactions aggravator" was appropriately used in this case.

6. There was sufficient evidence to support the jury's finding of "major violation of the Uniform Controlled Substances Act" for quantities substantially larger than for personal use.

II. STATEMENT OF THE CASE

The Respondent generally accepts the Appellant's recitation of the facts.

III. ARGUMENT

A. THERE WAS NO PUBLIC TRIAL RIGHT VIOLATION

There was no public trial right violation. A public trial right violation occurs when there is a closure of the courtroom and the trial court does not consider the *Bone-Club* factors. *State v. Brightman*, 155 Wn.2d 506, 515(2005). Because there was no specific attempt to

close the courtroom for any of the proceedings, there can be no public trial right violation.

There was no "closure" of the courtroom. The Washington State Supreme Court declared that "a '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). No closure occurred in this case because the courtroom was never purposefully closed to spectators.

The record shows there was no purposeful closure of the courtroom. The situation only occurred because a bailiff inadvertently forgot to unlock the courtroom doors. The court never intended to exclude any member of the public. 2 CP 178. The doors were locked for approximately 27 minutes. 2 CP 177. The doors had been locked over the lunch-hour to secure electronics in the courtroom. 2 CP 178. There was no sign or announcement suggesting that the door was locked. 2 CP 178. As soon as the error was discovered as to the locked doors, the one person who had tried to enter the courtroom was allowed to enter. 2 CP 178. Without any evidence of a member of the public being excluded, or an order from the court closing the courtroom, there is no evidence of a closure. The facts here simply do not amount to a "closure" for purposes of the public trial right.

No court in the State of Washington has held that anything even approaching these facts was a closure that warranted reversal. Every case cited by the Appellant is based on a purposeful closure of the courtroom. The Washington State Supreme Court has recognized, in *State v. Brightman,* that there are some cases involving brief and inadvertent closures that do not necessarily implicate or violate the public trial right. 155 Wn.2d at 517, *citing Peterson v. Williams*, 85 F.3d 39, 42-43 (2nd Cir. 1996) (Short inadvertent closure not a violation) *and U.S. v. Al-Smadi*, 15 F.3d 153, 154-55 (10th Cir. 1994)(trial ran 20 minutes after courthouse door locked and defendant's family excluded, not a violation), *and Snyder v. Coiner*, 510 F.2d 224, 230 (4th Cir. 1975)(bailiff's decision to deny people from entering or leaving courtroom during argument for a short time and corrected quickly by the judge not a violation).

It IS relevant whether the closure was intentional or inadvertent, in spite of the Appellant's citation to *Walton v. Briley*. In that case, the trial court held the first two portions of the jury trial were held in the late evening, after the courthouse had been closed and locked for the night. *Walton v. Briley*, 361 F.3d 431, 432 (7th Cir. 2004). Interested parties were prevented from entering the courtroom on three separate occasions. *Id.* The specific decision by the judge as to the timing of trying the case led to a *de facto* closure, since the decision directly resulted in the exclusion of the public.

Moreover, exclusion was an obvious and likely result. Even that court, however, acknowledged that different circumstances could lead to different results, distinguishing a 10th circuit case on the fact that the trial there began during normal hours and ran late, as opposed to the trial in *Walton*, which only began after the courthouse had closed for the night. *Id.* at 433, *citing Al-Smadi*, 15 F.3d at 154. So, even the court that said it is constitutionally irrelevant whether the closure was intentional, acknowledged the difference between an intentional act that precluded the public, and an inadvertent closure.

There was no purposeful closure of the courtroom, so there can be no public trial violation. Moreover, the only person who tried to enter the courtroom during the time of the inadvertent closure was immediately allowed to enter. No person of the public was actually excluded from the proceedings. Reversal is not required and is absolutely not warranted.

B. THE REASONABLE DOUBT INSTRUCTION IN THIS CASE WAS LAWFUL AND APPROPRIATE

The reasonable doubt instruction given in this case was lawful and appropriate, there was no error. The particular language in question, the "abiding belief" statement at the end of WPIC 4.01, has been vetted by the Washington State Supreme Court. It is not error to include the bracketed text containing the abiding belief language. *State v. Pirtle*, 127 Wn.2d 628, 658 (1995). The inclusion of such language in this case was not error.

The Appellant's argument for reversal based on the instruction requires this court to find that the abiding belief language amounts to an improper instruction on reasonable doubt. *Pirtle* made clear that the abiding belief language was not improper. *Id.* Thus, reversal is not warranted.

Reversal is not the appropriate remedy. Given the previous statements by the Supreme Court regarding the challenged portion of the instruction, this court should not reverse the trial court and vacate the conviction. If anything is to be done regarding the instruction, this court should follow the lead of the *Bennett* court and declare that further use of the instruction is no longer advised, but give deference to the ruling of the Court in *Pirtle* that it was not error to use the language and uphold the conviction. *State v. Bennett*, 161 Wn.2d 303 (2007).

C. THE SCHOOL BUS ENHANCEMENTS WERE PROPERLY RUN CONSECUTIVE TO ONE ANOTHER

The point of statutory construction, and the court's overall objective, is to determine the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9 (2002). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id.* at 9-10. Such "plain meaning" is determined by looking to the ordinary meaning of the statute, as well as the context of the statute, related provisions and the statutory scheme as a whole. *Wash. Pub. Ports Ass'n v. Dep't of*

Revenue, 148 Wn.2d 637, 645 (2003). If there is still room for more than one meaningful interpretation, the statute is ambiguous. *Id.* If ambiguous, the court would apply the rule of lenity and apply the statute in favor of the defendant. *In re PRP of Charles*, 135 Wn.2d 239, 249 (1998). The rule of lenity, however, only applies when there is no significant evidence of contrary legislative intent. *Id.* There is evidence that the legislature intended consecutive application of all enhancements under RCW 9.94A.533(6).

The legislature intended school zone enhancements to run consecutive to all other sentencing provisions, as well as one another. The evidence of legislative intent is shown by the legislature's response to *State v. Jacobs*, 154 Wn.2d 596 (2005). The Court in that case, interpreted former RCW 9.94A.310(6), which read "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.605". *Id.* at 601-02. Petitioners had been sentenced to two enhancements under then RCW 9.94A.310(6), the bus stop enhancement (RCW 69.50.435) and the enhancement for manufacturing methamphetamine with someone under the age of 18 present (then RCW 9.94A.605). *Id.* at 600. Both enhancements applied to a single count of unlawful manufacture of methamphetamine. *Id.* After substantial analysis, the Court found that former RCW 9.94A.310(6) was ambiguous as to whether or not it

intended for the enhancements to run consecutive to one another and applied the rule of lenity. *Id.* at 604. The following year, the legislature amended the statute adding language meant to clear up the ambiguity.

In response to *Jacobs*, the legislature amended RCW 9.94A.533(6) in 2006, adding a sentence, "All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter." Looking to the House Bill Report governing the change to the statute, it is clear that the intent of the change was to ensure all such enhancements under that provision run consecutive to each other and everything else. The House Bill report noted that in *Jacobs*, "the defendants challenged the statutory language regarding the sentence enhancements for violations of the UCSA on the grounds that they believed multiple sentence enhancements should be applied concurrently instead of consecutively. The courts concluded that the statutory language appeared ambiguous and as a result, under the rule of lenity, it was ruled that sentencing courts should apply multiple sentencing enhancements concurrently to each other." H.B. REP.. on Second Substitute H.B. 6239, 59th Leg., Reg. Sess., at 7, 13-14 (2006). Though the legislature put the wrong citation in the House Bill Report (citing the Court of Appeals case that had actually upheld the application of consecutive sentences), the remarks clearly

and accurately describe the Court's decision in *Jacobs*. This reference is contained in a number of different bill reports. ENGROSSED SECOND SUBSTITUTE on Final Bill Report S.B. 6239, 59th Leg., Reg. Sess., at 4 (Wash.2006); ENGROSSED SECOND SUBSTITUTE S.B. 6239, 59th Leg., Reg. Sess., at 2, 5 (Wash.2006); H.B. REP.. on Second Substitute H.B. 6239, 59th Leg., Reg. Sess., at 7, 13–14 (2006). There is clear notice of the intent of the legislature.

The Appellant's argument regarding the legislature's failure to add the specific language suggesting that multiple enhancements applied under the same statute should run consecutive to one another wilts in light of the legislative intent show by the specific reference to *Jacobs*. Remember, in *Jacobs*, the Court ruled on whether two enhancements, BOTH from RCW 9.94A.533(6) could be run consecutive to one another. The intent of the legislature is clear. Enhancements applied under RCW 9.94A.533(6) must be run consecutive to **any** other sentencing provision, including other enhancements applied under that section.

Because there is clear evidence of legislative intent, the rule of lenity does not apply. This court should deny the appellant's motion to vacate the school zone enhancements.

D. THE THREE SEPARATE TRANSACTIONS AGGRAVATOR APPLIED TO THIS CASE

The three or more transaction aggravator, as a basis for finding a major violation of the controlled substances statute, was

appropriately applied in this case. In *State v. Reynolds*, this court interpreted then RCW 9.94A.390(2)(d)(i), since recodified as RCW 9.94A.535(3)(e), to apply when there were three separate transactions involved in a case. *State v. Reynolds*, 80 Wn.App. 851, 856, 912 P.2d 494 (1996). The court determined the aggravator did not apply because only two of the three deliveries involved an actual controlled substance. *Id.* There was no charge of Leading Organize Crime, or Conspiracy, or other "offense" that might possible include three separate transactions involving drugs. Rather, the court looked at the case as a whole and determined that the aggravator could apply so long as there were three separate transactions. This interpretation of the statute is logical, appropriate, and should continue to be applied. As such, the aggravator did in fact apply in this case.

E. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE SUBSTANTIALLY LARGER THAN FOR PERSONAL USE AGGRAVATOR

There was sufficient evidence to support the jury verdict regarding the aggravator for quantities substantially larger than for personal use. The standard of review for a challenge to the sufficiency of the evidence is 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 crime beyond a reasonable doubt." *State v. Randhawa*, 133 Wn.2d 67, 74, 941 P.2d 661 (1997), *citing State v. Green*, 95 Wn.2d 216, 221, 616 P.2d 628 (1980). When the Appellant

challenges the sufficiency of the evidence, they admit "the truth of the State's evidence and all inferences that can reasonably be drawn from that evidence." *State v. Gentry*, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). This is an intentionally generous standard, emphasizing that deference that should be shown to a jury verdict.

The amounts at issue in this case were approximately quarter-ounces. Detective Hanson testified that in his experience one quarter-ounce of heroin was larger than ordinarily expected for personal use. 1 CP 38. He stated that such an amount would typically get broken down and sold to the end user in "points." 1 CP 38. He indicated that individuals could sell these points for between $25 and $50 a point. 1 CP 38. Detective Hanson also testified that an ounce of heroin typically weighs between 25 and 28 grams, depending on the nature of the heroin. 1 CP 37. This means that a quarter-ounce, in the light most favorable to the State, would be approximately 7 grams. Detective Hanson testified that a "point" was typically $1/10^{th}$ of a gram. 1 CP 37. This means that the once purchase from Appellant could have yielded up to 70 individual doses of heroin. Even assuming someone had a $100 a day heroin habit, the quarter-ounce would amount to 17.5 days of heroin use. Hanson further explained that stocking up like that is in unheard of in his experience. 1 CP 38. He testified that heroin users, typically, only purchase what they

might use for the day and that "there's nobody that could use a quarter-ounce in a day." 1 CP 38.

There is nothing unconstitutionally vague about 17.5 days of heroin being substantially larger than for personal use. The jury heard that personal use was up to .4 grams a day. The amount purchased was 17.5 times larger than that amount. Based on the testimony heard by the jury, the informant in this case used $400 to purchase approximately 6-7 grams of heroin in a transaction, which then could be broken into 60-70 points, each worth between $25 and $50 dollars. Taken in the light most favorable to the State, that means that $400 purchase turns into $3,000 to $3,500 when resold on the street. This is sufficient evidence to show "substantially larger than for personal use" and there is nothing vague about it, as applied.

IV. CONCLUSION

The appellant raises a number of issues, but none should compel this court to reverse any of the convictions or enhancements. There was not "closure" for public trial purposes. The reasonable doubt instruction precisely followed WPIC 4.01 and has been vetted by the Washington State Supreme Court, including the abiding belief language. The school bus enhancements in this case were run consecutive to one another by statute and both aggravators were supported by the evidence. This court should uphold the verdicts of

the jury and deny Appellant's motion for a new trial, as well as the motion to vacate the aggravators.

The State does concede error on sentencing and this court should remand the case to the trial court for resentencing, where the State would then prove up the prior convictions as required in *Hunley*.

Respectfully submitted this 30th day of August, 2013 .

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APPENDIX

RCW 69.50.435

(1) Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana to a person:

(a) In a school;

(b) On a school bus;

(c) Within one thousand feet of a school bus route stop designated by the school district;

(d) Within one thousand feet of the perimeter of the school grounds;

(e) In a public park;

(f) In a public housing project designated by a local governing authority as a drug-free zone;

(g) On a public transit vehicle;

(h) In a public transit stop shelter;

(i) At a civic center designated as a drug-free zone by the local governing authority; or

(j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand foot perimeter

may be punished by a fine of up to twice the fine otherwise authorized by this chapter, but not including twice the fine authorized by RCW 69.50.406, or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter, but not including twice the imprisonment authorized by RCW 69.50.406, or by both such fine and imprisonment. The provisions of this section shall not operate to more than double the fine or imprisonment otherwise authorized by this chapter for an offense.

(2) It is not a defense to a prosecution for a violation of this section that the person was unaware that the prohibited conduct took place while in a school or school bus or within one thousand feet of the school or school bus route stop, in a public park, in a public housing project designated by a local governing authority as a drug-free zone, on a public transit vehicle, in a public transit stop shelter, at a civic center designated as a drug-free zone by the local governing authority, or within one thousand feet of the perimeter of a facility designated under subsection (1)(i) of this section, if the local governing authority specifically designates the one thousand foot perimeter.

(3) It is not a defense to a prosecution for a violation of this section or any other prosecution under this chapter that persons under the age of eighteen were not present in the school, the school bus, the public park, the public housing project designated by a local governing authority as a drug-free zone, or the public transit vehicle, or at the school bus route stop, the public transit vehicle stop shelter, at a civic center designated as a drug-free zone by the local governing authority, or within one thousand feet of the perimeter of a facility designated under subsection (1)(i) of this section, if the local governing authority specifically designates the one thousand foot perimeter at the time of the offense or that school was not in session.

(4) It is an affirmative defense to a prosecution for a violation of this section that the prohibited conduct took place entirely within a private residence, that no person under eighteen years of age or younger was present in such private residence at any time during the commission of the offense, and that the prohibited conduct did not involve delivering, manufacturing, selling, or possessing with the intent to manufacture, sell, or deliver any controlled substance in RCW 69.50.401 for profit. The affirmative defense established in this section shall be proved by the defendant by a preponderance of the evidence. This section shall not be construed to establish an affirmative defense with respect to a prosecution for an offense defined in any other section of this chapter.

(5) In a prosecution under this section, a map produced or reproduced by any municipality, school district, county, transit authority engineer, or public housing authority for the purpose of depicting the location and boundaries of the area on or within one thousand feet of any property used for a school, school bus route stop, public park, public housing project designated by a local governing authority as a drug-free zone, public transit vehicle stop shelter, or a civic center designated as a drug-free zone by a local governing authority, or a true copy of such a map, shall under proper

authentication, be admissible and shall constitute prima facie evidence of the location and boundaries of those areas if the governing body of the municipality, school district, county, or transit authority has adopted a resolution or ordinance approving the map as the official location and record of the location and boundaries of the area on or within one thousand feet of the school, school bus route stop, public park, public housing project designated by a local governing authority as a drug-free zone, public transit vehicle stop shelter, or civic center designated as a drug-free zone by a local governing authority. Any map approved under this section or a true copy of the map shall be filed with the clerk of the municipality or county, and shall be maintained as an official record of the municipality or county. This section shall not be construed as precluding the prosecution from introducing or relying upon any other evidence or testimony to establish any element of the offense. This section shall not be construed as precluding the use or admissibility of any map or diagram other than the one which has been approved by the governing body of a municipality, school district, county, transit authority, or public housing authority if the map or diagram is otherwise admissible under court rule.

(6) As used in this section the following terms have the meanings indicated unless the context clearly requires otherwise:

(a) "School" has the meaning under RCW 28A.150.010 or 28A.150.020. The term "school" also includes a private school approved under RCW 28A.195.010;

(b) "School bus" means a school bus as defined by the superintendent of public instruction by rule which is owned and operated by any school district and all school buses which are privately owned and operated under contract or otherwise with any school district in the state for the transportation of students. The term does not include buses operated by common carriers in the urban transportation of students such as transportation of students through a municipal transportation system;

(c) "School bus route stop" means a school bus stop as designated by a school district;

(d) "Public park" means land, including any facilities or improvements on the land, that is operated as a park by the state or a local government;

(e) "Public transit vehicle" means any motor vehicle, streetcar, train, trolley vehicle, or any other device, vessel, or vehicle which is

owned or operated by a transit authority and which is used for the purpose of carrying passengers on a regular schedule;

(f) "Transit authority" means a city, county, or state transportation system, transportation authority, public transportation benefit area, public transit authority, or metropolitan municipal corporation within the state that operates public transit vehicles;

(g) "Stop shelter" means a passenger shelter designated by a transit authority;

(h) "Civic center" means a publicly owned or publicly operated place or facility used for recreational, educational, or cultural activities;

(i) "Public housing project" means the same as "housing project" as defined in RCW 35.82.020.

RCW 9.94A.535

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

(1) Mitigating Circumstances - Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(i) The defendant was making a good faith effort to obtain or provide medical assistance for someone who is experiencing a drug-related overdose.

(j) The current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse.

(2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances - Considered by a Jury -Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement

officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

(z)(i)(A) The current offense is theft in the first degree, theft in the second degree, possession of stolen property in the first degree, or possession of stolen property in the second degree; (B) the stolen property involved is metal property; and (C) the property damage to the victim caused in the course of the theft of metal property is more than three times the value of the stolen metal property, or the theft of the metal property creates a public hazard.

(ii) For purposes of this subsection, "metal property" means commercial metal property, private metal property, or nonferrous metal property, as defined in RCW 19.290.010.

(aa) The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.

(bb) The current offense involved paying to view, over the internet in violation of RCW 9.68A.075, depictions of a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (g).

(cc) The offense was intentionally committed because the defendant perceived the victim to be homeless, as defined in RCW 9.94A.030.

RCW 9.94A.533

(1) The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.

(2) For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the standard sentence range is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by seventy-five percent.

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Eighteen months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or

subsection (4)(a), (b), and/or (c) of this section, or both, all firearm enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) 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. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(3);

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(4) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the deadly weapon enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a deadly weapon enhancement. If the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any deadly weapon enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Two years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) One year for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Six months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced under (a), (b), and/or (c) of this subsection for any deadly weapon enhancements and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (3)(a), (b), and/or (c) of this section, or both, all deadly weapon enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all deadly weapon 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. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(3);

(f) The deadly weapon enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a deadly weapon enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(5) The following additional times shall be added to the standard sentence range if the offender or an accomplice committed the offense while in a county jail or state correctional facility and the offender is

being sentenced for one of the crimes listed in this subsection. If the offender or an accomplice committed one of the crimes listed in this subsection while in a county jail or state correctional facility, and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section:

(a) Eighteen months for offenses committed under RCW 69.50.401(2) (a) or (b) or 69.50.410;

(b) Fifteen months for offenses committed under RCW 69.50.401(2) (c), (d), or (e);

(c) Twelve months for offenses committed under RCW 69.50.4013.

For the purposes of this subsection, all of the real property of a state correctional facility or county jail shall be deemed to be part of that facility or county jail.

(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 or 9.94A.827. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

(7) An additional two years shall be added to the standard sentence range for vehicular homicide committed while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502 for each prior offense as defined in RCW 46.61.5055. All enhancements under this subsection shall be mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions.

(8)(a) The following additional times shall be added to the standard sentence range for felony crimes committed on or after July 1, 2006, if the offense was committed with sexual motivation, as that term is defined in RCW 9.94A.030. If the offender is being sentenced for more than one offense, the sexual motivation enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to a sexual motivation enhancement. If the offender committed the offense with sexual motivation and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW, the following additional times shall be added to the standard sentence range determined under

subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(i) Two years for any felony defined under the law as a class A felony or with a statutory maximum sentence of at least twenty years, or both;

(ii) Eighteen months for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both;

(iii) One year for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both;

(iv) If the offender is being sentenced for any sexual motivation enhancements under (i), (ii), and/or (iii) of this subsection and the offender has previously been sentenced for any sexual motivation enhancements on or after July 1, 2006, under (i), (ii), and/or (iii) of this subsection, all sexual motivation enhancements under this subsection shall be twice the amount of the enhancement listed;

(b) Notwithstanding any other provision of law, all sexual motivation enhancements under this subsection are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other sexual motivation enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(3);

(c) The sexual motivation enhancements in this subsection apply to all felony crimes;

(d) If the standard sentence range under this subsection exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a sexual motivation enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced;

(e) The portion of the total confinement sentence which the offender must serve under this subsection shall be calculated before any earned early release time is credited to the offender;

(f) Nothing in this subsection prevents a sentencing court from imposing a sentence outside the standard sentence range pursuant to RCW 9.94A.535.

(9) An additional one-year enhancement shall be added to the standard sentence range for the felony crimes of RCW 9A.44.073, 9A.44.076, 9A.44.079, 9A.44.083, 9A.44.086, or 9A.44.089 committed on or after July 22, 2007, if the offender engaged, agreed, or offered to engage the victim in the sexual conduct in return for a fee. If the offender is being sentenced for more than one offense, the one-year enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to the enhancement. If the offender is being sentenced for an anticipatory offense for the felony crimes of RCW 9A.44.073, 9A.44.076, 9A.44.079, 9A.44.083, 9A.44.086, or 9A.44.089, and the offender attempted, solicited another, or conspired to engage, agree, or offer to engage the victim in the sexual conduct in return for a fee, an additional one-year enhancement shall be added to the standard sentence range determined under subsection (2) of this section. For purposes of this subsection, "sexual conduct" means sexual intercourse or sexual contact, both as defined in chapter 9A.44 RCW.

(10)(a) For a person age eighteen or older convicted of any criminal street gang-related felony offense for which the person compensated, threatened, or solicited a minor in order to involve the minor in the commission of the felony offense, the standard sentence range is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by one hundred twenty-five percent. If the standard sentence range under this subsection exceeds the statutory maximum sentence for the offense, the statutory maximum sentence is the presumptive sentence unless the offender is a persistent offender.

(b) This subsection does not apply to any criminal street gang-related felony offense for which involving a minor in the commission of the felony offense is an element of the offense.

(c) The increased penalty specified in (a) of this subsection is unavailable in the event that the prosecution gives notice that it will seek an exceptional sentence based on an aggravating factor under RCW 9.94A.535.

(11) An additional twelve months and one day shall be added to the standard sentence range for a conviction of attempting to elude a police vehicle as defined by RCW 46.61.024, if the conviction included

a finding by special allegation of endangering one or more persons under RCW 9.94A.834.

(12) An additional twelve months shall be added to the standard sentence range for an offense that is also a violation of RCW 9.94A.831.

(13) An additional twelve months shall be added to the standard sentence range for vehicular homicide committed while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.520 or for vehicular assault committed while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.522, or for any felony driving under the influence (RCW 46.61.502(6)) or felony physical control under the influence (RCW 46.61.504(6)) for each child passenger under the age of sixteen who is an occupant in the defendant's vehicle. These enhancements shall be mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions. If the addition of a minor child enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

CERTIFICATE OF SERVICE

Crystal Iverson, certifies that opposing counsel was served electronically via the Division II portal:

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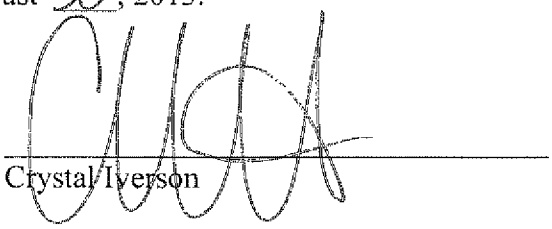
I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on August 30, 2013.



Crystal Iverson

COWLITZ COUNTY PROSECUTOR

August 30, 2013 - 3:37 PM

Transmittal Letter

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Case Name: st. of washington vs. timothy conover

Court of Appeals Case Number: 44175-6

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

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Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

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Petition for Review (PRV)

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