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NO. 34110-7-II  
Clark County No. 04-1-01253-8

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**TODD E. HENDERLING**

**Appellant.**

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**BRIEF OF APPELLANT**

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*pm 7-31-06*

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**A. ASSIGNMENTS OF ERROR**

1. **MR. HENDERLING WAS DENIED A SPEEDY TRIAL.**
2. **MR. HENDERLING IS ENTITLED TO A NEW TRIAL WHERE THE JURY INSTRUCTIONS CONTAINED JUDICIAL COMMENTS ON THE EVIDENCE AND THE RECORD DOES NOT AFFIRMATIVELY SHOW THAT NO PREJUDICE COULD HAVE RESULTED.**
3. **COUNT IV SHOULD BE REVERSED AND DISMISSED BECAUSE THE INFORMATION OMITTED AN ESSENTIAL ELEMENT OF THE CRIME.**

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. **THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE STATE A SIX WEEK CONTINUANCE BEYOND THE ALLOWABLE TIME FOR TRIAL SO THAT IT COULD CONDUCT FURTHER INVESTIGATION THAT SHOULD HAVE BEEN CONDUCTED DURING THE ALLOWABLE 90 DAY TIME FOR TRIAL PERIOD. THE COURT ALSO DENIED MR. HENDERLING HIS RIGHT TO DUE PROCESS BY USURPING THE ROLE OF DEFENSE COUNSEL AT THE HEARING ON THE MOTION.**
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## **C. STATEMENT OF THE CASE**

### **1. PROCEDURAL HISTORY**

On June 25<sup>th</sup>, 2004 the Clark County Prosecuting Attorney charged Mr. Todd E. Henderling, by Information, with Count I: Rape in the Second Degree; Count II: Rape of a Child in the Third Degree; Count III: Furnishing Liquor to a Minor; and Count IV: Delivery of a Controlled Substance by a person over the age of 18, to a person under the age of 18 and three years junior, in violation of RCW 69.50.401 (a) and RCW 69.50.406 (b).<sup>1</sup> CP 1-2. Specifically, with regard to Count IV, the Information stated the following:

**That he, TODD E HENDERLING, in the Count of Clark, State of Washington, on or about June 18, 2004 being over eighteen years of age did distribute Marijuana, a non-narcotic controlled substance classified under RCW 69.50.204 (c) (14), to a person under eighteen years of age and three years his junior, to wit: T.I.T. (female, DOB 2/22/89), in violation of RCW 69.50.401 (a), contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Washington.**

CP 2. The alleged victim in each of the four counts was T.I.T., with a date of birth of 2/22/89). A jury trial commenced on December 13<sup>th</sup>, 2004.

Report of Proceedings, Vol. 1. Mr. Henderling was convicted of counts II, III, and IV. CP 110-112. He was given standard range sentences of 34

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<sup>1</sup> Presumably, the State intended to cite to RCW 69.50.401 (1), and to RCW 69.50.406 (2).

months on Count II, which was the top of the standard range, 365 days on Count III, and 100 months on Count IV, which also was the top of the standard range. CP 124, 126, 138. This timely appeal followed. CP 152.

## **2. FACTUAL HISTORY**

Mr. Henderling was arraigned on the four count Information on July 8<sup>th</sup>, 2004. His trial was scheduled, with a 90-day time for trial period, for September 29<sup>th</sup>, 2004. CP 10. This was the 83<sup>rd</sup> day of the allowable time for trial (hereafter referred to as “speedy trial”). CP 10. On September 21<sup>st</sup>, 2004, day 75 of speedy trial, the State moved for a continuance of the trial date so that it could obtain a DNA sample from Mr. Henderling and send it to a DNA laboratory in California, where it could be compared to seminal fluid recovered from the alleged victim’s underwear. RP I, 5-14. This test, according to the State, would take four to six weeks. Id. at 6. When the court inquired why it was necessary to have the test conducted in California, the State claimed that “[t]here is only one test that can be done, and it’s not done in this state. So I need to send it to California to a lab.” Id. at 5. When the court found this seemingly unbelievable, the State clarified that the test it sought is simply “much more accurate” than the test available in this state. Id. at 6. The prosecutor informed the court that she received a test result from the crime

lab, showing the presence of seminal fluid on the underwear “last Monday.” *Id.* at 8. Her written motion made no reference to when the underwear was submitted to the crime lab for testing, or the date on which she received notice of the presence of seminal fluid on the underwear. CP 19-20.

Defense counsel objected to the continuance outside of the speedy trial period. *Id.* at 7. Defense counsel stated that the defense was ready to proceed to trial, that the State made no showing in its motion about when this underwear was submitted to the crime lab for testing, and that although she is sympathetic that the crime lab is backed up, that is not the fault of Mr. Henderling and he has the right to a speedy trial. *Id.* at 6-7. She further noted that she was very concerned about her availability for trial in the coming two months because of a previously scheduled homicide trial. *Id.* at 7.

The court asked the State whether this test could be exculpatory as well as inculpatory, to which the State replied “It could.” *Id.* at 8. The court began “I think it—to all fairness to the Defendant, you need to be able to find out—,” at which point defense counsel interjected “We’re not asking for that, Your Honor. We’re not seeking testing of it.” *Id.* at 8. The court replied “I’m looking at what I’m supposed to do in terms maintaining fairness to all. And the best way to maintain fairness is to

have solid scientific evidence. So I think it's appropriate that the tests be done. Okay." Id. at 9. The court stated it believed it was justifiable "in this case" to extend the time for trial period, but still wanted further argument from the parties. Id. at 9-11. The court set the hearing over to September 23<sup>rd</sup>, 2004.

At the continued hearing on the State's motion to continue, the State argued that a continuance was permissible under CrR 3.3 (f) because it was required in the "administration of justice." Id. at 16. The State said: "And the State's argument is that this is required for the administration of justice. As you pointed out the other day in court, the DNA result may also be exculpatory for the Defendant as well as be helpful for the State, in our case as well. And so, therefore, I also don't think that the Defendant would be prejudiced because we're only asking for a—four to six weeks, is what the lab asked for, for testing of this DNA. And so—that's not a substantial delay." Id. at 16.

Defense counsel responded that following the hearing on September 21<sup>st</sup>, 2004, she spoke to the alleged victim and learned that the underwear was turned over to the State within two days of the alleged incident (which was alleged to have occurred on June 18<sup>th</sup>, 2004). Id. at 16, CP 1. Defense counsel noted that the State presented no argument as to why this evidence was not tested until the third week of September, that

Mr. Henderling was restrained under very strict conditions of release (including court-ordered Anatabuse), and that if they failed to try the case on the original trial date she would be unavailable until at least late October or early November due to the previously scheduled homicide trial. Id. at 17. The following exchange occurred between the court and defense counsel:

Court: Well, I can appreciate what you're saying, Counselor. It still comes down to the same thing, it does appear under Subsection (f) that it's within the demonstration of justice as an exception, this extended period. Two, it does—you know, well [sic] all know the Lab is backed up. I can't explain why things like that happen, but they're always—

Ms. Clark: I'm just saying there's—I'm—and—don't mean to interrupt the Court, there's no showing as to when they sent this up.

Court: Understand. But counsel didn't present to the Court that, you know, I'm cognizant to the fact that the labs are all jammed up. As we already know, we're backed up 37,000 DNA tests in the state, so...And the real reason is that it can be exculpatory as well as incriminating. And I think for that reason, the fairness issue and the proper administration of justice require that we get this scientific evidence available to both side. So on that basis, I'm going to grant the continuance at this time.

Id. at 18-19.

The court then reset the trial date to November 1<sup>st</sup>, 2004. Id. at 19. Because continuances constitute an excluded period under CrR 3.3 (e), the court stopped the speedy trial clock at day 77 (September 23<sup>rd</sup>, 2004). CP

22. The trial eventually commenced on December 13<sup>th</sup>, 2004 for reasons that are not at issue in this appeal.<sup>2</sup>

At trial, T.I.T. testified that she was fifteen and her date of birth is 2/22/89. *Id.* at 53. She testified she went over to Mr. Henderling's house with her friend Angela on June 18<sup>th</sup>, 2004 for the purpose of drinking and getting stoned. *Id.* at 56. She identified a pair of underwear, identified as Exhibit 17, as her underwear that she was wearing on the night in question. *Id.* at 68-69. She testified that Mr. Henderling provided her with alcohol and marijuana on June 18<sup>th</sup>, 2004. *Id.* at 57-58. She also testified that Mr. Henderling had sexual intercourse with her on June 18<sup>th</sup>, 2004. *Id.* at 63.

Angela Butler of the Serological Research Institute in Richmond California testified that she analyzed the oral swab retrieved from Mr. Henderling as well as the semen found on T.I.T.'s underwear. Based on her DNA analysis, she could not exclude Mr. Henderling as the source of the DNA found on the underwear. *Id.* at 134.

Tamra Thomas, T.I.T.'s mother, testified that T.I.T. was fifteen years old and her date of birth is 2/22/89. *Id.* at 137. She also testified she

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<sup>2</sup> The analyst who analyzed the DNA samples had an unexpected medical situation that made her unavailable to testify for a period of time. Mr. Henderling agrees that a medical condition such as this would qualify as an unforeseen circumstance beyond the control of the parties. At issue in this appeal is the propriety of the court's decision to stop the speedy trial clock in the first place so that the State could continue to investigate this case by getting testing that should have been done within the 90 day speedy trial period.

knew Mr. Henderling because he is the brother of her fiancé Brian Henderling. Id. at 138. She testified Mr. Henderling was approximately 38 or 39 years old. Id.

As to Count II, the court instructed the jury as follows:

**To convict the defendant of the crime of rape of a child in the third degree, as charged in Count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:**

**(1) That on or about the 18<sup>th</sup> day of June, 2004, the defendant had sexual intercourse with T.I.T. (female, DOB 2/22/89);**

**(2) That T.I.T. was at least fourteen years old but was less than sixteen years old at the time of the sexual intercourse and was not married to the defendant;**

**(3) That the defendant was at least forty-eight months older than T.I.T.; and**

**(4) That the acts occurred in the State of Washington.**

**(Remaining language omitted here). CP 99.**

As to Count III, the court instructed the jury as follows:

**To convict the defendant of the crime of Furnishing Liquor to Minors, as charged in Count 3, each of the following elements of the crime must be proved beyond a reasonable doubt:**

**(1) That on or about the 18<sup>th</sup> day of June, 2004, the defendant did unlawfully sell, give, or otherwise supply liquor to T.I.T. (female, DOB: 2/22/89) a person under twenty-one (21) years of age; and/or did permit T.I.T. (female, DOB 2/22/89) a person under twenty-one (21) years of age to consume liquor on his premises; and**

**(2) That the acts occurred in Clark County, State of Washington.**

**(Remaining language omitted here). CP 101.**

As to Count IV, the court instructed the jury as follows:

**To convict the defendant of the crime of delivery of a controlled substance, as charged in Count 4, each of the following elements of the crime must be proved beyond a reasonable doubt:**

**(1) That on or about the 18<sup>th</sup> day of June, 2004, the defendant delivered a controlled substance to T.I.T. (female, DOB: 2/22/89), a person under eighteen years of age and three years his junior;**

**(2) That the defendant knew that the substance delivered was a controlled substance;**

**(3) That the defendant is over eighteen years of age; and**

**(4) That the acts occurred in the State of Washington.**

**(Remaining language omitted here). CP 103.**

The jury returned a verdict of not guilty on Count I, and verdicts of guilty on Counts II, III, and IV. CP 110-112.

**D. ARGUMENT**

**1. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE STATE A SIX WEEK CONTINUANCE BEYOND THE ALLOWABLE TIME FOR TRIAL SO THAT IT COULD CONDUCT FURTHER INVESTIGATION THAT SHOULD HAVE BEEN CONDUCTED DURING THE ALLOWABLE 90 DAY TIME FOR TRIAL PERIOD. THE COURT ALSO DENIED MR. HENDERLING HIS RIGHT TO DUE PROCESS BY USURPING THE ROLE OF DEFENSE COUNSEL AT THE HEARING ON THE MOTION.**

Under CrR 3.3 (b) (2), the allowable time for trial in Mr. Henderling's case was 90 days. Mr. Henderling never executed a waiver of his right to a speedy trial. Under CrR 3.3 (f) (2), the court may, upon the motion of a party, continue a trial date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. Under CrR 3.3 (e) (3), continuances pursuant to section (f) constitute an excluded period in the calculation of the time for trial. As such, by granting the continuance on day 77 of the original speedy trial period, the court stopped the clock at day 77. Under CrR 3.3 (b) (5), the State (assuming the stopping of the clock was proper in the first place) had forty-three days left following the re-commencement of the speedy trial clock to bring Mr. Henderling to

trial (the thirteen days remaining from the original period plus the thirty days that are tacked on to the speedy trial period whenever there has been an excluded period). Assuming the court did not abuse its discretion in granting the State's motion for a continuance, Mr. Henderling was timely brought to trial under the rule.

The original trial date of September 29<sup>th</sup>, 2004 was day 83 of the 90 day speedy trial period. When the State moved for a continuance on September 21<sup>st</sup>, 2004, it made an insufficient showing of why a six week continuance was needed. The State's written motion simply stated "A continuance is necessary in this case to allow the Serological Institute in California time to complete testing of the DNA sample in this matter. They have estimated four to six weeks of time needed to complete this testing. Further your affiant saith not." CP 20. As noted several times by defense counsel, the State made no representation to the court about when this evidence (the underwear) was initially submitted for testing, and why this need to have it sent to California could not have been anticipated earlier.

Acting on her own, and without any assistance from the State (the party seeking the continuance), defense counsel learned that the alleged victim had given this evidence to the State on or before June 20<sup>th</sup>, 2004, some *three months* earlier and presented this information to the court at

the continued hearing on September 23<sup>rd</sup>. Defense counsel wanted to know why it took so long for the Crime Lab that originally received the underwear to test it for the presence of seminal fluid. Defense counsel never got an answer to this question, however, because the State never offered one and the court never required it to do so. Instead, the court decided that because the DNA test could theoretically have been exculpatory, as opposed to inculpatory, the continuance was required in the administration of justice. Defense counsel immediately and strenuously reminded the court that the defense had no interest in this test being performed, was not requesting this test, and wanted a speedy trial. The court disregarded defense counsel's position on this matter, concluding that in his opinion, Mr. Henderling's interest in this possibly exculpatory evidence outweighed his interest in a speedy trial.

In so doing, the court improperly acted as an advocate for the State, as this "exculpatory evidence" basis was not advanced by the State as a basis for the continuance, and usurped the role of defense counsel by deciding that Mr. Henderling's interest in this possibly "exculpatory" evidence outweighed his interest in a speedy trial. In *State v. Moreno*, 147 Wn.2d 500, 58 P.3d 265 (2002) the Supreme Court cautioned that "the trial court must not undertake the role of either prosecutor or defense counsel." *Moreno* at 509, quoting *People v. Carlucci*, 23 Cal.3d 249, 258,

590 P.2d 15 (1979). A defendant is denied due process under the 14<sup>th</sup> Amendment to the United States Constitution when the court improperly assumes the role of either the prosecutor or defense counsel. *Moreno* at 509, relying on *People v. Carlucci* at 258, and *State v. Avena*, 281 N.J. Super. 327, 339, 657 A.2d 889 (1995).

Here, it was simply not the court's decision which interest *should* be more important to Mr. Henderling. That was a decision to be made by Mr. Henderling in consultation with his counsel. They in fact made a decision, and expressed it to the court: They had no desire to have this evidence tested and wanted a speedy trial. The reason why this decision should be within the sole province of Mr. Henderling and his counsel, as opposed to the court, is obvious: They were the two people in a position to know whether this evidence actually *would be* exculpatory (which it wasn't), not the court.

In addition to the court's denial of Mr. Henderling's right to due process by usurping the role of defense counsel, the court abused its discretion in granting this continuance. Continuances are governed by CrR 3.3 (f) which permits continuances in the interest of justice which do not prejudice the defendant in the presentation of his defense. The rule reads in relevant part:

(2) *Motion by the Court or a Party.* On Motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay. CrR 3.3 (f) (2).

When a charge is not brought to trial within the time period provided by CrR 3.3, it must be dismissed with prejudice. CrR 3.3 (h); *State v. Swenson*, 150 Wn.2d 181, 187, 75 P.3d 513 (2003) (interpreting former CrR 3.3). The application of the speedy trial rule to a particular set of facts is a question of law reviewed de novo. *State v. Raschka*, 124 Wn.App. 103, 108, 100 P.3d 339 (2004), citing *State v. Branstetter*, 85 Wn.App. 123, 127, 935 P.2d 620, *review denied*, 132 Wn.2d 1011 (1997). A trial court's decision to grant or deny a continuance is reviewed for an abuse of discretion. *State v. Selam*, 97 Wn.App. 140, 142, 983 P.2d 679 (1999).

Good cause for a continuance outside of speedy trial has been found in the following circumstances: A material witness temporarily unavailable due to a medical condition (*State v. Lilliard*, 122 Wn.App. 422, 436, 93 P.3d 969 (2004)); defense counsel's vacation (*State v. Selam*, *supra*); vacation of a witness (*State v. Grilley*, 67 Wn.App. 795, 799, 840 P.2d 903 (1992)) and a continuance to permit defense counsel adequate

time to prepare a defense, even over the defendant's objection (*State v. Woods*, 143 Wn.2d 561, 581, 23 P.3d 1046, *cert. denied*, 534 U.S. 964 (2001)).

Mr. Henderling's case is in stark contrast to cases where good cause was found for a continuance. The continuance in this case was based on the State's need to conduct forensic testing that, absent a showing by the State to the contrary, presumably could have been conducted within the 90 day speedy trial period. Despite defense counsel's repeated attempts to get the State to reveal exactly when this item was submitted by the police to the Crime Lab for testing, and why it took three months from the time T.I.T. submitted this evidence to the State for the State to produce a test result showing the presence of seminal fluid, no showing was ever made by the State that the delay in this forensic testing was not caused by governmental mismanagement or misconduct. The court, rather than require the State to answer this very reasonable and appropriate question by defense counsel, instead interjected its own theory for the delay: Routine congestion at the Crime Lab which has caused, according to the court, a backlog of 37,000 DNA tests waiting to be conducted.

Perhaps aware that routine, as opposed to unforeseeable, court congestion in the state crime laboratory does *not* constitute good cause for

a continuance, the State avoided this argument throughout the entire proceeding. *State v. Howell*, 119 Wn.App. 644, 79 P.3d 451 (2003). The court, however, raised this justification several times, and improperly took judicial notice of this alleged backlog in the process.

Under ER 201 (b), a court may take judicial notice only of facts which are not subject to reasonable dispute in that the fact is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. Among matters not subject to judicial notice are the following: That there are no truck tractors that are 80 inches in width or under (*Schneider v. Forcier*, 67 Wn.2d 161, 406 P.2d 935 (1965)); that all fisherman in a particular area had notice of an injunction (*State v. Payne*, 45 Wn.App. 528, 726 P.2d 997 (1986)); or that a certain laboratory was an independent blood testing laboratory for purposes of the drunk driving statutes (*State v. Anderson*, 80 Wn.App. 384, 909 P.2d 945 (1996)).

Here, even if routine congestion (due, according to the court, to the legislature's unwillingness to adequately fund the needs of the Crime Lab) were good cause for a continuance, the court abused its discretion in utilizing this basis by taking judicial notice of it as a fact.

Mr. Henderling's case is distinguishable from a case such as *State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046 (2001), a death penalty case in which the defendant's own attorneys insisted they would need, after receiving the DNA results, four months to have them tested by their own experts. *Woods* at 579. Further, in *Woods*, the DNA results were scheduled to arrive no later than October 1<sup>st</sup>, where the trial date was set for October 21<sup>st</sup>. *Woods* at 580-81. In that case, the DNA results would have arrived before the scheduled trial date, they simply would not have arrived in enough time for the defense to complete their own voluntary independent testing on the DNA.

This is in stark contrast to Mr. Henderling's case, where the DNA results would not have arrived prior to the original trial date and the trial date was therefore continued so that the results could arrive in time to be placed in the State's evidentiary arsenal against Mr. Henderling. Simply put, if this test was so critical to the State's case then the State (which includes not only the prosecuting attorney's office but the investigating police agency and the Crime Laboratory) should have acted diligently in having the evidence tested. The State came into possession of this evidence no later than June 20<sup>th</sup>, 2004. The original expiration of speedy trial was October 6<sup>th</sup>, 2004 (the September 29<sup>th</sup> trial date was day 83 of the original clock). The State had three months and sixteen days to complete

a test that, according to them, could be completed in four to six weeks.

Further, unlike in *State v. Howell*, supra, the State offered *no* explanation about why this evidence was not ready to be sent for DNA testing until the second or third week of September despite having been in the State's possession since June 20<sup>th</sup>, and despite the fact that the only test our state Crime Lab was charged with conducting was a simple test to determine the *presence* of seminal fluid. The State offered no explanation and simply sat back as the court supplied its own theory of overworked scientists at the Crime Lab.

Mr. Henderling's case is similar to *State v. Nguyen*, 131 Wn.App. 815, 129 P.3d 821 (2006). In *Nguyen*, the defendant was charged with committing a home invasion robbery. The trial date was set for December 29<sup>th</sup>, but on December 19<sup>th</sup> the State moved for a continuance of the trial date outside the speedy trial period because it felt that Mr. Nguyen's case was probably linked to a string of other burglaries, in which the defendants were set to stand trial on February 17<sup>th</sup>. Citing the same "administration of justice" catch-all, the State asked the court to continue the trial to February 17<sup>th</sup> so that it could complete forensic testing that it hoped would link Mr. Nguyen to these other defendants. The State acknowledged that it was not seeking to join Mr. Nguyen's case with the other defendants, nor did it have any evidence linking Mr. Nguyen with

those other burglaries (other than modus operandi), but that it simply wanted to time to complete forensic testing--including DNA and fingerprints--in the hope of connecting Mr. Nguyen to those other crimes.

In reversing Mr. Nguyen's conviction, Division I held that the trial court had abused its discretion in granting the continuance. The State had argued that a continuance in the administration of justice was required to allow more time for forensic testing where the testing would "potentially" eliminate the need for redundant trials. *Nguyen* at 820. Although observing that considerations of judicial economy will sometimes outweigh a defendant's right to a speedy trial, the Court of Appeals emphasized that there was no evidence linking Mr. Nguyen's case to the other burglaries and the argument that a link would "potentially" be discovered was not a basis to continue the trial outside of the speedy trial period.

Likewise, the argument that this DNA evidence would potentially be useful to either the State or Mr. Henderling, where the State had three months and sixteen days to complete this testing if it so chose and did not even bother to seek a DNA sample from Mr. Henderling until September 21<sup>st</sup>, does not constitute good cause to continue Mr. Henderling's trial outside of the 90 day speedy trial period. As observed by the *Nguyen* court: "...[I]f 'administration of justice' can be invoked at any time to

grant a continuance, then ‘there is little point in having the speedy trial rule at all.’” *Nguyen* at 821, citing *State v. Adamski*, 111 Wn.2d 574, 580, 761 P.2d 621 (1988).

Last, the court was required to consider whether the continuance would prejudice Mr. Henderling in the presentation of his defense. Beyond the court’s suggestion that this test could potentially be exculpatory, as opposed to inculpatory, the court engaged in no analysis of whether Mr. Henderling might be prejudiced in the presentation of his defense. Defense counsel (who had been placed in an extremely difficult position by the court), in emphasizing that they were *not* seeking this test and did not want it to be performed at the expense of a speedy trial, all but told the court in plain language that the test would not, in fact, be exculpatory. The court’s decision to ignore defense counsel on this point constituted an abuse of discretion. Again, it was her job to advocate for Mr. Henderling, not the court’s. The question of whether this evidence did, in fact, cause prejudice to Mr. Henderling in the presentation of his defense has been answered: The test could not exclude him as the secretor of the seminal fluid and was, therefore, incredibly incriminating. The trial court abused its discretion in granting the State’s motion to continue and Mr. Henderling’s conviction should be reversed and dismissed.

**2. THE “TO CONVICT” INSTRUCTIONS FOR COUNTS II, III, AND IV, CONTAINED JUDICIAL COMMENTS ON THE EVIDENCE AND RELIEVED THE STATE OF ITS BURDEN OF PROVING AN ESSENTIAL ELEMENT OF EACH CRIME. MR. HENDERLING IS ENTITLED TO A NEW TRIAL BECAUSE THE RECORD DOES NOT AFFIRMATIVELY SHOW THAT NO PREJUDICE COULD HAVE RESULTED.**

In each of the “To Convict” instructions for Counts II, III, and IV, each of which are crimes that depend upon proof of the alleged victim’s age, the court included T.I.T.’s date of birth in the instruction. Our Supreme Court has ruled that this is a judicial comment on the evidence in violation of Washington Constitution, Article IV, Section 16. *State v. Jackman*, 156 Wn.2d 736, 744 (2006). In *Jackman*, the defendant, like Mr. Henderling, was charged with acts that would not have been criminal but for the minority age of the victims (three counts of sexual exploitation of a minor, three counts of communication with a minor for immoral purposes, four counts of furnishing liquor to a minor, one count of patronizing a juvenile prostitute). *Jackman* at 740. Because the State is precluded, in light of the holding in *Jackman*, from arguing that these instructions *did not* contain judicial comments on the evidence, the sole issue here is whether the record affirmatively shows that no prejudice to Mr. Henderling could have resulted from these judicial comments.

A judicial comment on the evidence in a jury instruction is presumed to be prejudicial and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. *Jackman* at 743, relying on *State v. Levy*, 156 Wn.2d 709, 719-20 (2006). In *Jackman*, the State argued that there was no prejudice to Mr. Jackman because the ages of the victims were never in dispute. *Jackman* at 744. The Supreme Court disagreed, holding because the age of the victims was a “threshold issue without which there was no crime,” listing the ages of the victims in the “To Convict” instructions took a fundamental factual determination away from the jury. *Jackman* at 745, relying on *State v. Becker*, 132 Wn.2d 54, 935 P.2d 1321 (1977).

In *Jackman*, the State’s four victims each testified at trial about their birth dates. Further, the State presented corroborating evidence of the birth dates of three of the four victims. Nevertheless, the Court felt compelled to reverse because the age of the victims was a “critical element in the charges against Jackman.” *Jackman* at 745. The Court stated:

It is true that the record does not indicate that Jackman challenged the *fact* of their minority, nor does it reflect that he admitted or stipulated to their ages...Nevertheless, it is still conceivable that the jury could have determined that the boys were *not* minors at the time of the events, if the court had not specified the birth dates in the jury instructions. We conclude that because the jury instructions state the victims’ birth dates and removed those facts

from the jury's consideration, the record does not affirmatively show that no prejudice could have resulted.

*Jackman* at 745.

Mr. Henderling's case, at least insofar as this issue is concerned, is not materially different than Mr. Jackman's. Although the *Jackman* opinion does not state what the corroborating evidence of age presented in that case was, it could hardly have been weaker than the corroborating evidence of T.I.T.'s age presented in Mr. Henderling's trial. In Mr. Henderling's case, the State proved T.I.T.'s age through her testimony and the testimony of her mother. Neither of these two witnesses can be considered unbiased or disinterested. No independent evidence of T.I.T.'s age (such as school, hospital, or social security records) was offered by the State. But for the court telling the jury that T.I.T.'s age had been established as a matter of law, it is conceivable, just as in Mr. Jackman's case, that the jury could have found that T.I.T. was not the age she claimed at the time of the alleged crime. See *Jackman* at 745. Mr. Henderling's convictions on Counts II, III, and IV should be reversed and his case remanded for a new trial.

**3. COUNT IV MUST BE REVERSED AND DISMISSED  
BECAUSE THE CHARGING DOCUMENT OMITTED THE  
ESSENTIAL ELEMENT THAT MR. HENDERLING KNEW  
THE SUBSTANCE HE DELIVERED WAS A  
CONTROLLED SUBSTANCE.**

Mr. Henderling was charged with delivery of marijuana contrary to RCW 69.50.401, and with having delivered the marijuana to a person under the age of 18 and three years his junior contrary to RCW 69.50.406 (2). As explained by *State v. Hernandez*, 53 Wn.App. 702, 770 P.2d 642 (1989), this crime is simply the crime of delivering a controlled substance, with an enhancement of having delivered it to a person under the age of 18 which makes an offender eligible for the doubling of his sentence. While knowledge that the person the controlled substance was delivered to was a minor is neither a statutory nor a non-statutory element of this enhancement statute (*Hernandez*, supra), knowledge that the substance is a controlled substance is an essential element of the crime of delivery of a controlled substance, discussed below.

Knowledge that the substance delivered is a controlled substance is a non-statutory element of the crime of delivery of a controlled substance. *State v. Boyer*, 91 Wn.2d 342, 588 P. 2d 1151 (1979). Mr. Henderling did not challenge the sufficiency of the information in the trial court. Nevertheless, the question of whether the information contained all essential elements of the crime charged may be raised for the first time on appeal. *State v. Leach*, 113 Wn.2d 679, 782 P.2d 552 (1989). Charging documents which are challenged for the first time on appeal will be more liberally construed in favor of validity than those challenged before or

during trial. *State v. Kjorsvik*, 117 Wn.2d 93, 103, 812 P.2d 86 (1991).

The charging document for delivery of a controlled substance must either expressly or impliedly include the court-imposed element of guilty knowledge. *State v. Kitchen*, 61 Wn.App. 915, 918, 812 P.2d 888 (1991).

In *State v. Nieblas-Duarte*, 55 Wn.App. 376, 777 P.2d 583 (1989), Division I held that the language “unlawfully and feloniously” is the equivalent of “knowingly” and upheld an information charging delivery of a controlled substance which contained this language. In *Kitchen*, the Court reversed and dismissed the defendant’s conviction where the information stated: “[O]n or about October 8, 1988, in Klickitat County, Washington, you delivered a controlled substance, to wit: Cocaine to an undercover agent, contrary to RCW 69.50.401 (a) (1) (i)...” *Kitchen* at 917. The State argued that the statutory reference in the charge (i.e. “contrary to RCW 69.50.401”) was sufficient, under the standard of liberal construction, to apprise the defendant of the non-statutory mental state of knowledge which is an essential element of delivery of a controlled substance. *Kitchen* at 918. The Court disagreed, noting that the statutory reference in the charging document was particularly unhelpful where the mental state is a *non-statutory* element of the crime. *Kitchen* at 918.

Here, the information charging Mr. Henderling as to Count IV stated:

That he, TODD E HENDERLING, in the County of Clark, State of Washington, on or about June 18, 2004 being over eighteen years of age did distribute Marijuana, a non-narcotic controlled substance classified under RCW 69.50.204 (c) (14), to a person under eighteen years of age and three years his junior, to-wit: T.I.T. (female, DOB 2/22/89), in violation of RCW 69.50.401 (a), contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Washington.

CP 2. Notably absent from this language is any express or implied language demonstrating that the State must prove Mr. Henderling knew the substance delivered was a controlled substance. Nor does this charge contain the words “unlawfully and feloniously” which, under *Nieblas-Duarte*, would save, at least under the liberal construction rule, this charge. *Nieblas-Duarte* at 380.

The language used to charge Mr. Henderling with delivery of a controlled substance is nearly identical to the language used to charge the defendant in *State v. Kitchen*. In *Kitchen*, the information, like this one, simply said “contrary to RCW 69.50.401 (a) (1) (i)...” and bore no language such as “knowingly” or “unlawfully or feloniously.” The information contains no language that would expressly or impliedly inform the defendant that the State bore the burden of proving beyond a reasonable doubt that he knew the substance he delivered was a controlled substance. This, even under the standard of liberal construction, renders the information defective because it fails to allege every essential element

of the crime. Mr. Henderling's conviction on Count IV must be reversed and dismissed.

**E. CONCLUSION**

Mr. Henderling's convictions on Counts II, III, and IV should be reversed and dismissed with prejudice because his right to a speedy trial was violated. Alternatively, Mr. Henderling's convictions on Counts II, III, and IV should be reversed, and his case remanded for a new trial, because the jury instructions contained a judicial comment on the evidence which prejudiced Mr. Henderling. Mr. Henderling's conviction on Count IV should be reversed and dismissed because the information as to Count IV failed to state every essential element of the crime.

RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of July, 2006.

  
ANNE M. CRUSER, WSBA# 27944  
Attorney for Mr. Henderling

## APPENDIX

### 1. **69.50.401.** Prohibited acts: A -- Penalties

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(2) Any person who violates this section with respect to:

(a) A controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam, including its salts, isomers, and salts of isomers, classified in Schedule IV, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine;

(b) Amphetamine, including its salts, isomers, and salts of isomers, or methamphetamine, including its salts, isomers, and salts of isomers, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine. Three thousand dollars of the fine may not be suspended. As collected, the first three thousand dollars of the fine must be deposited with the law enforcement agency having responsibility for cleanup of laboratories, sites, or substances used in the manufacture of the methamphetamine, including its salts, isomers, and salts of isomers. The fine moneys deposited with that law enforcement agency must be used for such clean-up cost;

(c) Any other controlled substance classified in Schedule I, II, or III, is guilty of a class C felony punishable according to chapter 9A.20 RCW;

(d) A substance classified in Schedule IV, except flunitrazepam, including its salts, isomers, and salts of isomers, is guilty of a class C felony punishable according to chapter 9A.20 RCW; or

(e) A substance classified in Schedule V, is guilty of a class C felony punishable according to chapter 9A.20 RCW.

### 2. **69.50.406.** Distribution to persons under age eighteen

(1) Any person eighteen years of age or over who violates RCW 69.50.401 by distributing a controlled substance listed in Schedules I or II which is a narcotic drug or methamphetamine, including its salts, isomers, and salts of isomers, or

flunitrazepam, including its salts, isomers, and salts of isomers, listed in Schedule IV, to a person under eighteen years of age is guilty of a class A felony punishable by the fine authorized by RCW 69.50.401(2) (a) or (b), by a term of imprisonment of up to twice that authorized by RCW 69.50.401(2) (a) or (b), or by both.

(2) Any person eighteen years of age or over who violates RCW 69.50.401 by distributing any other controlled substance listed in Schedules I, II, III, IV, and V to a person under eighteen years of age who is at least three years his or her junior is guilty of a class B felony punishable by the fine authorized by RCW 69.50.401(2) (c), (d), or (e), by a term of imprisonment up to twice that authorized by RCW 69.50.401(2) (c), (d), or (e), or both.

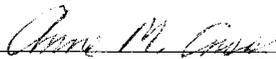


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4 Mr. Todd E. Henderling  
5 DOC# 745570  
6 Stafford Creek Correctional Center  
7 191 Constantine Way  
8 Aberdeen, WA 98520

9 and that said envelope contained the following:

- 10 (1) BRIEF OF APPELLANT  
11 (2) VERBATIM REPORT OF PROCEEDINGS (TO MR. CURTIS)  
12 (3) R.A.P. 10.10 (TO MR. HENDERLING)  
13 (4) AFFIDAVIT OF MAILING

14 Dated this 31<sup>st</sup> day of July 2006,

15   
16 ANNE M. CRUSER, WSBA #27944  
17 Attorney for Appellant

18 I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of  
19 Washington that the foregoing is true and correct.

20 Date and Place: July 31<sup>st</sup>, 2006, Kalama, Washington

21 Signature: Anne M. Crusier