

TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iv
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issues Pertaining to Assignment of Error	2
C. STATEMENT OF THE CASE	
1. Factual History	3
2. Procedural History	6
D. ARGUMENT	
I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT’S MOTION TO SUPPRESS EVIDENCE BECAUSE THE POLICE VIOLATED WASHINGTON CONSTITUTION, ARTICLE 1, § 7 AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT WHEN THEY EXECUTED A SEARCH WARRANT UNSUPPORTED BY PROBABLE CAUSE	14
II. THE TRIAL COURT VIOLATED THE DEFENDANT’S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT AGAINST HIM FOR A CRIME UNSUPPORTED BY SUBSTANTIAL EVIDENCE	25
III. THE STATE’S COMMENTS DURING CLOSING ARGUMENT ON THE DEFENDANT’S FAILURE TO CALL WITNESSES VIOLATED THE DEFENDANT’S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT	29

IV. THE TRIAL COURT ERRED WHEN IT ORDERED THE DEFENDANT TO SUBMIT A SECOND DNA SAMPLE AND PAY A SECOND DNA FEE AND WHEN IT IMPOSED COMMUNITY CUSTODY CONDITIONS NOT AUTHORIZED BY THE LEGISLATURE 35

(1) RCW 43.43.754 Does Not Authorize the Trial Court to Order a Defendant to Submit Multiple DNA Samples or Pay Multiple DNA Fees 36

(2) The Trial Court May Only Order Community Custody Conditions Specifically Authorized under the Sentencing Reform Act 38

E. CONCLUSION 45

F. APPENDIX

1. Washington Constitution, Article 1, § 3 46

2. Washington Constitution, Article 1, § 7 46

3. United States Constitution, Fourth Amendment 46

4. United States Constitution, Fourteenth Amendment 46

5. RCW 9.94A.700 47

6. RCW 9.94A.715 49

7. RCW 43.43.753 51

8. RCW 43.43.754 52

9. RCW 43.43.7541 54

TABLE OF AUTHORITIES

Page

Federal Cases

Andresen v. Maryland,
427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976) 14

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 25, 29

Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 26

State Cases

In re Jones, 118 Wn.App. 199, 76 P.3d 258 (2003) 38

State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983) 25, 29

State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991) 30, 31

State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969) 26, 27, 29

State v. Cheatam, 150 Wn.2d 626, 81 P.3d 830 (2003) 30

State v. Cleveland, 58 Wn.App. 634, 794 P.2d 546 (1990) 29

State v. Cote, 123 Wn.App. 526, 96 P.3d 410 (2004) 27-29

State v. Gebaroff, 87 Wn.App. 11, 939 P.2d 706 (1997) 22, 23

State v. Gentry, 125 Wn.2d 570, 888 P.2d 1105 (1995) 37

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 26

State v. J.P., 149 Wn.2d 444, 69 P.3d 318 (2003) 37

State v. Johnson, 12 Wn.App. 40, 527 P.2d 1324 (1974) 26

State v. Johnson, 104 Wn. App. 489, 17 P.3d 3 (2001) 14

<i>State v. Jones</i> , 118 Wn. App. 199, 76 P.3d 258 (2003)	42
<i>State v. Julian</i> , 102 Wn. App. 296, 9 P.3d 851 (2000), <i>review denied</i> , 143 Wn.2d 1003 (2001)	42
<i>State v. Kelley</i> , 52 Wn. App. 581, 762 P.2d 20 (1988)	20, 22
<i>State v. Llamas-Villa</i> , 67 Wn. App. 448, 836 P.2d 239 (1992)	41
<i>State v. Lougin</i> , 50 Wn.App. 376, 749 P.2d 173 (1988)	34
<i>State v. Moore</i> , 7 Wn.App. 1, 499 P.2d 16 (1972)	25
<i>State v. Morgan</i> , 78 Wn.App. 208, 896 P.2d 731 (1995)	26
<i>State v. Mulcare</i> , 189 Wash. 625, 628, 66 P.2d 360 (1937)	35
<i>State v. Perez</i> , 92 Wn.App. 1, 963 P.2d 881 (1998)	15
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993)	42
<i>State v. Spruell</i> , 57 Wn.App. 383, 788 P.2d 21 (1990)	27, 29
<i>State v. Stroud</i> , 106 Wn.2d 144, 720 P.2d 436 (1986)	23
<i>State v. Taplin</i> , 9 Wn.App. 545, 513 P.2d 549 (1973)	25
<i>State v. Thein</i> , 138 Wn.2d 133, 977 P.2d 582 (1999)	14, 15
<i>State v. Thorne</i> , 129 Wn.2d 736, 921 P.2d 514 (1996)	35

Constitutional Provisions

Washington Constitution, Article 1, § 3	25, 29, 34
Washington Constitution, Article 1, § 7	14, 20
United States Constitution, Fourth Amendment	14, 20
United States Constitution, Fourteenth Amendment	25, 29, 34

Statutes and Court Rules

RCW 9.94A.700 40, 41, 44

RCW 9.94A.715 40

RCW 43.43.753 37

RCW 43.43.754 36, 38

RCW 43.43.7541 36

Other Authorities

Black’s Law Dictionary 259 (8th ed. 2004) 42

R. Utter, *Survey of Washington Search and Seizure
Law: 1988 Revision*, 11 U.P.S. Law Review 449-472 (1988) 20

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it denied the defendant's motion to suppress evidence because the police violated Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment when they executed a search warrant unsupported by probable cause.

2. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgment against him for a crime unsupported by substantial evidence.

3. The state's comments during closing argument on the defendant's failure to call witnesses violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

4. The trial court erred when it ordered the defendant to submit a second DNA sample and pay a second DNA fee and when it imposed community custody conditions not authorized by the legislature.

Issues Pertaining to Assignment of Error

1. Does a trial court violate Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment if it denies a defendant's motion to suppress evidence the police seized based upon a search warrant unsupported by probable cause?

2. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it enters judgment against the defendant for a crime unsupported by substantial evidence?

3. Does a prosecutor's prejudicial comments during closing argument that the jury should infer guilt based on the defendant's failure to call witnesses violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment?

4. Does a trial court err if it orders a defendant to submit a second DNA sample and pay a second DNA fee or when it imposes community custody conditions not authorized by the legislature?

STATEMENT OF THE CASE

Factual History

In April of 2005 a number of Clark County Drug Task Force Officers along with Vancouver Police Officer Spencer Harris arrested the defendant Joe Fuller on drug delivery charges. RP 95, 98, 101. Following that arrest the Clark County Prosecutor charged the defendant with one count of delivery of methamphetamine on October 28, 2004, and two counts of possession of methamphetamine hydrochloride with intent to deliver on October 15, 2004 and April 12, 2005. See CP 1 in *State v. Fuller*, No. 33999-4-II.¹ Three months later these same officers went to the emergency room at Southwest Washington Medical Center to interview Anthony Cain, who claimed that the defendant had beat him with some sort of metal pipe. RP 6-9. Mr. Cain told the officers that earlier that evening he had been at a friend's house when the defendant arrived, chased him out of the house, and beat him with some type of metal pipe or table leg. RP 10.

During this interview police note that Mr. Cain's head was bloody and that he had a number of lacerations around his eyes, head and wrist. RP 7-8. The next day the officers went to the friend's house, noted a number of metal table legs sitting in the yard, and found a similar table leg in an adjacent field

¹For a complete rendition of the facts underlying these drug charges see Appellant's Statement of the Case in *State v. Fuller*, No. 33999-4-II.

where Mr. Cain said the defendant had attacked him. RP 19, 35. According to Mr. Cain, after the defendant attacked him, he jumped into the passenger side of a gold Mazda 626 and drove away. RP 15. A records check revealed that the defendant was the registered owner of a gold Mazda 626.² RP 15.

Apparently these officers discovered that the defendant had an appearance the next day in Superior Court on his original drug charges. RP 531. As a result, Officers Harris and McGarrity waited in front of the courthouse and then arrested the defendant after he went through the security checkpoint. RP 46. The defendant had \$2,262.00 in cash on him when arrested. RP 530. While arresting the defendant Officer Harris saw two women driving by the courthouse in the gold Mazda 626 that was registered to the defendant. RP 198. Upon seeing this, Officer Harris called for a patrol unit to stop and seize the Mazda, ostensibly to get a warrant to search for evidence of the assault. RP 198. About a block away from the courthouse a patrol unit stopped the Mazda, seized the key from the driver, and had the vehicle towed to a secured lot. RP 198-199. The passenger in the vehicle was Chelsea Wake, the defendant's girlfriend. RP 50, 356, 525-526. The place where the patrol officer stopped the vehicle was within 1,000 feet of a

²For a full account of the evidence presented at the subsequent trial upon the assault charge see Appellant's Statement of the Case in *State v. Fuller*, No. 34219-7-II.

bus stop. Rp 486-507.

The next day Vancouver Officer Martin prepared an affidavit in support of a request for a warrant to search the Mazda. RP 62. In this affidavit, Officer Martin set out the facts concerning the alleged assault, and made the following request:

Your affiant knows that Anthony R. Cain sustained serious injuries to his head from a blunt object. Your affiant also knows that the person(s) delivering these blows to Cain may have clothing that was contaminated with Cains' bodily fluids (including but not limited to blood). Your affiant also knows that blood and other bodily fluids can be transferred from the clothing to the seats and other interior components of the vehicle used to flee the crime scene in. In addition, at the time of his arrest and after the search of Wakes' residence, the blunt object used was not recovered and may be located inside the passenger compartment of the car used by Fuller to leave the crime scene in.

CP 91.

After obtaining the search warrant a number of officers went to the tow yard and searched the gold Mazda. RP 298-299. They found nothing of potential evidentiary value in the passenger compartment of the vehicle besides the registration in the glove compartment. RP 44-59. In spite of the fact that Officer Martin only claimed a belief that items of evidentiary value would be found in the passenger compartment, the officers none the less opened and searched the trunk of the vehicle. CP 87; RP 44-59. Inside the trunk the officers found a black "gym bag" containing mens clothing, sandals, and a smaller zippered black bag. RP 220 The officers did not seize the

clothing or the sandals. *Id.* Inside the smaller black bag the officers found a glass pipe, digital scales, a spoon, and seven bindles of methamphetamine weighing 28.2 grams, 14.3 grams, 7.2 grams, 7.4 grams, 3.4 grams, 3.9 grams, and 1.8 grams respectively. RP 244, 460-462.

Procedural History

By information filed August 16, 2005, the Clark County Prosecutor charged the defendant Joe Albert Fuller with one count of possession of methamphetamine with intent to deliver within 1,000 feet of a school bus stop. CP 2, 97. After the initial charge the defendant brought a motion to suppress the evidence seized, arguing that (1) Officer Martin made an intentional material omission in his affidavit when he failed to include the fact that other officers had already seized the item they believed the defendant used in the attack, (2) the request to search for evidence of the assault was actually a pretext to search for drugs, and (3) the affidavit did not establish probable cause to search the vehicle. CP 3-5, 6-10. This motion eventually came on for hearing with the state calling three witnesses and the defense calling two. RP 4-96. Following the presentation of this testimony the court denied the motion. RP 119. As far as appellant can tell the state has never prepared findings of fact and conclusions of law on the denial of this motion as required under the court rules. CP 1-191.

While the state has failed to propose findings and conclusions on the

motion, the trial court was quite detailed in its ruling. RP 114-119. Initially the court reviewed the facts surrounding the arrest of the defendant, the seizure of the vehicle and the execution of the warrant. RP 114-115. The court then stated the following:

The search warrant asked to search for two things. One for an -- basically two things. For a blunt instrument and for evidence of bodily or blood fluid related to this assault.

Those are pretty much all undisputed facts. The disputed facts concern whether or not the officers were acting under a pretext and what they knew and what they either deliberately or recklessly left out of the search warrant affidavit.

RP 115.

In addressing these issues the court examined the actions of the officers and then ruled that the defense had failed to prove either that the officers were acting under a pretext. RP 117. The court stated the following on this point. *Id.*

So everything that they were doing was concerned with the assault. They may have been the same officers that were involved with Mr. Fuller and somebody else a few months ago, but that fact alone is not enough for me to find that they had a pretext in this case.

RP 117.

At this point the court addressed both the issue of probable cause along with the defendant's argument that the affidavit contained a material omission concerning the finding of the blunt object. RP 117. In essence, the court held that (1) the affidavit did not establish probable cause to search for

the blunt object, and (2) even if there was a material omission concerning the finding of blunt object at the location of the assault the addition of this information merely reinforced the court finding that the affidavit did not establish probable cause to search for the blunt object. *Id.* The court stated the following on the issue of probable cause to find the blunt object. RP 117-118.

If this case was involving a search warrant where the only thing the officers said they were still looking for was this weapon, then I would suppress the evidence.

It's fairly clear that at the time that they applied for the search warrant, not at the time they seized the car, but at the time they applied for the search warrant they had no reasonable expectation that they would find this object in the car, and that's why in the affidavit for search warrant there really is basically nothing for which a reasonable magistrate could find that there would be this object in the car.

If I were to say that they could -- they had probable cause to find this blunt object in the car, I'd basically be saying that when a person is suspected of a crime you can look anywhere they might have been and for evidence, and we don't allow that sort of broad, exploratory searching around for things. You have to have some reason to believe -- the magistrate would have to have some reason to believe that the object you're looking for will be in the place you're looking for it.

And all they had here was a -- an observation that at the time Mr. Fuller was in the car, the person who said he was in the car also said he did have the object with him.

RP 117-118.

The court then went on to address the defendant's claim of either a

material omission in the affidavit or a claim that at the time the officers executed the warrant they knew that the blunt object had already been recovered. RP 118. The court stated:

Now, they also knew that they'd recovered objects at the scene which were supposedly the types of things which were weapons, so it seems unlikely that -- I mean, that's a -- that's another issue that's troubling to me, but I don't have to get to whether that was a reckless or intentional omission from this because even without adding that in there's nothing in the affidavit which would lead officers to believe that the weapon would be found in the car.

RP 118.

At this point the court addressed the issue of Officer Martin's claim that there was probable cause to believe that there might be a transfer of blood or bodily fluids off of the defendant's clothing onto the interior of the vehicle based upon the evidence that he committed the assault and then immediately jumped into the passenger compartment of the Mazda. RP 119. The court agreed with this contention and thereby denied the motion. *Id.*

The court held:

However, at the time that they applied for the search warrant, they had probable cause to believe that evidence of blood or bodily fluids, the other thing they were looking for, might be in the car. Mr. Fuller had been in the car, or at least allegedly had been in the car right after he'd been involved in an assault in which the person bled and in which he was in close proximity to them.

RP 119.

The case later came on for trial with the state calling eight witnesses

to establish the facts set out in the preceding *Factual History*. RP 178-501. The defendant then took the stand and denied knowledge or ownership of the drugs. RP 524-563. He also testified that while the Mazda was registered in his name he had previously given it to his girlfriend as a gift and that his girlfriend's father had loaned him the money he had on his person the day of his arrest. RP 525-526, 530. In fact, the defense had intended to call both Chelsea Wake and her father to testify to these facts and had served trial subpoenas on both of them. RP 182. However, neither person appeared pursuant to the subpoenas. *Id.*

During closing, the prosecutor made the following statement in front of the jury.

So did Mr. Fuller transfer or -- or give -- give the car over to Chelsea Wake when he said he did? The State submits that he did not. Like I said, he referred to Chelsea Wake as the mother of his baby, he admitted that she was his girlfriend, and testimony developed that he was with her extensively the previous evening and also that same day, and he by all accounts kept in contact with her until -- at least until November 15th, 2005 (indicating).

Okay. So they were still together if you -- you know, you can infer that. Where is Chelsea Wake? Why is she not here to testify to corroborate what he is saying? Okay. Why? That's a big question mark. That's a big hole in his defense. I mean, you can imagine if -- if someone is -- has given you a car, someone who used to be your lover, boyfriend, some --

CP 581-582.

At this point the defense objected and the court sent the jury out of the

courtroom. CP 582. The court sustained the objection, noting that the prosecutor was arguing that the jury could infer guilty from the defendant's failure to call a witness and that "[i]n the absence of a missing witness instruction given to the jury, it is not acceptable." RP 584. However, while the court sustained the objection it refused to give an ameliorative instruction as requested by the defense. RP 584. Just prior to the jury returning the court admonished the prosecutor as follows:

The state is not allowed to argue that the absence of a witness by the defendant is a basis for conviction in the absence of a missing witness instruction which allows the jury to make that inference.

CP 585.

As soon the jury returned the prosecutor stated the following. RP 585-586.

Thank you, Your Honor. Now, as I was saying, defendant was on the stand and yesterday and today he testified that Danny Wake, the father of Chelsea Wake, loaned him \$1,800. Okay. (Writing at easel.) \$1,800. And that this \$1,800 was part of the 2269 hundred dollars that – that the police recovered from him after he was arrested.

Look at these amounts, okay (indicating). Draw your own conclusions. If there is a Danny Wake with the - with the estimated street value of the drugs (indicating), and the amount of money that Mr. Fuller had on him (indicating), very comfortable, very consistent. Is that a coincidence? I submit to you that it's not, that if there is a Danny Wake out there –

CP 586.

At this point the defense again objected to this line of argument,

arguing that the state's use of the phrase "if there is a Danny Wake" constituted an argument that commented upon the defendant's failure to call witnesses. *Id.* However, this time the court overruled the objection. *Id.*

Following deliberation the jury returned a verdict of guilty and a special verdict that the defendant committed the crime within 1,000 feet of a school bus stop. CP 155-156. The court later sentenced the defendant to 100 months in prison on a 60 to 120 months range. CP 176. This sentence included a 24 month enhancement for the school zone enhancement. *Id.* Among other costs in the judgment and sentence the court ordered the defendant to provide a biological sample and pay a \$100.00 DNA processing fee. CP 177-178. The sentence also included imposition of from 9 to 12 months of community custody or the term of early earned release if it was longer with the following conditions, among others:

- ☒ . . . The defendant shall notify his/her community corrections officer on the next working day when a controlled substance or legend drug has been medically prescribed.
- ☒ Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held electronic scheduling or data storage devices.
- ☒ Defendant shall undergo an evaluation for treatment for ☒ substance abuse ☐ mental health ☐ anger management treatment and fully comply with all recommended treatment.

- ☒ Defendant shall enter into, cooperate with, fully attend and successfully complete all in-patient and outpatient phases of a
 - ☒ substances abuse
 - ☐ mental health
 - ☐ anger managementtreatment program as established by the community corrections officer and/or the treatment facility.

- ☒ Treatment shall be at the defendant's expense and he/she shall keep his/her account current if it is determined that the defendant is financially able to afford it.

CP 180-181.

The court entered these last three findings in spite of the fact that it failed to enter a finding that the defendant either had a chemical dependency or that any chemical dependency contributed to the offenses committed. CP 175. The option for entering such a finding is found on page two of the judgment and sentence and the court in this case did not enter the finding. *Id.*

Page two of the judgment and sentence includes the following:

- ☐ The court finds that the offender has a chemical dependency that has contributed to the offense(s). RCW 9.94A.607.

CP 175.

Following imposition of sentence the defendant filed timely notice of appeal. CP 56.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT’S MOTION TO SUPPRESS EVIDENCE BECAUSE THE POLICE VIOLATED WASHINGTON CONSTITUTION, ARTICLE 1, § 7 AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT WHEN THEY EXECUTED A SEARCH WARRANT UNSUPPORTED BY PROBABLE CAUSE.

Under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment search warrants may only be issued upon a determination of probable cause. *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582, 585 (1999); *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976). In order for the judge, rather than the requesting officer, to make that determination, the affidavit must state the underlying facts and circumstances so that the judge can make a “detached and independent evaluation of the evidence.” *Id.* “Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched.” *Id.*

In 2001, Judge Morgan of Division II of the Court of Appeals emphasized that there is no probable cause to search unless the facts in the affidavit prove *two* nexus. *State v. Johnson*, 104 Wn. App. 489, 17 P.3d 3 (2001). There must be both “a nexus between criminal activity and the item

to be seized” and “a nexus between the item to be seized and the place to be searched.” *Id.* (quoting a different case). This means that any search warrant affidavit “must contain facts from which to infer (1) that the item to be seized is probably evidence of a crime, and (2) that the item to be seized will probably be in the place to be searched when the search occurs.” *Id.*

When a search warrant is challenged, the reviewing court performs a *de novo* evaluation of the warrant and affidavit, examining them in a commonsense manner. *State v. Perez*, 92 Wn.App. 1, 963 P.2d 881 (1998). Although the reviewing court is to give deference to the issuing judge, it must find the warrant invalid if the information on which the warrant is based is not sufficient to establish probable cause. *Id.*

For example in *State v. Thein, supra*, the defendant was charged with possession of marijuana with intent to deliver and defrauding a public utility after the police executed a search warrant at the defendant’s residence and found a large quantity of marijuana. The affidavit given in support of the search warrant contained a detailed description of the prior execution of a search warrant at another address. Based upon the evidence seized during the execution of this warrant along with the interview of a number of witnesses the police developed strong evidence that the defendant was then, and had in the past, been dealing large quantities of marijuana. Based upon this information and the general experience of the police that drug dealers usually

keep drugs and evidence of their drug dealing at their homes, the police sought and obtained the warrant they executed at the defendant's house.

Following his arrest the defendant unsuccessfully moved to suppress the evidence seized from his home. Following conviction the defendant appealed and the court of appeal affirmed. From that point the defendant sought and obtained review before the state supreme court. In addressing the issues presented the court noted a division between the three divisions of the court of appeals in Washington as well as a division among the many federal and state courts that had addressed this issue. After examining a number of these cases the court held that the mere fact that the police have probable cause to believe that the defendant is a drug dealer does not create probable cause to search that person's home without some evidence other than police speculation that there will be evidence of the drug dealing in the defendant's house.

In the case at bar the trial court characterized the search warrant affidavit as requesting permission to search the gold Mazda for two types of evidence: (1) a blunt object used in the assault, and (2) evidence of the victim's blood or other bodily fluid transferred from the defendant's clothing to the interior of the vehicle when he entered the passenger seat just after the assault. The court's characterization is apt, particularly given the following paragraph from the supporting affidavit.

Your affiant knows that Anthony R. Cain sustained serious injuries to his head from a blunt object. Your affiant also knows that the person(s) delivering these blows to Cain may have clothing that was contaminated with Cains' bodily fluids (including but not limited to blood). Your affiant also knows that blood and other bodily fluids can be transferred from the clothing to the seats and other interior components of the vehicle used to flee the crime scene in. In addition, at the time of his arrest and after the search of Wakes' residence, the blunt object used was not recovered and may be located inside the passenger compartment of the car used by Fuller to leave the crime scene in.

CP 91.

In addressing these claims the trial court found that there was no probable cause to believe that the blunt instrument would be found in the vehicle (even had it been in it at one time) because of its mobility and the fact that the defendant and the vehicle had been to any number of locations after the assault. In other words there would be no more reason to believe that the blunt instrument would be in the vehicle than there would be to believe it would be at any other location the defendant visited after the assault. The court noted the following on this point:

If this case was involving a search warrant where the only thing the officers said they were still looking for was this weapon, then I would suppress the evidence.

It's fairly clear that at the time that they applied for the search warrant, not at the time they seized the car, but at the time they applied for the search warrant they had no reasonable expectation that they would find this object in the car, and that's why in the affidavit for search warrant there really is basically nothing for which a reasonable magistrate could find that there would be this object in the car.

If I were to say that they could -- they had probable cause to find this blunt object in the car, I'd basically be saying that when a person is suspected of a crime you can look anywhere they might have been and for evidence, and we don't allow that sort of broad, exploratory searching around for things. You have to have some reason to believe -- the magistrate would have to have some reason to believe that the object you're looking for will be in the place you're looking for it.

And all they had here was a -- an observation that at the time Mr. Fuller was in the car, the person who said he was in the car also said he did have the object with him.

RP 117-118.

Once again the trial court's ruling is apt on this point since the "blunt object" was an easily transported item that might well have been found anywhere by the next day when the police seized the vehicle. The same conclusion follows from any request by the police to search the vehicle for the clothing the defendant wore at the time of the assault. Unless the defendant disrobed in the vehicle after fleeing the scene of the assault in the passenger compartment of the Mazda, his clothing certainly exited the vehicle along with him when he got out of it. Thus, as with the "blunt instrument," there was no probable cause to believe that the defendant's clothing would be found in the vehicle.

However, as the trial court also observed, this conclusion does not follow concerning the possible transfer of blood and bodily fluids from the defendant's clothing to the interior of the vehicle when the defendant sat

down in the front passenger seat after the assault. Any such transfer would have occurred as the defendant was in the vehicle and could then be found adhering to the seat, the floor, or somewhere else in the interior of the vehicle. Thus, the trial found probable cause to search the interior of the vehicle. The trial court noted:

However, at the time that they applied for the search warrant, they had probable cause to believe that evidence of blood or bodily fluids, the other thing they were looking for, might be in the car. Mr. Fuller had been in the car, or at least allegedly had been in the car right after he'd been involved in an assault in which the person bled and in which he was in close proximity to them.

RP 119.

On appeal the defendant does not dispute the trial court's conclusion on this issue. Thus, the defendant does not dispute the search of the interior of the vehicle. However, at this point the trial court did err because the police did not find the contraband in the interior of the vehicle. Rather they found the contraband in the trunk of the vehicle. As a careful review of the officer's affidavit reveals the officer did not even request permission to search the trunk of the car. Rather, he only requested permission to search the passenger compartment where the transfer of bodily fluids might had occurred. No such transfer was possible in the trunk. Thus, for the very reason that there was probable cause to search the passenger compartment for the transfer of bodily fluids (because the defendant was in it just after the assault) there was not

probable cause to search the trunk of the vehicle (because the defendant was not in the trunk after the assault. Absent probable cause the search warrant is defective to the extent that it allowed the search of the trunk. Thus, the trial court erred when it denied the defendant's motion to suppress the evidence found in the trunk.

There is a second reason the trial court erred when it denied the defendant's motion to suppress the evidence seized from the trunk of the Mazda. This reason is that the search warrant did not authorize the police to even search the trunk. Thus, by extending the search beyond that authorized in the search warrant the police violated the defendant's right to privacy under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment. The following expands on this argument.

As was stated above, in order for a search warrant to be valid under either Washington Constitution, Article 1, Section 7, and United States Constitution, Fourth Amendment, the affidavit offered in support of the warrant must establish probable cause to believe that evidence of a crime is present in the place to be searched. *See generally*, R. Utter, *Survey of Washington Search and Seizure Law: 1988 Revision*, 11 U.P.S. Law Review 449-472 (1988). The case of *State v. Kelley*, 52 Wn. App. 581, 762 P.2d 20 (1988), illustrates this principle.

In *Kelley*, the Clark County Sheriff's Office obtained information

from informants indicating that the defendant was operating a marijuana grow operation in a detached two-car garage, a detached four-car garage, and a detached barn all next to his house. Upon receipt of this information, the officer obtained a warrant. However, it only authorized the search of the Defendant's "one story, wood framed residence, green in color, with an attached carport", and it did not even mention the detached garages and barns. No information had been obtained indicating the existence of criminal activity in defendant's residence. During execution of the warrant, the officers searched all of the structures, and found evidence of criminal activity in both the house, as well as the other buildings mentioned.

Defendant later moved to suppress all the evidence seized on the basis that (1) the search of the garages and the barn exceeded the scope of the warrant, and (2) the affidavit given in support of the warrant failed to establish probable cause to search the residence. The trial court agreed, suppressed the evidence, and then dismissed the charges. On appeal Division II of the Court of Appeals affirmed, stating as follows concerning the issue of probable cause to search the house.

The State contends that the trial court erred in concluding that probable cause did not exist to justify the issuance of the search warrant for the house. We disagree. All of the information contained in [Deputy] Christensen's affidavit related to observations about the outbuildings. Christensen presented no information which furnished probable cause for a search of the house.

State v. Kelley, 52 Wn.App. at 586.

Similarly, in *State v. Gebaroff*, 87 Wn.App. 11, 939 P.2d 706 (1997), Division II of the Court of Appeals held that a probable cause to search a mobile home on a piece of property does not provide probable cause to search a separate travel trailer on the property. In this case, the police obtained information from a confidential informant indicating that he had recently purchased drugs in a mobile home at 45 Sudderth Road in Hoquiam. They then obtained a warrant to search that mobile home, as well as “any and all other buildings or structures on the property” which included “three recreational travel trailers located to the rear of the mobile home.” Upon execution of the warrant, the police found drugs in one of the travel trailers, and arrested the defendant, who lived in the trailer. The defendant then moved to dismiss, arguing that even if probable cause supported the issuance of a warrant to search the mobile home, probable cause did not exist to justify a search of the travel trailer. The Court of Appeals agreed and reversed, stating as follows:

We considered a variant of this issue in *State v. Kelley*, 52 Wn.App. 581, 762 P.2d 20 (1988). The warrant in *Kelley* authorized the search of a residence with attached carport, but the police searched some outbuildings as well. *Kelley*, 52 Wn.App. at 584, 762 P.2d 20. We noted in *Kelley* the general principles that the police must execute a search warrant strictly within the bounds set by the warrant, and that a warrant describes a place with sufficient particularity “if it identifies the place to be searched adequately enough so that the officer executing the warrant can, with reasonable

care, identify the place intended,” *Kelley*, 52 Wn.App. at 585, 762 P.2d 20 (quoting *State v. Cockrell*, 102 Wash.2d 561, 569-70, 689 P.2d 32 (1984)). Moreover, if a warrant authorizes the search of a house without mentioning outbuildings, either in the warrant itself or by incorporating such a reference in the affidavit, a search of the outbuildings is outside the scope. *Kelley*, 52 Wn.App. at 585-86, 762 P.2d 20.

A corollary to this rule, which applies here, is that probable cause to search outbuildings does not furnish probable cause to search a house--and vice versa, if the outbuildings are under the control of other persons. *See Kelley*, 52 Wn.App. at 586-87, 762 P.2d 20. Thus, even if probable cause had existed for a search of the main residence, it did not exist for the search of Gebaroff’s separately occupied trailer.

State v. Gebaroff, 87 Wn.App. at 16-17.

In the case at bar the officer presenting the affidavit only requested permission to search the passenger compartment of the vehicle, not the trunk. This distinction was logical as there was probable cause to believe there was evidence of the crime in the passenger compartment but not the trunk. In fact, the law has long recognized the distinction between searches of a passenger compartment of a vehicle as opposed to searches of the trunk. *See State v. Stroud*, 106 Wn.2d 144, 152, 720 P.2d 436 (1986) (warrantless search of the passenger compartment allowed upon the arrest of the driver or a passenger but police may not search the trunk without a warrant). Thus, in the same manner that the court in *Kelley* found that an affidavit that established probable cause to search a barn did not allow the search of the adjacent house so this court should find that the fact that the affidavit

established probable cause to search the passenger compartment of the vehicle did not allow the search of the trunk.

In the case at bar suppose that the police had taken the wheels off the vehicle then removed the tires from wheels thereby finding evidence of a crime. Suppose the officer had then taken the plastic tail light covers off of the lights and found evidence of a crime hidden therein. Finally, suppose the police had pulled the gas tank out of the vehicle and found evidence of a crime concealed therein. Each of these locations have been used for the concealment of contraband on other occasions. However, in the context of a search warrant that established probable cause to search for blood and bodily fluids in the passenger compartment all of these actions would well exceeded the scope of the warrant, even though it ostensibly authorized the search of the “vehicle.” Similarly in the case at bar the search of the trunk exceed the scop of the warrant because the affidavit only established probable cause to believe that blood and bodily fluids had possibly transferred in the passenger compartment of the vehicle. Thus in the case at bar the trial court erred when it denied the defendant’s motion to suppress.

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT AGAINST HIM FOR A CRIME UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

As a part of the due process rights guaranteed under both the Washington Constitution and the United States Constitution, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d

549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974).

The test for determining the sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In the case at bar the state charged the defendant with one count of possession of methamphetamine with intent to deliver. The gravamen of this offense is to possess methamphetamine with the intent to deliver it to another person. As the court instructed the jury in this case possession may be either actual or constructive. Generally, possession may be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Actual control indicates physical custody, while constructive control indicates dominion and control over an item. *Id.* In examining dominion and control, the reviewing court must examine the “totality of the situation.” *State v. Morgan*, 78 Wn.App. 208, 212, 896 P.2d 731 (1995) (quoting *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977)). Constructive possession need not be

exclusive. *Morgan*, 78 Wn.App. at 212, 896 P.2d 731.

For example, in *State v. Cote*, 123 Wn.App. 526, 96 P.3d 410 (2004), the defendant appealed his conviction for possession of pseudoephedrine with intent to manufacture methamphetamine arguing that the state had failed to present substantial evidence to support this charge. At trial the state had adduced the following evidence: (1) that the day before his arrest the defendant arrived at a residence as a passenger in a stolen truck, (2) that the defendant was arrested in that residence the next day, (3) that the stolen truck was still parked by the residence at the time of the defendant's arrest, and (4) in the back of the truck police officers found pseudoephedrine in a liquid in mason jars with the defendant's fingerprints on them.

In making his argument on appeal the defendant principally relied upon two cases: *State v. Callahan, supra*, and *State v. Spruell*, 57 Wn.App. 383, 788 P.2d 21 (1990). In *Callahan*, drugs were found in a houseboat near the defendant, who admitted handling the drugs earlier that day. The court held that the defendant's mere momentary handling of the drugs was insufficient to establish actual possession. In *Spruell* the defendant was arrested in close proximity to drugs found in a house, but the State failed to present evidence that the defendant had dominion and control over the premises. Under these facts the court held that the State had failed to prove the defendant actually or constructively possess the drugs. After reviewing

these two cases the court of appeals held as follows;

Mr. Cote was not in or near the truck at the time of his arrest. He was seen as a passenger in the truck, but this alone does not establish he had dominion and control over it. *See State v. Plank*, 46 Wn.App. 728, 733, 731 P.2d 1170 (1987) (mere fact that defendant is a passenger in a stolen vehicle is not sufficient to establish dominion and control). There is also no evidence indicating that the Mason jar containing Mr. Cote's fingerprint was found in the passenger area of the truck. The officer indicated it was in the "back of the stolen pickup." Report of Proceedings (Oct. 22, 2002) at 101. Moreover, the fingerprint on the jar proves only that Mr. Cote touched it. *See Spruell*, 57 Wn.App. at 386, 788 P.2d 21.

The evidence establishes that Mr. Cote was at one point in proximity to the contraband and touched it. But under Callahan and Spruell this is insufficient to establish dominion and control. Accordingly, there was no evidence of constructive possession. Because this issue is dispositive, we will not address the other issues raised in this appeal.

State v. Cote, 123 Wn.App. at 950.

In *Cote* the state at least had the defendant's fingerprints on the contraband the defendant was alleged to have possessed. In the case at bar the only connection between the defendant and the contraband found in the trunk of the car was the fact that the vehicle was registered to him. His fingerprints were not on the contraband, his identification was not found with the contraband, and no item identified as belonging to the defendant was found in the trunk of the car. The defendant was not seen driving the vehicle while another person was. The defendant did not have a key to the vehicle when he was arrested. At most, the state had evidence that the defendant had

ridden in the vehicle as a passenger the day before. These facts constitute less of a connection between the defendant and the contraband than existed in *Cote*, *Spruell*, and *Callahan*. In the same manner that these court's found an absence of substantial evidence to support a claim of constructive possession so then the court in this case should find that the evidence presented at trial does not support a claim of constructive possession.

III. THE STATE'S COMMENTS DURING CLOSING ARGUMENT ON THE DEFENDANT'S FAILURE TO CALL WITNESSES VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza, supra; In re Winship, supra*. As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364. In addition, since the burden rests upon the state to prove every element of the crime charged beyond a reasonable doubt, it is prosecutorial misconduct for the state to comment upon the defendant's failure to testify, to call witnesses, or to present any defense at all. *State v.*

Cleveland, 58 Wn.App. 634, 794 P.2d 546 (1990).

There are certain limited exceptions to the rule prohibiting the state from commenting upon the defendant's failure to call an available witness. Under the "missing witness rule," if the defendant testifies or puts on evidence that refers to the existence of witness who is "particularly available" to the defendant and who the defense would logically call to corroborate the defendant's testimony, then the state may properly comment on the defendant's failure to call that witness. *State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003). In *Cheatam*, the court states the rule as follows:

Under this doctrine, where a party fails to call a witness to provide testimony that would properly be a part of the case and is within the control of the party in whose interest it would be natural to produce that testimony, and the party fails to do so, the jury may draw an inference that the testimony would be unfavorable to that party. The inference only arises where the witness is peculiarly available to the party, i.e., peculiarly within the party's power to produce. In addition, the testimony must concern a matter of importance as opposed to a trivial matter, it must not be merely cumulative, the witness's absence must not be otherwise explained, the witness must not be incompetent or his or her testimony privileged, and the testimony must not infringe a defendant's constitutional rights. If the prosecutor properly invokes the missing witness doctrine, no prosecutorial misconduct occurs.

State v. Cheatam, 150 Wn.2d at 652-653.

For example, in *State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991), the defendant was charged with delivery of a controlled substance. During its case-in-chief, the state introduced evidence that the defendant possessed "buy and owe" sheets setting out the names of persons to whom he sold drugs

along with amounts that those persons owed him. Following the close of the state's case, the defendant took the stand and testified that the names and amounts of money on the papers the police seized memorialized personal loans that he had made to friends. In closing, the state commented upon the defendant's failure to call any of the persons listed on the sheets of papers.

Following conviction, the defendant appealed, arguing in part that the state had improperly shifted the burden of proof by commenting on his failure to call witnesses when he had no duty to do so. In response, the state argued that under the missing witness rule it was not misconduct to refer to the defendant's failure to call witnesses to whom he referred in his own testimony and who were only known to him. The Washington Supreme Court agree with the state's argument, holding as follows:

Here, nothing in the prosecutor's comments said that the defendant had to present any proof on the question of his innocence. The prosecutor was entitled to argue the reasonable inference from the evidence presented. Defendant testified. In so doing, he waived his right to remain silent. He specifically testified about the notations on the slips of paper. He testified he knew, at the time he was arrested, how to locate the people listed on the slips. Only their first names were listed, and according to his testimony he had a business or personal relationship with the people listed. Under these circumstances, the prosecutor's comments about defendant's failure to call the witnesses were not error.

State v. Blair, 117 Wn.2d at 492.

In *Blair*, the basis for the court's holding was twofold: (1) the defendant specifically referred to the existence of these witnesses in the

defendant's case, and (2) the witnesses were "particularly available" to the defense because the defendant knew who they were and the state did not.

In the case at bar the defendant testified that while the gold Mazda was registered to him it was his girlfriend's vehicle and she did not allow him to drive it. He also testified that the cash he possessed at the time of his arrest was a loan from his girlfriend's father. The defense had subpoenaed both of these witnesses, had filed a witness list with their names on it, and expected to call them at trial. However, they did not appear pursuant to the subpoenas. Thus these witnesses were not "particularly available" to the defense because the state had notice and an opportunity to interview them.

In spite of the fact that the defendant listed these witnesses and gave the state notice of the fact, the prosecutor specifically argued guilt from the defendant's failure to call them. This occurred on two occasions during the trial and the defense objected to both instances. The first instance occurred at the following point:

So did Mr. Fuller transfer or -- or give -- give the car over to Chelsea Wake when he said he did? The State submits that he did not. Like I said, he referred to Chelsea Wake as the mother of his baby, he admitted that she was his girlfriend, and testimony developed that he was with her extensively the previous evening and also that same day, and he by all accounts kept in contact with her until -- at least until November 15th, 2005 (indicating).

Okay. So they were still together if you -- you know, you can infer that. Where is Chelsea Wake? Why is she not here to testify to corroborate what he is saying? Okay. Why? That's a big question

mark. That's a big hole in his defense. I mean, you can imagine if -- if someone is -- has given you a car, someone who used to be your lover, boyfriend, some --

CP 581-582.

At this point the defense objected and the court sent the jury out of the courtroom. CP 582. The court sustained the objection, noting that the prosecutor was arguing that the jury could infer guilty from the defendant's failure to call a witness and that "[i]n the absence of a missing witness instruction given to the jury, it is not acceptable." RP 584. However, while the court sustained the objection it refused to give an ameliorative instruction as requested by the defense. RP 584. Just prior to the jury returning the court admonished the prosecutor as follows:

The state is not allowed to argue that the absence of a witness by the defendant is a basis for conviction in the absence of a missing witness instruction which allows the jury to make that inference.

CP 585.

As soon the jury returned the prosecutor exacerbated its improper argument by stated the following. RP 585-586.

Thank you, Your Honor. Now, as I was saying, defendant was on the stand and yesterday and today he testified that Danny Wake, the father of Chelsea Wake, loaned him \$1,800. Okay. (Writing at easel.) \$1,800. And that this \$1,800 was part of the 2269 hundred dollars that -- that the police recovered from him after he was arrested.

Look at these amounts, okay (indicating). Draw your own conclusions. If there is a Danny Wake with the - with the estimated street value of the drugs (indicating), and the amount of money that

Mr. Fuller had on him (indicating), very comfortable, very consistent. Is that a coincidence? I submit to you that it's not, that if there is a Danny Wake out there –

CP 586.

The defendant again objected, particularly to the language “if there is a Danny Wake” because it implied guilt from the defendant’s failure to call this witness. However, on this instance the court overruled the objection. Both of these arguments violated the defendant’s right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment because they shifted the burden of proof to the defendant and argued that the jury could infer guilt from the defendant’s failure to call these witnesses. This misconduct was particularly egregious because the defense had served subpoenas to the witnesses, given the state notice that it intended to call the witnesses, and had given the state ample opportunity to interview the witnesses.

Errors of constitutional magnitude such as occurred in the case at bar when the prosecutor sought to shift the burden of proof are presumed prejudicial and require reversal of the defendant’s conviction unless the state can prove beyond a reasonable doubt that the error was harmless. *State v. Lougin*, 50 Wn.App. 376, 382, 749 P.2d 173 (1988). In the case at bar the only connection the state was able to make between the defendant and the drugs found in the trunk of the Mazda was that the defendant was the

registered owner of the vehicle and occasionally road in it with other people driving. The state had no fingerprints or other evidence of identification that associated the defendant with the drugs. In this context the defendant's testimony that the car belonged to his girlfriend and that the money he possessed upon his arrest was a loan from her father was critical to the defendant's efforts to weaken the state's claim that the drugs in the trunk of the vehicle belonged to him. Viewing all of this evidence as a whole demonstrates that the state's improper argument during closing caused significant prejudice to the defendant's case. At a minimum it was far from "harmless beyond a reasonable doubt." Since it was not harmless, the defendant is entitled to a new trial.

IV. THE TRIAL COURT ERRED WHEN IT ORDERED THE DEFENDANT TO SUBMIT A SECOND DNA SAMPLE AND PAY A SECOND DNA FEE AND WHEN IT IMPOSED COMMUNITY CUSTODY CONDITIONS NOT AUTHORIZED BY THE LEGISLATURE.

In Washington the establishment of penalties for crimes is solely a legislative function. *See State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). As such, the power of the legislature to set the type, amount and terms of criminal punishment is plenary and only confined by constitutional constraints. *Id.* Thus, a trial court may only impose those terms and conditions of punishment that the legislature authorizes. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). In the case at bar, the defendant

argues that the trial court exceeded its statutory authority when it ordered the defendant to submit a second DNA sample and pay a second DNA fee and when it imposed community custody conditions not authorized in the sentencing reform act. The following sets out these arguments.

(1) RCW 43.43.754 Does Not Authorize the Trial Court to Order a Defendant to Submit Multiple DNA Samples or Pay Multiple DNA Fees.

Under RCW 43.43.754 the trial court is authorized to require that a defendant convicted of a felony give a DNA sample for identification analysis. Under RCW 43.43.7541 the trial court has authority to impose a fee for the collection of the biological sample. Subsection (1) of the former statute states:

(1) Every adult or juvenile individual convicted of a felony, stalking under RCW 9A.46.110, harassment under RCW 9A.46.020, communicating with a minor for immoral purposes under RCW 9.68A.090, or adjudicated guilty of an equivalent juvenile offense must have a biological sample collected for purposes of DNA identification analysis in the following manner:

RCW 43.43.754.

Under this statute the question arises whether or not the phrase “convicted of a felony” means “every time a person is convicted of a felony” even if a biological sample and fee have previously been collected as part of another judgment and sentence. Since the statute does not use the phrase “every time a defendant is convicted of a felony” it is susceptible to two

equally reasonable interpretations: first, that the process should be repeated with every judgment and sentence, and second, that the process should only be performed once.

The court's primary duty when interpreting any statute is to discern and implement the intent of the legislature. *State v. J.P.*, 149 Wn.2d 444, 69 P.3d 318 (2003). Under RCW 43.43.753 the legislature has stated its intent as regards to the collection of biological samples of DNA. This purpose is to create a forensic DNA database of all offenders which can be checked against DNA samples taken as evidence in crime scenes, thereby aiding in the identification of the perpetrators of new crimes. The reason such a database is effective is that each person's DNA is unique and once obtained functions like fingerprints do in aiding to identify the perpetrators of crimes and exclude innocent persons. *See State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105 (1995).

In addition, part of the theory behind DNA analysis is that DNA does not change over time. Once a sample is taken, analyzed and the results placed in a database, there is no need to take a new sample if the defendant is convicted of a new felony. Interpreting RCW 43.43.754 to require the taking of a new sample for each subsequent felony conviction does not further the purpose of DNA testing. In fact, requiring a new sample and subsequent testing for each new felony sentence has a detrimental effect upon

the creation of a state database because it wastes scarce state resources in the analysis of duplicate samples. Consequently, the interpretation of RCW 43.43.754 that best implements the intent of the legislature is the one that limits its application to the collection of a single DNA sample.

In the case at bar, the defendant's criminal history includes a Clark County conviction for two drug charges sentenced during the pendency of the case at bar and a Clark County conviction for assault sentenced during the pendency of this case. In each of these cases the court ordered the defendant to submit a biological sample and pay a DNA fee. Consequently the State of Washington had already gathered the defendant's DNA sample and placed the results of the test in the state data bank. As a result, there is neither a need nor authority for gathering a second sample and imposing a second fee. Thus, the trial court, in this case, erred when it imposed a second DNA test and fee.

(2) The Trial Court May Only Order Community Custody Conditions Specifically Authorized under the Sentencing Reform Act.

In the case of *In re Jones*, 118 Wn.App. 199, 76 P.3d 258 (2003), the Court of Appeals addressed the issue of what conditions a trial court may impose as part of community custody. In this case, the defendant pled guilty to a number of felonies including first degree burglary. The court sentenced him to concurrent prison time and community custody which included the

following conditions among others: (1) that the defendant violate no laws, (2) that the defendant not consume alcohol, (3) that the defendant complete alcohol treatment, and (4) that the defendant participate in mental health treatment. At the time of sentencing the court had no evidence before it that alcohol or mental health problems contributed to the defendant's crimes. The defendant appealed the sentence arguing that the trial court did not have authority to impose these conditions.

In addressing these claims the Court of Appeals first looked to the applicable statutes concerning conditions of community custody and determined that certain statutes in RCW 9.94A specifically allowed the court to order that a defendant not violate the law and not consume alcohol. The court then reviewed the remaining two conditions and determined that the legislature only allow imposition of alcohol or mental health treatment if it found that alcohol or mental health issues were "reasonably related" to the defendant's commission of the crimes to which the court was sentencing him. Finding no such evidence in the record the court struck these two conditions.

In the case at bar, the defendant was found guilty of possession of methamphetamine with intent to deliver under RCW 69.50. At sentencing the court imposed 100 months in prison and 12 months community custody. For offenders sentenced to over 12 months confinement on a "drug offense,"

RCW 9.94A.715 controls the imposition of community custody conditions.

This statute states as follows in relevant part:

(1) When a court sentences a person to the custody of the department for . . . a felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728 (1) and (2); or (c) with regard to offenders sentenced under RCW 9.94A.660, upon failure to complete or administrative termination from the special drug offender sentencing alternative program. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community custody imposed under this section.

RCW 9.94A.715(1).

As RCW 9.94A.715(2)(a) states, “the conditions of community custody shall include those provided for in RCW 9.94A.700(4).” In addition, “[t]he conditions may also include those provided for in RCW 9.94A.700(5).” Herein one finally finds the actual conditions. Subsection 4 of RCW 9.94A.700 states:

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(b) The offender shall work at department-approved education,

employment, or community restitution, or any combination thereof;

(c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

RCW 9.94A.700(4).

Section (5) of this same statute states:

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(a) The offender shall remain within, or outside of, a specified geographical boundary;

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) The offender shall participate in crime-related treatment or counseling services;

(d) The offender shall not consume alcohol; or

(e) The offender shall comply with any crime-related prohibitions.

RCW 9.94A.700(5).

Under these provisions no causal link need be established between the condition imposed and the crime committed so long as the condition relates to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wn. App.

448, 456, 836 P.2d 239 (1992). A condition relates to the “circumstances” of the crime if it is “an accompanying or accessory fact.” Black’s Law Dictionary 259 (8th ed. 2004). On review, objections to these conditions can be raised for the first time on appeal. *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003); *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), *review denied*, 143 Wn.2d 1003 (2001) (“sentences imposed without statutory authority can be addressed for the first time on appeal”). Imposition of crime-related prohibitions are reviewed for an abuse of discretion and will only be reversed if the decision is manifestly unreasonable or based on untenable grounds. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

In the case at bar the trial court imposed the following conditions among others:

- ☒ . . . The defendant shall notify his/her community corrections officer on the next working day when a controlled substance or legend drug has been medically prescribed.
- ☒ Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held electronic scheduling or data storage devices.
- ☒ Defendant shall undergo an evaluation for treatment for ☒ substance abuse ☐ mental health ☐ anger management treatment and fully comply with all recommended treatment.
- ☒ Defendant shall enter into, cooperate with, fully attend and successfully complete all in-patient and outpatient phases of a

substances abuse mental health anger management treatment program as established by the community corrections officer and/or the treatment facility.

Treatment shall be at the defendant's expense and he/she shall keep his/her account current if it is determined that the defendant is financially able to afford it.

CP 180-181.

The court entered these last three findings in spite of the fact that it failed to enter a finding that the defendant either had a chemical dependency or that any chemical dependency contributed to the offenses committed. CP 175. The option for entering such a finding is found on page two of the judgment and sentence and the court in this case did not enter the finding. *Id.*

Page two of the judgment and sentence includes the following:

The court finds that the offender has a chemical dependency that has contributed to the offense(s). RCW 9.94A.607.

CP 175.

The last three conditions listed above are not related to the offense the defendant committed. Indeed the court itself failed to enter any finding that the defendant had a substance abuse problem. Thus, the trial court erred when it imposed the first three conditions relating to the imposition of an evaluation and treatment requirements.

Under RCW 9.94A.700(4)(c) the court does have authority to prohibit a defendant from possessing or consuming controlled substances "except

pursuant to lawfully issued prescriptions.” However, there is nothing in this section that allows the court to require that the defendant notify the department upon receiving a valid prescription for a controlled substance. Neither is there anything in this section that allows the trial court to prohibit a defendant from possessing or using “any paraphernalia that can be used for the ingestion of controlled substance” such as “pagers, cell phone, and police scanners.” Thus, the trial court exceeded its authority when it imposed the first two conditions listed above.

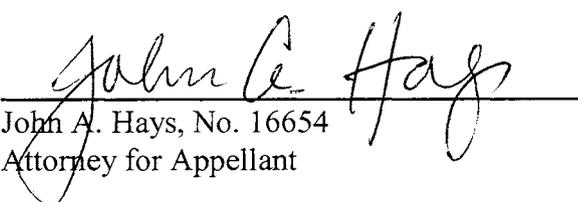
It is true that RCW 9.94A.700(5)(e) authorizes the court to impose “crime-related prohibitions.” However as the decision in *Jones* explains the trial court must have facts to support the conclusion that the condition imposed “relates to the circumstances of the crime” before it may impose the condition. In the case at bar the defendant committed the crime of possession of methamphetamine with intent to deliver. The state did not allege, the defendant did not admit and the court did not find any facts that related “to the circumstances of the crime.” Thus, the conditions here at issue cannot be saved under RCW 9.94A.700(5)(e). The trial court erred when it imposed them.

CONCLUSION

The trial court erred when it denied the defendant's motion to suppress because the affidavit given in support of the warrant did not establish probable cause to search the trunk of the vehicle in question. As a result this court should reverse the conviction and remand with instructions to grant the motion to suppress. In addition, the trial court denied the defendant his right to due process when it entered judgment on a crime unsupported by substantial evidence and when it allowed the state to shift the burden of proof during closing argument. The defendant is entitled to a new trial based upon either one of these errors. Finally, the trial court erred when it imposed conditions of community custody not authorized by the legislature. These improper conditions should be stricken from the judgment and sentence in this case.

DATED this 27th day of September, 2006.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against reasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 9.94A.700

When a court sentences an offender to a term of total confinement in the custody of the department for any of the offenses specified in this section, the court shall also sentence the offender to a term of community placement as provided in this section. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community placement imposed under this section.

(1) The court shall order a one-year term of community placement for the following:

(a) A sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990; or

(b) An offense committed on or after July 1, 1988, but before July 25, 1999, that is:

(i) Assault in the second degree;

(ii) Assault of a child in the second degree;

(iii) A crime against persons where it is determined in accordance with RCW 9.94A.602 that the offender or an accomplice was armed with a deadly weapon at the time of commission; or

(iv) A felony offense under chapter 69.50 or 69.52 RCW not sentenced under RCW 9.94A.660.

(2) The court shall sentence the offender to a term of community placement of two years or up to the period of earned release awarded pursuant to RCW 9.94A.728, whichever is longer, for:

(a) An offense categorized as a sex offense committed on or after July 1, 1990, but before June 6, 1996, including those sex offenses also included in other offense categories;

(b) A serious violent offense other than a sex offense committed on or after July 1, 1990, but before July 1, 2000; or

(c) A vehicular homicide or vehicular assault committed on or after

July 1, 1990, but before July 1, 2000.

(3) The community placement ordered under this section shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release. When the court sentences an offender to the statutory maximum sentence then the community placement portion of the sentence shall consist entirely of the community custody to which the offender may become eligible. Any period of community custody actually served shall be credited against the community placement portion of the sentence.

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;

(c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(a) The offender shall remain within, or outside of, a specified geographical boundary;

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) The offender shall participate in crime-related treatment or counseling services;

(d) The offender shall not consume alcohol; or

(e) The offender shall comply with any crime-related prohibitions.

(6) An offender convicted of a felony sex offense against a minor victim after June 6, 1996, shall comply with any terms and conditions of community placement imposed by the department relating to contact between the sex offender and a minor victim or a child of similar age or circumstance as a previous victim.

(7) Prior to or during community placement, upon recommendation of the department, the sentencing court may remove or modify any conditions of community placement so as not to be more restrictive.

RCW 9.94A.715

(1) When a court sentences a person to the custody of the department for a sex offense not sentenced under RCW 9.94A.712, a violent offense, any crime against persons under RCW 9.94A.411(2), or a felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728 (1) and (2); or (c) with regard to offenders sentenced under RCW 9.94A.660, upon failure to complete or administrative termination from the special drug offender sentencing alternative program. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community custody imposed under this section.

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs

or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department shall enforce such conditions pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

(3) If an offender violates conditions imposed by the court or the department pursuant to this section during community custody, the department may transfer the offender to a more restrictive confinement status and impose other available sanctions as provided in RCW 9.94A.737 and 9.94A.740.

(4) Except for terms of community custody under RCW 9.94A.670, the department shall discharge the offender from community custody on a date determined by the department, which the department may modify, based on risk and performance of the offender, within the range or at the end of the period of earned release, whichever is later.

(5) At any time prior to the completion or termination of a sex offender's term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions imposed pursuant to this section for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody. If a violation of a condition extended under this subsection occurs after the expiration of the offender's term of community custody, it shall be

deemed a violation of the sentence for the purposes of RCW 9.94A.631 and may be punishable as contempt of court as provided for in RCW 7.21.040. If the court extends a condition beyond the expiration of the term of community custody, the department is not responsible for supervision of the offender's compliance with the condition.

(6) Within the funds available for community custody, the department shall determine conditions and duration of community custody on the basis of risk to community safety, and shall supervise offenders during community custody on the basis of risk to community safety and conditions imposed by the court. The secretary shall adopt rules to implement the provisions of this subsection.

(7) By the close of the next business day after receiving notice of a condition imposed or modified by the department, an offender may request an administrative review under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not reasonably related to any of the following: (a) The crime of conviction; (b) the offender's risk of reoffending; or (c) the safety of the community.

RCW 43.43.753

The legislature finds that recent developments in molecular biology and genetics have important applications for forensic science. It has been scientifically established that there is a unique pattern to the chemical structure of the deoxyribonucleic acid (DNA) contained in each cell of the human body. The process for identifying this pattern is called "DNA identification."

The legislature further finds that DNA data bases are important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts. It is the policy of this state to assist federal, state, and local criminal justice and law enforcement agencies in both the identification and detection of individuals in criminal investigations and the identification and location of missing and unidentified persons. Therefore, it is in the best interest of the state to establish a DNA data base and DNA data bank containing DNA samples submitted by persons convicted of felony offenses and DNA samples necessary for the identification of missing persons and unidentified human remains.

The legislature further finds that the DNA identification system used by the Federal Bureau of Investigation and the Washington state patrol has no ability to predict genetic disease or predisposal to illness. Nonetheless, the legislature intends that biological samples collected under RCW 43.43.754, and DNA identification data obtained from the samples, be used only for purposes related to criminal investigation, identification of human remains or missing persons, or improving the operation of the system authorized under RCW 43.43.752 through 43.43.758.

RCW 43.43.754

(1) Every adult or juvenile individual convicted of a felony, stalking under RCW 9A.46.110, harassment under RCW 9A.46.020, communicating with a minor for immoral purposes under RCW 9.68A.090, or adjudicated guilty of an equivalent juvenile offense must have a biological sample collected for purposes of DNA identification analysis in the following manner:

(a) For persons convicted of such offenses or adjudicated guilty of an equivalent juvenile offense who do not serve a term of confinement in a department of corrections facility, and do serve a term of confinement in a city or county jail facility, the city or county shall be responsible for obtaining the biological samples either as part of the intake process into the city or county jail or detention facility for those persons convicted on or after July 1, 2002, or within a reasonable time after July 1, 2002, for those persons incarcerated before July 1, 2002, who have not yet had a biological sample collected, beginning with those persons who will be released the soonest.

(b) For persons convicted of such offenses or adjudicated guilty of an equivalent juvenile offense who do not serve a term of confinement in a department of corrections facility, and do not serve a term of confinement in a city or county jail facility, the local police department or sheriff's office is responsible for obtaining the biological samples after sentencing on or after July 1, 2002.

(c) For persons convicted of such offenses or adjudicated guilty of an equivalent juvenile offense, who are serving or who are to serve a term of confinement in a department of corrections facility or a department of social and health services facility, the facility holding the person shall be responsible for obtaining the biological samples either as part of the intake process into such facility for those persons convicted on or after July 1, 2002,

or within a reasonable time after July 1, 2002, for those persons incarcerated before July 1, 2002, who have not yet had a biological sample collected, beginning with those persons who will be released the soonest.

(2) Any biological sample taken pursuant to RCW 43.43.752 through 43.43.758 may be retained by the forensic laboratory services bureau, and shall be used solely for the purpose of providing DNA or other tests for identification analysis and prosecution of a criminal offense or for the identification of human remains or missing persons. Nothing in this section prohibits the submission of results derived from the biological samples to the Federal Bureau of Investigation combined DNA index system.

(3) The director of the forensic laboratory services bureau of the Washington state patrol shall perform testing on all biological samples collected under subsection (1) of this section, to the extent allowed by funding available for this purpose. The director shall give priority to testing on samples collected from those adults or juveniles convicted of a felony or adjudicated guilty of an equivalent juvenile offense that is defined as a sex offense or a violent offense in RCW 9.94A.030.

(4) This section applies to all adults who are convicted of a sex or violent offense after July 1, 1990; and to all adults who were convicted of a sex or violent offense on or prior to July 1, 1990, and who are still incarcerated on or after July 25, 1999. This section applies to all juveniles who are adjudicated guilty of a sex or violent offense after July 1, 1994; and to all juveniles who were adjudicated guilty of a sex or violent offense on or prior to July 1, 1994, and who are still incarcerated on or after July 25, 1999. This section applies to all adults and juveniles who are convicted of a felony other than a sex or violent offense, stalking under RCW 9A.46.110, harassment under RCW 9A.46.020, or communicating with a minor for immoral purposes under RCW 9.68A.090, or adjudicated guilty of an equivalent juvenile offense, on or after July 1, 2002; and to all adults and juveniles who were convicted or adjudicated guilty of such an offense before July 1, 2002, and are still incarcerated on or after July 1, 2002.

(5) This section creates no rights in a third person. No cause of action may be brought based upon the noncollection or nonanalysis or the delayed collection or analysis of a biological sample authorized to be taken under RCW 43.43.752 through 43.43.758.

(6) The detention, arrest, or conviction of a person based upon a data

base match or data base information is not invalidated if it is determined that the sample was obtained or placed in the data base by mistake, or if the conviction or juvenile adjudication that resulted in the collection of the biological sample was subsequently vacated or otherwise altered in any future proceeding including but not limited to posttrial or postfact-finding motions, appeals, or collateral attacks.

RCW 43.43.7541

Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after July 1, 2002, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030, payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. The clerk of the court shall transmit fees collected to the state treasurer for deposit in the state DNA data base account created under RCW 43.43.7532.

FILED
COURT APPEALS

06 SEP 29 PM 12:44

STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH ALBERT FULLER,

Appellant,

CLARK CO. NO. 05-1-01692-2
APPEAL NO: 34319-3-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON

COUNTY OF CLARK

) vs.

CATHY RUSSELL, being duly sworn on oath, states that on the 27th day of SEPTEMBER, 2006, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

ARTHUR CURTIS
CLARK COUNTY PROS. ATTY
1200 FRANKLIN ST.
VANCOUVER, WA 98668

JOE ALBERT FULLER #727823
WASH STATE PENITENTIARY
1313 N. 13th Ave.
WALLA WALLA, WA 99362

and that said envelope contained the following:

1. BRIEF OF APPELLANT
2. SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS
3. AFFIDAVIT OF MAILING

DATED this 27TH day of SEPTEMBER, 2006.

Cathy Russell
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 27th day of SEPTEMBER, 2006.



Donna Baker
NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW, /KELSO
Commission expires: 10-24-09