

61722-2

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NO. 61722-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ELI PINEDA-PINEDA,

Appellant.

FILED
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STATE OF WASHINGTON
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REPLY BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION1

II. THE STATE ERRS IN CLAIMING THAT *SILVA-BALTAZAR* ALREADY DECIDED WHETHER A DEFENDANT IS STRICTLY LIABLE FOR AN ACCOMPLICE’S DRUG CRIME IN A SCHOOL ZONE – WHEN THE DEFENDANT HIMSELF DOES NOT ENTER THAT SCHOOL ZONE.....3

III. THE STATE ERRS IN CONTENDING THAT RCW 69.50.407 HAS NO SUBSTANTIAL STEP ELEMENT; DESPITE THE ABSENCE OF SUCH LANGUAGE IN THE STATUTE, IT IS INTERPRETED IN TANDEM WITH RCW 9A.28.040 WHICH DOES CONTAIN “SUBSTANTIAL STEP” LANGUAGE8

IV. THE STATE ARGUES THAT OTHER COURTS HOLD THAT A PERSON CAN BE CONVICTED OF BEING AN ACCOMPLICE TO CONSPIRACY, BUT CITES NO CONTROLLING WASHINGTON AUTHORITY; INSTEAD, CONTROLLING WASHINGTON AUTHORITY HOLDS THAT THE CONSPIRACY STATUTE IS TO BE NARROWLY CONSTRUED11

V. THE STATE ERRS IN CLAIMING THAT SCHOOL BUS STOPS ARE READILY DISCERNIBLE WHEN THEY ARE CHANGED FROM TIME TO TIME BASED ON THE AGE OF THE SCHOOLCHILD AND CONSIST OF NOTHING MORE THAN A STOP AT THE FOOT OF THE CHILD’S RURAL DRIVEWAY13

VI. CONCLUSION.....14

TABLE OF AUTHORITIES

STATE CASES

<i>State v. Becker</i> , 132 Wn.2d 54, 935 P.2d 1321 (1997).....	13
<i>State v. Bobic</i> , 140 Wn.2d 250, 996 P.2d 610 (2000).....	8
<i>State v. Casarez-Gastelum</i> , 48 Wn. App. 112, 738 P.2d 303 (1987)	9, 10
<i>State v. Coria</i> , 120 Wn.2d 156, 839 P.2d 890 (1992).....	13
<i>State v. Dent</i> , 123 Wn.2d 467, 869 P.2d 392 (1994)	8
<i>State v. Hawthorne</i> , 48 Wn. App. 23, 737 P.2d 717 (1987)	9, 10
<i>State v. Lively</i> , 130 Wn.2d 1, 921 P.2d 1035 (1996)	8
<i>State v. Lynn</i> , 67 Wn. App. 339, 835 P.2d 251 (1992)	2, 10, 11
<i>State v. Moavenzadeh</i> , 135 Wn.2d 359, 956 P.2d 1097 (1998).....	8
<i>State v. Neher</i> , 112 Wn.2d 347, 771 P.2d 330 (1989)	7
<i>State v. Pacheco</i> , 125 Wn.2d 150, 882 P.2d 183 (1994)	2, 9, 11
<i>State v. Silva-Baltazar</i> , 125 Wn.2d 472, 886 P.2d 138 (1994).....	1, 3, 4, 5
<i>State v. Stein</i> , 144 Wn.2d 236, 27 P.3d 184 (2001).....	12, 13

FEDERAL CASES

<i>Pinkerton v. United States</i> , 328 U.S. 640, 660 S. Ct. 1180, 90 L.Ed. 1489 (1946).....	12
<i>Ratzlaf v. United States</i> , 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed. 2d 615 (1994).....	8

STATE STATUTES

RCW 9A.04.010(2).....10
RCW 9A.28.020(2).....11
RCW 9A.28.040..... *passim*
RCW 69.50.407 *passim*
RCW 69.50.4355

I. INTRODUCTION

The state argues that *Silva-Baltazar*¹ already decided that a defendant is strictly liable for an accomplice's drug crime in a school zone. The state errs. *Silva-Baltazar* left that precise question open. It is no answer to say that the school zone enhancement requires no *mens rea*; the main question is whether it requires the *actus reus* of the defendant's own presence. It is no answer to say that the school zone enhancement applies to principals; the question is whether it applies to principals who do not themselves enter the school zone. It is no answer to say that Mr. Pineda was in a different school zone before the drug transaction in Count II occurred; the school zone enhancement does not apply unless the defendant was in the school zone during the crime itself rather than during preliminary visiting. Finally, it is no answer to say that the school zone enhancement statute should be liberally construed in favor of its punitive purpose; the rule of construction that actually applies is that the enhancement must be strictly construed against the state and in the defendant's favor under the rule of lenity. Section II.

The Opening Brief explained that a "substantial step" was an element of conspiracy, and that both the Information and jury instructions omitted that step. The state responds that "substantial step" is an element

¹ *State v. Silva-Baltazar*, 125 Wn.2d 472, 886 P.2d 138 (1994).

of conspiracy under RCW 9A.28.040, not an element of conspiracy under RCW 69.50.407, citing a pair of 1987 appellate court decisions. More recent, controlling, authority, however, holds that those two statutes should be interpreted in tandem, despite differences in language, most notably *State v. Pacheco*, 125 Wn.2d 150, 153 n.1, 159, 882 P.2d 183 (1994) and *State v. Lynn*, 67 Wn. App. 339, 349, 835 P.2d 251 (1992).
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The state further argues that the school bus stops in this case were readily discernible, even from watching where children stood. The state does not explain how this could be true, given that the uncontradicted evidence showed that the school bus stops changed from time to time, based on the age of the schoolchild, and that they were no more than directives to stop at the foot of a child's rural driveway. In fact, the state does not explain how this could be true of the school zone enhancement charged with regard to the May 4, 2007, transaction, in particular, given that Ms. McCormick, the school bus dispatcher, testified that the Dogwood Lane stop which was the site of that transaction was a "fairly new" stop on a new road. Section V.

II. THE STATE ERRS IN CLAIMING THAT *SILVA-BALTAZAR* ALREADY DECIDED WHETHER A DEFENDANT IS STRICTLY LIABLE FOR AN ACCOMPLICE'S DRUG CRIME IN A SCHOOL ZONE – WHEN THE DEFENDANT HIMSELF DOES NOT ENTER THAT SCHOOL ZONE

The Opening Brief argued that there is no statutory authority for imposing strict liability on a defendant for an accomplice's or co-conspirator's drug crime in a school zone, when the defendant himself does not enter that school zone. Opening Brief, pp. 12-28.

The state responds that the “school zone enhancement under RCW 69.50.435 is a strict liability crime and knowledge of the school zone is irrelevant.” Response, pp. 10-11.

That may be true, but it is irrelevant. The Opening Brief did not principally argue about *mens rea*, but about presence. With regard to the enhancement alleged in Count II, that brief explained that the state failed to prove that Mr. Pineda entered the school zone in which the drug sale occurred during that sale.

The state appears to concede that it failed to prove that Mr. Pineda actually entered that school zone, but claims, instead, that Mr. Pineda was the principal and that the women who entered the school zone were his accomplices. Opening Brief, pp. 12-13.

Once again, that is irrelevant. If the school zone enhancement applies only to those who actually enter the school zone, it is not relevant whether Mr. Pineda acted as an accomplice or a principal. Further, although the state now asserts that Mr. Pineda was the principal, that is not what the state asserted at trial. It submitted an accomplice instruction, provided to the jury as Instruction No. 23, CP:51, which allowed the jury to convict whether Mr. Pineda was the accomplice or the principal. So the jury was not required to answer any special interrogatory or submit any special verdict on who was the accomplice and who was the principal, and it was not required to label Mr. Pineda as the accomplice or principal in order to convict.

Even if this Court in hindsight now concludes that Mr. Pineda was the principal, rather than the accomplice, that is still irrelevant to the imposition of the school zone enhancement. The question posed by the Opening Brief was whether the defendant could be tagged with a school zone enhancement when he personally did not enter the school zone in which the transaction occurred. That remains a question of first impression. The state claims that that question was answered in *State v. Silva-Baltazar*, 125 Wn.2d 472, 480. But in that case, the Court addressed a related question and held that defendants could be held strictly liable for school zone enhancements if they were actually present within the school

zone when the transaction occurred. It left open whether defendants – not just defendants who are characterized as principals rather than accomplices but all defendants – could be held strictly liable for the RCW 69.50.435 school zone enhancement when they are “not within the drug free zone themselves” but “another participant in the crime engages in the specified drug activity within the drug free zone.” In fact, it explicitly used that word “participant” rather than “accomplice,” so it made no distinction between who acted as accomplice and who acted as principal. *Silva-Baltazar*, 125 Wn.2d at 480 (emphasis added).

The Response also argues that Mr. Pineda was in a different school zone – the café – at a different time, before the drug transaction occurred, so he is properly tagged with a school zone enhancement for being in that location. The enhancement, however, can only be applied if the defendant was present in the school zone at the time of the specific drug transaction charged in the Information. As the Court stated in *State v. Silva-Baltazar*, 125 Wn.2d 472, 480, the question left open by that decision was whether defendants can be held liable for the RCW 69.50.435 school zone enhancement when they are “not within the drug free zone themselves” but “another participant in the crime engages in *the specified drug activity* within the drug free zone.” (Emphasis added.) The “specified drug activity” listed in Count II is “the above-named Defendant did knowingly

deliver a controlled substance, to-wit: Cocaine.” The sentence enhancement for Count II charges that the presence in the school zone occurred during “commission” of that crime – not during the occurrence of some other preliminary matter, like meeting at a restaurant. CP:15. Instruction No. 27 similarly asked whether the defendant “*delivered* the controlled substance to a person within one thousand feet of a school bus route stop ...” CP:56 (emphasis added). The Information, instructions, and hence the jury verdict, are thus all based upon the single school bus zone in which “deliver[y]” itself occurred. Not a different zone in which deliveries did not occur. The only evidence of a May 9 delivery is that it occurred when the two women in the blue Cavalier pulled off the shoulder of Avon Allen Road, just north of Bennett Road, not at the Valley Café. 4/22/08 VRP:89-90, 144-5.

Since Mr. Pineda was not present at that location, and since the school bus zone enhancement does not apply to “participants” who are not themselves present in the school zone at the time that the specific crime charged is committed, the school bus zone enhancement on Count II must be vacated.

Any other result – which characterizes the crime as a continuing one that occurs in any school zone through which a defendant might pass on his way to a transaction – would have too many outrageous

consequences. It could allow a defendant who drives to a drug transaction and passes through various school zones on the way to be charged with a variety of school zone enhancements. It could allow a defendant who obtained drugs from a third party who drove through a variety of school zones and then redelivered them to another person to be charged with the principal seller's school zone enhancements. In fact, given that all drugs are transported from one location to another before their ultimate retail sale, it is likely that all drugs pass through a school zone at some point before reaching their ultimate purchaser. If the state's interpretation of the statute were correct – that any school zone that a participant passes through on the way to a transaction can trigger application of the enhancement – nearly every drug crime could be saddled with that enhancement. The statute cannot be interpreted to produce such an absurd result. *State v. Neher*, 112 Wn.2d 347, 351, 771 P.2d 330 (1989).

Finally, the state argues that the “purpose of the school zone enhancements supports holding the defendant accountable when he arranged to sell drugs and sent another to complete the transaction.” Response, p. 14. It advances this interpretation because the purpose of that school zone enhancement statute is to curb drug transactions in areas where there are children. *Id.*

This amounts to an argument in favor of broad construction of the

statute to achieve a punitive purpose. The proper rule of statutory interpretation, however, is that the statute must be interpreted in Mr. Pineda's favor and against the government under the rule of lenity.²

III. THE STATE ERRS IN CONTENDING THAT RCW 69.50.407 HAS NO SUBSTANTIAL STEP ELEMENT; DESPITE THE ABSENCE OF SUCH LANGUAGE IN THE STATUTE, IT IS INTERPRETED IN TANDEM WITH RCW 9A.28.040 WHICH DOES CONTAIN "SUBSTANTIAL STEP" LANGUAGE

The Opening Brief explained that a "substantial step" was an element of conspiracy, and that both the Information and jury instructions omitted that step. The state responds that "substantial step" is an element of conspiracy under RCW 9A.28.040, but that it is not an element of conspiracy under RCW 69.50.407.

The state is certainly correct that a "substantial step" is an element of conspiracy under RCW 9A.28.040. *State v. Bobic*, 140 Wn.2d 250, 996 P.2d 610 (2000); *State v. Moavenzadeh*, 135 Wn.2d 359, 364, 956 P.2d 1097 (1998) (essential elements of a conspiracy are "an agreement to commit a crime and taking a 'substantial step' toward the completion of that agreement."); *State v. Dent*, 123 Wn.2d 467, 476, 869 P.2d 392 (1994).

² *Ratzlaf v. United States*, 510 U.S. 135, 148, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994); *State v. Lively*, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996).

It errs, however, in contending that the drug conspiracy statute is construed differently than the general conspiracy statute. In fact, the Washington Supreme Court has ruled that the two statutes are construed in the same manner. *See State v. Pacheco*, 125 Wn.2d 150, 153 n.1, 159 (construing RCW 9A.28.040's conspiracy crime and RCW 69.50.407's conspiracy crime identically, there, with regard to element that the state must prove that defendant had an agreement with someone other than a police informant).

The state cites not to *Pacheco*, a state Supreme Court decision which interprets the two statutes in an identical manner, but to two Court of Appeals cases decided more than 20 years ago: *State v. Hawthorne*, 48 Wn. App. 23, 737 P.2d 717 (1987), and *State v. Casarez-Gastelum*, 48 Wn. App. 112, 738 P.2d 303 (1987).

Intervening, controlling, authority, however, compels a different result.

In *Pacheco*, 125 Wn.2d 150, the state Supreme Court ruled that the general conspiracy statute and the specific drug conspiracy statute should generally be interpreted in the same manner, despite differences in language. It therefore ruled that it would interpret the "conspiratorial agreement" element of both statutes in the same manner, as follows:

We note at the outset Pacheco was convicted of conspiracy to deliver a controlled substance pursuant to RCW 69.50.407, not the general conspiracy statute, RCW 9A.28.040. The State has not suggested or presented any argument that the requisite conspiracy under RCW 69.50.407 is contrary to or inconsistent with the agreement required under RCW 9A.28.040. *State v. Lynn*, 67 Wn. App. 339, 349, 835 P.2d 251 (1992). Thus, *our construction of the conspiratorial agreement element in RCW 9A.28.040 is applicable to RCW 69.50.407. Lynn*, 67 Wash.App. at 349, 835 P.2d 251.

Pacheco, 125 Wn.2d at 153 n.1 (emphasis added).

The decision in *State v. Lynn*, 67 Wn. App. 339, 349, cited with approval by the state Supreme Court, in turn explains that differences between the language of the two conspiracy statutes do not signal differences in the way they should be construed. In fact, this Court in *Lynn* (post-dating *Hawthorne* and *Casarez-Gastelum*) ruled that any defenses negated by the general statute would also be negated by the specific drug statute, RCW 69.50.407, despite differences in language, because the drug conspiracy/attempt statute essentially incorporated by reference the elements and defenses of the regular conspiracy statute:

We note that Lynn was not charged under the general attempt statute, RCW 9A.28.040, but under RCW 69.50.407. Although the latter statute does not *explicitly* negate an impossibility defense, absence of such language is without significance. RCW 9A.04.010(2) provides in part:

The provisions of this title shall apply to any offense ... which is defined in

this title or the general statutes, unless otherwise expressly provided or unless the context otherwise requires, and shall also apply to any defense to prosecution for such an offense.

Thus, the above-quoted portion of the general attempt statute, RCW 9A.28.020(2), *is applicable to a controlled substance attempt, RCW 69.50.407, since there is nothing to the contrary or inconsistent in the latter statute.*

State v. Lynn, 67 Wn. App. 339, 348-49 (footnotes omitted) (emphasis added).

There is nothing “to the contrary or inconsistent” with the substantial step requirement of RCW 9A.28.040 in RCW 69.50.407, either – despite the absence of “explicit[]” language incorporating such an element. Thus, post-*Pacheco*, the “substantial step” element of RCW 9A.28.040 must be considered just as incorporated into RCW 69.50.407 as was the negation of the impossibility defense in *Lynn*.

IV. THE STATE ARGUES THAT OTHER COURTS HOLD THAT A PERSON CAN BE CONVICTED OF BEING AN ACCOMPLICE TO CONSPIRACY, BUT CITES NO CONTROLLING WASHINGTON AUTHORITY; INSTEAD, CONTROLLING WASHINGTON AUTHORITY HOLDS THAT THE CONSPIRACY STATUTE IS TO BE NARROWLY CONSTRUED

The Opening Brief argued that there is no statutory authority permitting a court to impose criminal liability for being an accomplice to,

rather than a principal in, the inchoate crime of conspiracy. The state responds that other jurisdictions hold that a criminal defendant can be convicted of being an accomplice to conspiracy, so the Washington courts should come to the same conclusion.

In *State v. Stein*, 144 Wn.2d 236, 27 P.3d 184 (2001), however, the Washington Supreme Court made clear that Washington does not necessarily follow other courts in their interpretations of their jurisdictions' conspiracy laws. Instead, under *Stein*, the court must begin with the language of the conspiracy statute (there, the general conspiracy statute). The state Supreme Court in that case ruled that that statute makes all parties to a conspiracy guilty of the conspiracy itself, but it is *silent* about whether all parties to the conspiracy are liable for the substantive crimes committed by co-conspirators. The Court continued that no Washington decision holds a defendant liable on such an attenuated "*Pinkerton*"³ basis.

Following this analysis, the drug conspiracy statute is equally silent about whether one may be convicted of a conspiracy based on complicity with one who is involved in the conspiracy. Further, no

³ *Pinkerton v. United States*, 328 U.S. 640, 660 S.Ct. 1180, 90 L.Ed. 1489 (1946).

Washington case holding a defendant liable as an accomplice to conspiracy has been cited by either party.

Based on *Stein*, and without a clear statutory basis for imposing such an attenuated form of liability for conspiracy, Washington's conspiracy statute should not be extended that far.

V. THE STATE ERRS IN CLAIMING THAT SCHOOL BUS STOPS ARE READILY DISCERNIBLE WHEN THEY ARE CHANGED FROM TIME TO TIME BASED ON THE AGE OF THE SCHOOLCHILD AND CONSIST OF NOTHING MORE THAN A STOP AT THE FOOT OF THE CHILD'S RURAL DRIVEWAY

The state apparently acknowledges that *State v. Becker*, 132 Wn.2d 54, 935 P.2d 1321 (1997), and *State v. Coria*, 120 Wn.2d 156, 164, 839 P.2d 890 (1992), provide the framework for determining whether the due process clause bars enhanced punishment for presence in a school zone when it is debatable whether a person of ordinary intelligence could determine that a school was located there. Response, pp. 15-17. The state asks whether, under these cases, there were "objective means to discover the locations of school bus stops where the information was available on the internet, by contacting the transportation department or dispatcher or by observing schoolchildren?" Response, p. 1.

The answer is that observing schoolchildren would not have provided a definitive answer in this case because the locations of the bus

stops were at the foot of rural driveways and changed from time to time as students moved and grew up. As Ms. McCormick, the school bus dispatcher testified, the Dogwood Lane stop, off Donnelly Road, where the alleged 5/4/07 transaction took place, was a “fairly new” stop on a new road. 4/22/08 VRP:201-2; 4/23/08 VRP:161.

VI. CONCLUSION

For the foregoing reasons, the conspiracy conviction should be reversed and the school zone enhancements should be vacated.

DATED this 3rd day of June, 2009.

Respectfully submitted,



Sheryl Gordon McCloud, WSBA No. 16709
Attorney for Appellant, Eli Pineda-Pineda

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30th day of June, 2009, a copy of the REPLY BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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Mount Vernon, WA 98273-3867

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Once again, that is irrelevant. If the school zone enhancement applies only to those who actually enter the school zone, it is not relevant whether Mr. Pineda acted as an accomplice or a principal. Further, although the state now asserts that Mr. Pineda was the principal, that is not what the state asserted at trial. It submitted an accomplice instruction, provided to the jury as Instruction No. 23, CP:51, which allowed the jury to convict whether Mr. Pineda was the accomplice or the principal. So the jury was not required to answer any special interrogatory or submit any special verdict on who was the accomplice and who was the principal, and it was not required to label Mr. Pineda as the accomplice or principal in order to convict.

Even if this Court in hindsight now concludes that Mr. Pineda was the principal, rather than the accomplice, that is still irrelevant to the imposition of the school zone enhancement. The question posed by the Opening Brief was whether the defendant could be tagged with a school zone enhancement when he personally did not enter the school zone in which the transaction occurred. That remains a question of first impression. The state claims that that question was answered in *State v. Silva-Baltazar*, 125 Wn.2d 472, 480. But in that case, the Court addressed a related question and held that defendants could be held strictly liable for school zone enhancements if they were actually present within the school

zone when the transaction occurred. It left open whether defendants – not just defendants who are characterized as principals rather than accomplices but all defendants – could be held strictly liable for the RCW 69.50.435 school zone enhancement when they are “not within the drug free zone themselves” but “another participant in the crime engages in the specified drug activity within the drug free zone.” In fact, it explicitly used that word “participant” rather than “accomplice,” so it made no distinction between who acted as accomplice and who acted as principal. *Silva-Baltazar*, 125 Wn.2d at 480 (emphasis added).

The Response also argues that Mr. Pineda was in a different school zone – the café – at a different time, before the drug transaction occurred, so he is properly tagged with a school zone enhancement for being in that location. The enhancement, however, can only be applied if the defendant was present in the school zone at the time of the specific drug transaction charged in the Information. As the Court stated in *State v. Silva-Baltazar*, 125 Wn.2d 472, 480, the question left open by that decision was whether defendants can be held liable for the RCW 69.50.435 school zone enhancement when they are “not within the drug free zone themselves” but “another participant in the crime engages in *the specified drug activity* within the drug free zone.” (Emphasis added.) The “specified drug activity” listed in Count II is “the above-named Defendant did knowingly

deliver a controlled substance, to-wit: Cocaine.” The sentence enhancement for Count II charges that the presence in the school zone occurred during “commission” of that crime – not during the occurrence of some other preliminary matter, like meeting at a restaurant. CP:15. Instruction No. 27 similarly asked whether the defendant “*delivered* the controlled substance to a person within one thousand feet of a school bus route stop ...” CP:56 (emphasis added). The Information, instructions, and hence the jury verdict, are thus all based upon the single school bus zone in which “deliver[y]” itself occurred. Not a different zone in which deliveries did not occur. The only evidence of a May 9 delivery is that it occurred when the two women in the blue Cavalier pulled off the shoulder of Avon Allen Road, just north of Bennett Road, not at the Valley Café. 4/22/08 VRP:89-90, 144-5.

Since Mr. Pineda was not present at that location, and since the school bus zone enhancement does not apply to “participants” who are not themselves present in the school zone at the time that the specific crime charged is committed, the school bus zone enhancement on Count II must be vacated.

Any other result – which characterizes the crime as a continuing one that occurs in any school zone through which a defendant might pass on his way to a transaction – would have too many outrageous

consequences. It could allow a defendant who drives to a drug transaction and passes through various school zones on the way to be charged with a variety of school zone enhancements. It could allow a defendant who obtained drugs from a third party who drove through a variety of school zones and then redelivered them to another person to be charged with the principal seller's school zone enhancements. In fact, given that all drugs are transported from one location to another before their ultimate retail sale, it is likely that all drugs pass through a school zone at some point before reaching their ultimate purchaser. If the state's interpretation of the statute were correct – that any school zone that a participant passes through on the way to a transaction can trigger application of the enhancement – nearly every drug crime could be saddled with that enhancement. The statute cannot be interpreted to produce such an absurd result. *State v. Neher*, 112 Wn.2d 347, 351, 771 P.2d 330 (1989).

Finally, the state argues that the “purpose of the school zone enhancements supports holding the defendant accountable when he arranged to sell drugs and sent another to complete the transaction.” Response, p. 14. It advances this interpretation because the purpose of that school zone enhancement statute is to curb drug transactions in areas where there are children. *Id.*

This amounts to an argument in favor of broad construction of the

statute to achieve a punitive purpose. The proper rule of statutory interpretation, however, is that the statute must be interpreted in Mr. Pineda's favor and against the government under the rule of lenity.²

III. THE STATE ERRS IN CONTENDING THAT RCW 69.50.407 HAS NO SUBSTANTIAL STEP ELEMENT; DESPITE THE ABSENCE OF SUCH LANGUAGE IN THE STATUTE, IT IS INTERPRETED IN TANDEM WITH RCW 9A.28.040 WHICH DOES CONTAIN "SUBSTANTIAL STEP" LANGUAGE

The Opening Brief explained that a "substantial step" was an element of conspiracy, and that both the Information and jury instructions omitted that step. The state responds that "substantial step" is an element of conspiracy under RCW 9A.28.040, but that it is not an element of conspiracy under RCW 69.50.407.

The state is certainly correct that a "substantial step" is an element of conspiracy under RCW 9A.28.040. *State v. Bobic*, 140 Wn.2d 250, 996 P.2d 610 (2000); *State v. Moavenzadeh*, 135 Wn.2d 359, 364, 956 P.2d 1097 (1998) (essential elements of a conspiracy are "an agreement to commit a crime and taking a 'substantial step' toward the completion of that agreement."); *State v. Dent*, 123 Wn.2d 467, 476, 869 P.2d 392 (1994).

² *Ratzlaf v. United States*, 510 U.S. 135, 148, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994); *State v. Lively*, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996).

It errs, however, in contending that the drug conspiracy statute is construed differently than the general conspiracy statute. In fact, the Washington Supreme Court has ruled that the two statutes are construed in the same manner. *See State v. Pacheco*, 125 Wn.2d 150, 153 n.1, 159 (construing RCW 9A.28.040's conspiracy crime and RCW 69.50.407's conspiracy crime identically, there, with regard to element that the state must prove that defendant had an agreement with someone other than a police informant).

The state cites not to *Pacheco*, a state Supreme Court decision which interprets the two statutes in an identical manner, but to two Court of Appeals cases decided more than 20 years ago: *State v. Hawthorne*, 48 Wn. App. 23, 737 P.2d 717 (1987), and *State v. Casarez-Gastelum*, 48 Wn. App. 112, 738 P.2d 303 (1987).

Intervening, controlling, authority, however, compels a different result.

In *Pacheco*, 125 Wn.2d 150, the state Supreme Court ruled that the general conspiracy statute and the specific drug conspiracy statute should generally be interpreted in the same manner, despite differences in language. It therefore ruled that it would interpret the "conspiratorial agreement" element of both statutes in the same manner, as follows:

We note at the outset Pacheco was convicted of conspiracy to deliver a controlled substance pursuant to RCW 69.50.407, not the general conspiracy statute, RCW 9A.28.040. The State has not suggested or presented any argument that the requisite conspiracy under RCW 69.50.407 is contrary to or inconsistent with the agreement required under RCW 9A.28.040. *State v. Lynn*, 67 Wn. App. 339, 349, 835 P.2d 251 (1992). Thus, *our construction of the conspiratorial agreement element in RCW 9A.28.040 is applicable to RCW 69.50.407. Lynn*, 67 Wash.App. at 349, 835 P.2d 251.

Pacheco, 125 Wn.2d at 153 n.1 (emphasis added).

The decision in *State v. Lynn*, 67 Wn. App. 339, 349, cited with approval by the state Supreme Court, in turn explains that differences between the language of the two conspiracy statutes do not signal differences in the way they should be construed. In fact, this Court in *Lynn* (post-dating *Hawthorne* and *Casarez-Gastelum*) ruled that any defenses negated by the general statute would also be negated by the specific drug statute, RCW 69.50.407, despite differences in language, because the drug conspiracy/attempt statute essentially incorporated by reference the elements and defenses of the regular conspiracy statute:

We note that *Lynn* was not charged under the general attempt statute, RCW 9A.28.040, but under RCW 69.50.407. Although the latter statute does not *explicitly* negate an impossibility defense, absence of such language is without significance. RCW 9A.04.010(2) provides in part:

The provisions of this title shall apply to any offense ... which is defined in

this title or the general statutes, unless otherwise expressly provided or unless the context otherwise requires, and shall also apply to any defense to prosecution for such an offense.

Thus, the above-quoted portion of the general attempt statute, RCW 9A.28.020(2), *is applicable to a controlled substance attempt, RCW 69.50.407, since there is nothing to the contrary or inconsistent in the latter statute.*

State v. Lynn, 67 Wn. App. 339, 348-49 (footnotes omitted) (emphasis added).

There is nothing “to the contrary or inconsistent” with the substantial step requirement of RCW 9A.28.040 in RCW 69.50.407, either – despite the absence of “explicit[]” language incorporating such an element. Thus, post-*Pacheco*, the “substantial step” element of RCW 9A.28.040 must be considered just as incorporated into RCW 69.50.407 as was the negation of the impossibility defense in *Lynn*.

IV. THE STATE ARGUES THAT OTHER COURTS HOLD THAT A PERSON CAN BE CONVICTED OF BEING AN ACCOMPLICE TO CONSPIRACY, BUT CITES NO CONTROLLING WASHINGTON AUTHORITY; INSTEAD, CONTROLLING WASHINGTON AUTHORITY HOLDS THAT THE CONSPIRACY STATUTE IS TO BE NARROWLY CONSTRUED

The Opening Brief argued that there is no statutory authority permitting a court to impose criminal liability for being an accomplice to,

rather than a principal in, the inchoate crime of conspiracy. The state responds that other jurisdictions hold that a criminal defendant can be convicted of being an accomplice to conspiracy, so the Washington courts should come to the same conclusion.

In *State v. Stein*, 144 Wn.2d 236, 27 P.3d 184 (2001), however, the Washington Supreme Court made clear that Washington does not necessarily follow other courts in their interpretations of their jurisdictions' conspiracy laws. Instead, under *Stein*, the court must begin with the language of the conspiracy statute (there, the general conspiracy statute). The state Supreme Court in that case ruled that that statute makes all parties to a conspiracy guilty of the conspiracy itself, but it is *silent* about whether all parties to the conspiracy are liable for the substantive crimes committed by co-conspirators. The Court continued that no Washington decision holds a defendant liable on such an attenuated "*Pinkerton*"³ basis.

Following this analysis, the drug conspiracy statute is equally silent about whether one may be convicted of a conspiracy based on complicity with one who is involved in the conspiracy. Further, no

³ *Pinkerton v. United States*, 328 U.S. 640, 660 S.Ct. 1180, 90 L.Ed. 1489 (1946).

Washington case holding a defendant liable as an accomplice to conspiracy has been cited by either party.

Based on *Stein*, and without a clear statutory basis for imposing such an attenuated form of liability for conspiracy, Washington's conspiracy statute should not be extended that far.

V. THE STATE ERRS IN CLAIMING THAT SCHOOL BUS STOPS ARE READILY DISCERNIBLE WHEN THEY ARE CHANGED FROM TIME TO TIME BASED ON THE AGE OF THE SCHOOLCHILD AND CONSIST OF NOTHING MORE THAN A STOP AT THE FOOT OF THE CHILD'S RURAL DRIVEWAY

The state apparently acknowledges that *State v. Becker*, 132 Wn.2d 54, 935 P.2d 1321 (1997), and *State v. Coria*, 120 Wn.2d 156, 164, 839 P.2d 890 (1992), provide the framework for determining whether the due process clause bars enhanced punishment for presence in a school zone when it is debatable whether a person of ordinary intelligence could determine that a school was located there. Response, pp. 15-17. The state asks whether, under these cases, there were "objective means to discover the locations of school bus stops where the information was available on the internet, by contacting the transportation department or dispatcher or by observing schoolchildren?" Response, p. 1.

The answer is that observing schoolchildren would not have provided a definitive answer in this case because the locations of the bus

stops were at the foot of rural driveways and changed from time to time as students moved and grew up. As Ms. McCormick, the school bus dispatcher testified, the Dogwood Lane stop, off Donnelly Road, where the alleged 5/4/07 transaction took place, was a “fairly new” stop on a new road. 4/22/08 VRP:201-2; 4/23/08 VRP:161.

VI. CONCLUSION

For the foregoing reasons, the conspiracy conviction should be reversed and the school zone enhancements should be vacated.

DATED this 3rd day of June, 2009.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30th day of June, 2009, a copy of the REPLY BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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