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DIVISION II

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STATE OF WASHINGTON  
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COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent

vs.

DANIEL WHEELER,

Appellant.

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BRIEF OF APPELLANT

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APPEAL FROM THE SUPERIOR COURT FOR  
THURSTON COUNTY  
The Honorable Richard D. Hicks, Judge  
Cause No. 04-1-00776-7

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in commenting on the evidence and thereby indicated to the jury its opinion on the credibility of the two witnesses on the tampering with a witness charge (Count IV) with the result that this conviction should be reversed.
2. The trial court erred in denying Wheeler's motion for a mistrial based on the court's improper comments on the evidence as to Count IV.
3. The trial court erred in allowing Detective Rudolph to testify that the amount of methamphetamine recovered evidenced that Wheeler was dealing, which was an improper opinion on Wheeler's guilt on Count II—unlawful possession of a controlled substance with the intent to deliver.
4. The trial court erred in allowing Wheeler to be represented by counsel who provided ineffective assistance in failing to object to Detective Rudolph's improper opinion testimony on his guilt for Count II.
5. The trial court erred in allowing Wheeler to be tried and in instructing the jury in Count II on the uncharged alternative means of committing the crime on April 21<sup>st</sup>.
6. The trial court erred in failing to give an unanimity instruction on Count II.
7. The trial court erred in allowing Wheeler to be convicted in Count II where the information alleged that this crime occurred on April 20<sup>th</sup> and the to-convict instruction, which became the law of the case, alleged that the crime occurred on April 21<sup>st</sup>.
8. The trial court erred in denying Wheeler's motion for a new trial on Count II.

9. The trial court erred in allowing Wheeler to be represented by counsel who provided ineffective assistance in failing to move for dismissal rather than move for a new trial on Count II.
10. The trial court erred in allowing the State to present inadmissible ER 404(b) testimony over Wheeler's objection of allegedly "stolen" property where Wheeler was not charged with possession of stolen property.
11. The trial court erred in allowing the State to impeach Wheeler with his prior drug convictions over his objection where Wheeler did not open the door to such impeachment.
12. The trial court erred in failing to dismiss Wheeler's case where the cumulative effect of the claimed errors materially affected the outcome of the trial.
13. The trial court erred in not taking the case from the jury on all four counts for lack of sufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in commenting on the evidence and thereby indicated to the jury its opinion on the credibility of the two witnesses on the tampering with a witness charge (Count IV) with the result that this conviction should be reversed? [Assignments of Error Nos. 1 and 2].
2. Whether the trial court erred in allowing Detective Rudolph to testify that the amount of methamphetamine recovered evidenced that Wheeler was dealing, which was an improper opinion on Wheeler's guilt on Count II—unlawful possession of a controlled substance with the intent to deliver? [Assignments of Error Nos. 3 and 4].
3. Whether the trial court erred in allowing trial court erred in allowing Wheeler to be tried and in instructing the jury in Count II on the uncharged alternative means of committing the crime on April 21<sup>st</sup>? [Assignment of Error No. 5].

4. Whether the trial court erred in failing to give an unanimity instruction on Count II? [Assignment of Error No. 6].
5. Whether the trial court erred in allowing Wheeler to be convicted in Count II where the information alleged that this crime occurred on April 20<sup>th</sup> and the to-convict instruction, which became the law of the case, alleged that the crime occurred on April 21<sup>st</sup>? [Assignments of Error Nos. 7-9].
6. Whether the trial court erred in allowing the State to present inadmissible ER 404(b) testimony over Wheeler's objection of allegedly "stolen" property where Wheeler was not charged with possession of stolen property? [Assignment of Error No. 10].
7. Whether the trial court erred in allowing the State to impeach Wheeler over his objection with his prior drug convictions previously ruled inadmissible where Wheeler did not open the door to such impeachment? [Assignments of Error No. 11].
8. Whether the trial court erred in failing to grant Wheeler's motion for a mistrial on Count IV based on the court's improper comments on the evidence and in failing to grant Wheeler's motion for a new trial on Count II based on the State's failure to sustain the burden of proof it assumed to prove that Wheeler had unlawful possession of a controlled substance with the intent to deliver on April 21<sup>st</sup>? [Assignments Error Nos. 2 and 8].
9. Whether the trial court erred in failing to dismiss Wheeler's case where the cumulative effect of the claimed errors materially affected the outcome of the trial? [Assignment of Error No. 12].
10. Whether the State elicited sufficient evidence to prove beyond a reasonable doubt that Wheeler was guilty of unlawful delivery of a controlled substance (Count I), unlawful possession of a controlled substance with the intent to deliver (Count II), unlawful possession of a

controlled substance (Count III), and tampering with a witness (Count IV)? [Assignments of Error No. 13].

C. STATEMENT OF THE CASE

1. Procedure

Daniel Wheeler (Wheeler) was charged by sixth amended information filed in Thurston County Superior Court with one count of unlawful delivery of a controlled substance including a school bus route stop sentence enhancement (Count I), one count of unlawful possession of a controlled substance with the intent to deliver including a school bus route stop sentence enhancement (Count II), one count of unlawful possession of a controlled substance (Count III), and one count of tampering with a witness (Count IV). [CP 27-28].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. Wheeler was tried by a jury, the Honorable Richard D. Hicks presiding. During trial, the court denied Wheeler's motion for mistrial after the court improperly commented on the evidence in ruling on Wheeler's objections. [CP 34-36; Vol. I RP 41-50; Vol. II RP 53-66]. The jury found Wheeler guilty of all four counts including finding special verdicts finding the crimes in Counts I and II took place within 1000 feet of a school bus route stop. [CP 78, 80, 81, 82, 83, 84; Vol. IV RP 422-426].

Prior to sentencing the court heard and denied Wheeler's motion for a new trial on Count II based on the to-convict instruction containing a date not charged. [9-28-06 RP 3-12]. The court then sentenced Wheeler to standard range sentences of 144-months (120-months for the underlying offense and 24-months for the sentence enhancement) on Count I, of 144-months (120-months for the underlying offense and 24-months for the sentence enhancement) on Count II, of 24-months on Count III, and of 60 months on Count IV based on an uncontested offender score of 19 for a total sentence of 144-months. [CP 100, 101, 102, 103, 104, 106-118; 9-28-06 RP 13-19].

Timely notice of appeal was filed on October 16, 2006. [CP 119]. This appeal follows.

2. Facts

On April 20, 2004, Jean Mathis (Mathis), working as a confidential informant with the Thurston County Narcotics Task Force, arranged to obtain drugs from Wheeler while the police watched from a surveillance point. [Vol. I RP 25, 28-30; Vol. II RP 96-101, 163-164]. Mathis was working with the police because she was facing her own drug charge, which was eventually reduced to a misdemeanor. [Vol. I RP 23-24, 38-40; Vol. II RP 96-109].

Prior to contacting Wheeler, Mathis and her vehicle were searched to ensure she did not have any drugs. [Vol. I RP 30; Vol. II RP 96-109, 139, 165-172]. Mathis then drove to a mobile home park, met Wheeler and went inside the mobile home. [Vol. I RP 31-37; Vol. II RP 96-109, 165-172]. Mathis and Wheeler then got into Wheeler's truck and drove off with the police following. [Vol. I RP 31-37; Vol. II RP 96-109, 165-172]. Wheeler and Mathis were seen to make two stops and contact unidentified individuals then return to the mobile home park. [Vol. I RP 31-37; Vol. II RP 96-109, 125, 165-172]. Wheeler and Mathis then got into Mathis's car and drove to a nearby feed store. [Vol. I RP 31-37; Vol. II RP 96-109, 140-142, 165-172]. Mathis got out of the car and Wheeler got into the driver's seat while Mathis went into the feed store purchasing iodine. [Vol. I RP 31-37; Vol. II RP 96-109, 140-142, 165-172]. The two then returned to the mobile home park, Mathis left to meet the police, and Wheeler was seen by the police surveillance taking the iodine into a trailer near the mobile home. [Vol. I RP 31-37; Vol. II RP 96-109, 140-142, 165-172].

Mathis met with the police, reported what had occurred, and gave the police what she had obtained from Wheeler—suspected methamphetamine. [Vol. I RP 31-37; Vol. II RP 96-109, 143, 165-172]. The police then went and contacted Wheeler. [Vol. II RP 109, 111, 143,

172-185]. The police obtained a search warrant for the mobile home and trailer and found in a lockbox as described by Mathis an additional 10 bindles of suspected methamphetamine, two bindles of suspected heroin, and other items related to the sale of drugs. [Vol. II RP 109, 111-123, 142-148, 172-185]. The next day, April 21<sup>st</sup>, the police returned and executed a second search warrant and Wheeler was arrested—suspected methamphetamine was found on his person. [Vol. II RP 148-155, 190-192].

The suspected drugs recovered were tested by the Washington State Patrol Crime Lab and found to be methamphetamine and heroin. [Exhibit No. 17; Vol. II RP 237-238].

Theodore Tetrealt who had contact with Wheeler while both were in jail and was an acquaintance of Mathis, testified that Wheeler spoke of his pending case and that if Mathis didn't appear for trial the case would end. [Vol. I RP 5, 8-10]. Upon his release, Tetrealt contacted Mathis and conveyed this to her. [Vol. I RP 10, 12-20]. Mathis became frightened and contacted the police. [Vol. I RP 12, 40-43; Vol. II RP 67-68, 211-213].

Wheeler testified in his defense denying giving Mathis methamphetamine or possessing with the intent to deliver the methamphetamine or possessing the heroin found during the first search.

[Vol. II RP 240-247; Vol. III RP 257-260, 277-285]. He did admit to possessing the methamphetamine found on his person during the second search on April 21<sup>st</sup>. [Vol. III RP 316, 329-330]. Wheeler also denied having Tetrealt contact Mathis so that she would not appear at trial. Finally, Wheeler testified that he did not live at the mobile home where the drugs were found that formed the basis of the charges. [Vol. II RP 189, 240-247; Vol. III RP 257-260, 277-285].

Mathis at first denied that she had a sexual relationship with Wheeler then admitted the same. [Vol. II RP 76-77]. Mathis also admitted that she and Wheeler had used methamphetamine before going to the feed store, and that she had failed to tell the police as she was prohibited from doing so while working as a confidential informant with the police. [Vol. II RP 75-76, 217-218].

D. ARGUMENT

- (1) THE TRIAL COURT IMPROPERLY COMMENTED ON THE EVIDENCE AND INDICATED TO THE JURY THE COURT'S OPINION AS TO THE CREDIBILITY OF THE TWO WITNESSES ON THE TAMPERING WITH A WITNESS CHARGE (COUNT IV) AND WHEELER'S GUILT ON THIS CHARGE IN ITS RESPONSE TO WHEELER'S PROPER OBJECTIONS THEREBY REQUIRING THE REVERSAL OF THIS CONVICTION.

Art. 4, sec. 16 of the Washington Constitution provides:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

The constitution prohibits judges from conveying to the jury their personal attitudes towards the merits of the case. State v. Foster, 91 Wn.2d 466, 481, 589 P.2d 789 (1979). The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge's opinion from influencing the jury. State v. Hansen, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986). A judge comments on the evidence if the court's attitude towards the merits of the case or the court's evaluation relative to the disputed issue is inferable. *See* State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court has been communicated to the jury. State v. Trickle, 16 Wn. App. 18, 25, 553 P.2d 139 (1976), *review denied*, 88 Wn.2d 1004 (1977); *see also*, State v. Deal, 128 Wn.2d 693, 703, 911 P.2d (1996), *quoting* State v. Swan, 114 Wn.2d 613, 657, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772 (1991).

Here, after Tetrealt had testified as to his conversations with Wheeler and his actions in contacting Mathis based on these conversations while Mathis was testifying regarding her contact with Tetrealt, Wheeler properly objected to Mathis testifying as to what Tetrealt told her as hearsay. [Vol. I RP 41-42]. The trial court in ruling on these objections in

front of the jury stated that Tetrealt was still in the courtroom to be questioned further, i.e. corroborate Mathis's testimony. [Vol. I RP 42-43]. At which point, Wheeler asked to be heard outside the presence of the jury given the court's repeated comments on the evidence in this regard. [Vol. I RP 43-44]. Wheeler moved for a mistrial based on the court's improper comments, which the court denied even while upholding Wheeler's objections and admitting its statements were not "prudent." [CP 34-36; Vol. I RP 44-51; Vol. II RP 53-64]. While the court did give Wheeler's requested curative instruction, [Vol. II RP 65-66], the jury was still tainted by the court's actions in that these comments revealed the court's opinion as to the credibility of the only two witnesses supporting the tampering with a witness charge—Wheeler testified in his own defense and denied the tampering charge—and the court's comments could also be improperly construed by the jury as placing a burden on Wheeler to present evidence establishing his innocence on this charge. In effect, the trial court telegraphed its belief in Mathis's testimony as it could be corroborated by Tetrealt and thereby conveyed the court's belief in Wheeler's guilt on the charge of tampering with a witness (Count IV) to the jury. The trial court essentially admitted it had improperly commented on the evidence, but instead of granting the mistrial requested on Count IV allowed the matter to proceed to verdict after it had tainted the jury by its comments. This

was error given the heavy constitutional burden prohibiting courts from doing this very thing. This court should reverse and dismiss Wheeler's conviction for tampering with a witness (Count IV).

- (2) THE TRIAL COURT ERRED IN ALLOWING DETECTIVE RUDLOPH TO TESTIFY THAT THE AMOUNT OF METHAMPHETAMINE RECOVERED INDICATED THAT WHEELER WAS DEALING WHERE THIS TESTIMONY WAS AN OPINION ON WHEELER'S GUILT ON COUNT II (UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH THE INTENT TO DELIVER)—THE ULTIMATE QUESTION FOR THE JURY TO DECIDE.

A witness may not testify to his or her opinion as to guilt of a criminal defendant, whether by direct statement or inference. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1992). No witness, lay or expert, may comment on the guilt or innocence of the defendant. Id.; State v. Farr-Lenzini, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999); City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993). Admission of impermissible opinion as to the guilt of a criminal defendant is error of constitutional magnitude. State v. Jones, 71 Wn. App. 798, 813 P.2d 85 (1993).

Here, the State was allowed to present Detective Rudolph's testimony, without objection, that the quantity of methamphetamine recovered was consistent with "somebody who's dealing methamphetamine." [Vol. III RP 341-342]. This testimony constitutes an

improper opinion as to Wheeler's guilt on Count II—unlawful possession of a controlled substance with the intent to deliver—where this was the ultimate question for the jury not this witness to decide based solely on the facts not an improper opinion of Wheeler's guilty, and was error for the trial court to admit.

Constitutional error is harmless error only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 575 (1989), *cert. denied*, 475 U.S. 1020, 89 L.Ed.2d 321, 106 S.Ct. 1208 (1986). On the other hand, the erroneous admission of evidence of non-constitutional error is prejudicial only if within reasonable probability the outcome of the trial would have been materially affected. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Regardless of the analytical prism employed, under either standard, admitting the testimony here at issue was not harmless. There is reasonable doubt the jury would have reached the same verdict without this evidence, since in its absence the jury could have believed Wheeler's denial given that he testified he did not live in the mobile home where the methamphetamine was discovered. Concomitantly, for the same reasons the evidence at issue materially affected the outcome of the trial. The error was of major significance and not harmless. This court should

reverse Wheeler's conviction on Count II—unlawful possession of a controlled substance with the intent to deliver.

Finally, a criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Assuming, *arguendo*, this court finds that trial counsel waived the issue relating to the trial court's admission of improper opinion evidence of Wheeler's guilty on Count II as set forth above by failing to object to Detective Rudolph's testimony, then both elements of ineffective assistance of counsel have been established.

First, for the reasons set forth above, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object to this testimony. Second, again for the reasons set forth above, the prejudice is self evident: the state used the improper opinion evidence on Wheeler's guilt to obtain a conviction on Count II.

- (3) IT WAS REVERSIBLE ERROR TO INSTRUCT THE JURY ON THE UNCHARGED ALTERNATIVE MEANS OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH THE INTENT TO DELIVER (COUNT II) ON APRIL 21<sup>ST</sup>.

An accused must be informed of the criminal charge to be met at trial and cannot be tried for an offense that has not been charged. State v. Iziarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988); State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995). It is error to instruct the jury that they may consider other alternative means by which the crime may have been committed, regardless of the strength of the evidence admitted at trial. State v. Williamson, 84 Wn. App. 37, 42, 924 P.2d 960 (1996). The manner of committing the crime is an element and the defendant must be informed of this element in the information in order to prepare a proper defense. *See* State v. Carothers, 84 Wn.2d 256, 263, 525 P.2d 731 (1974). A defendant cannot be tried for an uncharged offense. State v. Brown, 45 Wn. App. 571, 576, 726 P.2d 60 (1986).

A claimed manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). An erroneous instruction which may have affected a criminal defendant's right to a fair trial may be considered for the first time on appeal. State v. Fesser, 23 Wn. App. 422, 423-24, 595 P.2d 955 (1979); *See* State v. Hanna, 123 Wn.2d 704, 709, 871 P.2d 135 (1994).

In State v. Severns, 13 Wn.2d 542, 125 P.2d 659 (1942), our Supreme Court rejected the State's argument that the trial court could instruct on means of committing an offense not addressed in the information, provided sufficient evidence of the means had been presented to the jury.

The jury is entitled to know what the law is concerning the offense, and the court may in its discretion define the offense, the sole limitation being that the court stay within the bounds of the crime charged.

We have recognized that, where the statute provides that a crime may be committed in different ways or by different means, it is proper to charge in the information that the crime was committed in one of the ways or by one of the means specified in the statute, or in all the ways. Even though the statute disjunctively connects the different ways or means the information may allege them conjunctively, provided the different ways or means are not repugnant to each other...However, we have been cited to no authority, nor do we know of any, which permits a court, when the information charges the act to have been done in only one of the ways or by one of the means named in the statute, to instruct the

jury that they may consider other ways or means by which the act may have been committed.

We are firmly of the opinion that, where, as in the instant case, the information charges that the crime was committed in a particular way, under one subdivision of a statute, it is error for the trial court to instruct the jury, as was done in this case, that they might consider other ways or means by which the act charged might have been committed, regardless of the range which the court may have permitted the testimony to take.

State v. Severns, 13 Wn.2d at 548.

An erroneous instruction given on behalf of the party in whose favor the verdict was returned is presumed prejudicial unless it affirmatively appears that the error was harmless. State v. Brown, *supra*.

By way of the sixth amended information, Wheeler was charged in Count II with unlawful possession of a controlled substance with the intent to deliver on “the 20<sup>th</sup> day of April, 2004.” [Emphasis added]. [CP 27-28].

However, the to-convict instruction for this charge, Instruction No. 16 [CP 69], states as an element in pertinent part that “on...the 21<sup>st</sup> day of April, 2004.” [Emphasis added].

It was reversible error to try Wheeler under the uncharged alternative means of the crime at issue being committed on April 21<sup>st</sup> since it violated his right to notice of the crime charged i.e. the specific date upon which the alleged crime occurred. *See State v. Doogan*, 82 Wn.

App. 185, 188, 917 P.2d 155 (1996) *citing* State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1323 (1988). This is prejudicial because there is a reasonable possibility that the jury convicted Wheeler under the uncharged alternative means as instructed by the court of the crime being committed on April 21<sup>st</sup> when he was found to have in his possession two bindles of methamphetamine (an amount consistent with personal use) on that date as compared to the ten bindles allegedly found in his possession on the charged date of April 20<sup>th</sup> along with other items consistent with an intent to deliver. As such, Wheeler's conviction for unlawful possession of a controlled substance with the intent to deliver (Count II) should be reversed. State v. Severns, 13 Wn.2d at 552.

- (4) WHEELER'S CONVICTION FOR UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH THE INTENT TO DELIVER (COUNT II) SHOULD BE REVERSED WHERE THE COURT FAILED TO GIVE AN UNANIMITY INSTRUCTION.

Art. 1, sec. 21 of the Washington Constitution guarantees a criminal defendant the right to a unanimous jury verdict. "The right to a unanimous verdict is derived from the fundamental constitutional right to a fair trial by a jury, it may be raised for the first time on appeal." State v. Gooden, 51 Wn. App. 615, 617, 754 P.2d 1000, *review denied*, 111 Wn.2d 1012 (1988); State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991); State v. Hursh, 77 Wn. App. 242, 248, 890

P.2d 1066 (1995). Issues of constitutional magnitude may be raised for the first time on appeal. State v. Peterson, 73 Wn. App. 303, 306, 438 P.2d 183 (1968); State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996); *see also* RAP 2.5(a)(3).

In alternative means cases, a single offense that may be committed in more than one way, the jury must unanimously agree on guilt for the single crime charged but not on the means by which the crime was committed so long as there is sufficient evidence to support each alternative. State v. Ortega-Martinez, 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994); State v. Hursh, 77 Wn. App. at 248.

Here, as argued in the preceding section of this brief, the State charged Wheeler in the sixth amended information with unlawful possession of a controlled substance with the intent to deliver (Count II) based on the date of April 20<sup>th</sup>. [CP 27-28]. Yet the to-convict instruction on this charge included the uncharged alternative of the crime being committed on April 21<sup>st</sup>. [CP 69]. Thus, the State bore the burden of eliciting sufficient evidence to prove beyond a reasonable doubt both the charged alternative as well as the uncharged alternative—that Wheeler in fact possessed methamphetamine on both dates with the intent to deliver. The court did not give an unanimity instruction regarding this charge. The State failed to elicit sufficient evidence of all the alternatives (charged and

uncharged) as required by the to-convict instruction, again, as set forth above in the preceding section of this brief. The evidence presented does not constitute sufficient evidence to establish that Wheeler possessed methamphetamine with the intent to deliver on April 21<sup>st</sup> as he only possessed an amount consistent with personal use—much like the amount of heroin he allegedly possessed that formed the basis for Count III—and it was the State’s burden to do so. Having failed to elicit the requisite evidence to prove beyond a reasonable doubt of all the alternatives (charged and uncharged) given the court’s failure to give a unanimity instruction, this court should reverse Wheeler’s conviction for unlawful possession of a controlled substance with the intent to deliver (Count II).

(5) THE TRIAL COURT ERRED IN ALLOWING WHEELER TO BE CONVICTED IN COUNT II OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH THE INTENT TO DELIVER WHERE THE INFORMATION CHARGES WHEELER WITH COMMITTING THIS CRIME ON APRIL 20<sup>TH</sup> AND THE TO-CONVICT INSTRUCTION REQUIRES THAT THE CRIME WAS COMMITTED ON APRIL 21<sup>ST</sup> THEREBY BECOMING THE LAW OF THE CASE.

On appeal, an appellant may assign error to elements added under the

law of the case doctrine. State v. Ng, 110 Wn.2d 32, 39, 750 P.2d 631 (1988) (because the State failed to object to the jury instructions they “are the law of the case and we will consider error predicated on them.” (citations omitted)). Such assignment of error may include a

challenge to the sufficiency of the evidence of the added element....

State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

If the reviewing court finds insufficient evidence to prove the added element, reversal is required. (citations omitted). Retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)....

State v. Hickman, 135 Wn.2d at 103.

Here, the State charged Wheeler in Count II in the sixth amended information with unlawful possession of a controlled substance with the intent to deliver occurring on April 20, 2004. [CP 27-28]. The to-convict instruction on this charge, Instruction No. 16 [CP 69], alleged that the crime occurred on “the 21<sup>st</sup> day of April, 2004,” which was not objected to by the State thereby becoming the law of the case. By virtue of this instruction, the State assumed the burden of proving that this crime occurred on April 21<sup>st</sup>. There was no evidence presented nor did the State argue that the crime occurred on the 21<sup>st</sup>. Wheeler moved for a new trial on this charge based on this error, but the court denied his motion. [CP 85-93, 105; 9-28-06 RP 3-12]. The court’s order denying Wheeler’s motion states:

...there is no basis, given the interpretation of the jury instructions and the reading of the information taken as a whole, that the jury

was confused on the guilty verdict finding for Count II of the sixth amended information.

[CP 105].

However, the court's ruling fails to recognize the true nature of the error committed—the State assumed the burden of proving the crime was committed on April 21<sup>st</sup> and no reading of the instructions as a whole or determining that the jury could not have been confused can alter this fact because the to-convict instruction became the law of the case on this count. The State was required to prove beyond a reasonable doubt that Count II occurred on April 21<sup>st</sup> and it cannot. This court should reverse and dismiss Wheeler's conviction on Count II.

Assuming, arguendo, this court finds that trial counsel waived this issue by moving for a new trial rather than dismissal of Count II for the reasons set forth above then Wheeler received ineffective assistance of counsel. In order to prevent needless duplication, the test for ineffective assistance of counsel previously set forth herein is adopted by reference for this portion of the brief. With this understanding then, both elements of ineffective assistance of counsel have been established.

First, for the reasons set forth above, the record does not reveal any tactical or strategic reason why trial counsel would have failed to make a motion to dismiss rather than merely a motion for a new trial. Second,

again for the reasons set forth above, the prejudice is self evident: the evidence does not support beyond a reasonable doubt that Wheeler possessed methamphetamine with the intent to deliver on April 21<sup>st</sup>, a burden the State assumed given the to-convict instruction on this count. This court should reverse Count II.

- (6) THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT INADMISSIBLE 404(b) TESTIMONY OF ALLEGEDLY “STOLEN” PROPERTY OVER WHEELER’S OBJECTION WHERE WHEELER WAS NOT CHARGED WITH POSSESSION OF STOLEN PROPERTY.

To be admissible, evidence must be relevant. ER 402. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence. ER 401. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the likelihood it will mislead the jury. ER 403.

The admission of other crimes, wrongs or acts is governed by ER 404 (b). Under the rule, “(e)vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b). To admit such evidence, the trial court must first determine whether the evidence is relevant and, if so, whether its probative value outweighs its potential for prejudice. ER 401;

State v. Kelly, 102 Wn.2d 188, 198, 685 P.2d 564 (1984); ER 403; State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). Additionally, evidence admissible under ER 404(b) requires proof by a preponderance of the evidence of the commission of the alleged wrong or act and the defendant's connection to it. State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981).

Here, over Wheeler's objection, the State elicited testimony that the officers executed a second search warrant on April 21<sup>st</sup> based on observing allegedly "stolen" the prior day. [Vol. II RP 148-150]. At the execution of both search warrants Wheeler was present. In overruling Wheeler's objection, the court reasoned that the testimony was being admitted to show why the officers returned to the property the next day and was not unduly prejudicial because "they [the officers] had already been there and searched and allegedly found things that belonged to him [Wheeler]." [Vol. II RP 150].

This rationale is unpersuasive. First, the State did not provide proof by a preponderance of the evidence of Wheeler's connection to the allegedly "stolen" property. The only evidence was that the officers executed a search warrant on April 20<sup>th</sup> and recovered/observed items related to potential drug charges then returned the next day (April 21<sup>st</sup>) to execute a second search warrant and Wheeler was present at the time of

the execution of both warrants. The evidence, regarding allegedly “stolen” property, is not relevant to show any element of the crimes for which Wheeler was charged—he was never charged with possession of stolen property as noted even by the court in making this inexplicable ruling. Any claim of relevancy as contrasted to the prejudicial effect fails when considering that this testimony only served to establish in the jury’s mind an unfavorable impression of Wheeler’s character and that because he was present where allegedly “stolen” property was found he must be a criminal. In any event, any claimed probative value was clearly outweighed by danger of unfair prejudice under ER 403.

If the only logical relevancy is to show propensity to commit similar acts, admission of prior acts may be reversible error. State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001). For example, in Pogue’s trial for possession of cocaine, the court allowed the State to elicit Pogue’s admission that he had possessed cocaine in the past on the issue of knowledge and to rebut his assertion that the police had planted the drugs. The conviction was reversed. The appellate court held:

The only logical relevance of (Pogue’s) prior possession is through a propensity argument: because he knowingly possessed cocaine in the past, it is more likely that he knowingly possessed it on the day of the charged incident.

Pogue, 104 Wn. App. at 985.

Similarly, here, the only logical relevancy of the evidence at issue was through a propensity argument; i.e., since Wheeler was present where allegedly “stolen” property was found he must be a criminal or not to be believed when he testified, thus he was more likely to have committed the crimes charged.

The evidence should not have been allowed. And the error was not harmless. This court examines evidentiary, non-constitutional error to see if the error, within reasonable probability, materially affected the outcome of the trial. *See State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). It is within reasonable probability that but for the admission of the evidence the jury would have acquitted Wheeler. The admission of the evidence was clearly introduction of Wheeler’s propensity and character, which ER 404(b) forbids.

The prejudice resulting from the introduction of the evidence denied Wheeler his right to a fair and impartial jury trial and outweighed the probative value, if any, of the evidence. *See State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Oughton*, 26 Wn. App. 74, 612 P.2d 812 (1980). And the evidence materially affected the outcome by confirming that since Wheeler was in proximity to allegedly “stolen” property he must be a criminal or not believed when he testified and he

was more likely to have committed the crimes charged. The error was of major significance and not harmless.

- (7) THE TRIAL COURT ERRED IN ALLOWING THE STATE TO “IMPEACH” WHEELER WITH HIS PRIOR DRUG CONVICTIONS OVER WHEELER’S OBJECTION WHERE HE DID NOT OPEN THE DOOR TO SUCH IMPEACHMENT.

While inadmissible evidence may be admitted if a witness “opens the door” during direct examination and the evidence is relevant to some issue at trial, State v. Tarman, 27 Wn. App. 645, 650-51, 621 P.2d 737 (1980), Wheeler’s response to his counsel’s question as to when he became addicted to drugs, [Vol. II RP 245], did not open the door to the admission of evidence of his prior drug convictions for methamphetamine possession and the inferences to be drawn therefrom. *See* State v. Avendano-Lopez, 79 Wn. App. 706, 713-14, 904 P.2d 324 (1995) (passing reference that defendant had been released from jail does not open door for State to present evidence of defendant’s prior crimes); *see also* State v. Stockton, 91 Wn. App. 35, 40, 955 P.2d 805 (1998) (passing reference to a prohibited topic during direct examination does not open door for cross examination about prior misconduct).

Evidentiary rulings will not be disturbed on appeal absent an abuse of discretion. State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995).

Before admitting evidence of a prior conviction for impeachment purposes under ER 609(a)(1), the trial court is required to weigh its probative value against the potential for undue prejudice. ER 609(a)(1); State v. Rivers, 129 Wn.2d 697, 705-06, 921 P.2d 495 (1996). In this narrow context, impeachment evidence can be introduced to enlighten the jury about a defendant's credibility. State v. Hardy, 133 Wn.2d 701, 707, 946 P.2d 1175 (1997). For this reason, only prior convictions that are probative of truthfulness are admissible. State v. Hardy, 133 Wn.2d at 707-08.

A prior conviction that does not involve dishonesty is presumed inadmissible. State v. Calegar, 133 Wn.2d 718, 947 P.2d 235 (1997); State v. Hardy, *supra*. To overcome this presumption, the burden is on the party seeking admission of the prior conviction to show that the probative value exceeds the prejudicial effect to the defendant. State v. Jones, 101 Wn.2d 113, 677 P.2d 131 (1984). There is "nothing inherent in ordinary drug convictions to suggest the person convicted is untruthful and ... prior drug convictions, in general, are not probative of a witness's veracity under ER 609(a)(1)." State v. Hardy, 133 Wn.2d at 709-10.

In weighing the probative value against the potential prejudicial effect, the trial court considers the six factors set forth in State v. Alexis, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980). These factors are:

(1) the length of the defendant's criminal record; (2) remoteness of the prior conviction; (3) nature of the prior crime; (4) the age and circumstances of the defendant; (5) centrality of the credibility issue; and (6) the impeachment value of the prior crime.

State v. Alexis, 95 Wn.2d at 19. Weighing these factors on the record is mandatory and the failure to do so is an abuse of discretion and, thus, error. State v. Rivers, 129 Wn.2d at 706.

Here, Wheeler and the State reached an agreement as to which of his prior convictions were admissible under ER 609—only those prior convictions involving dishonesty. [Vol. III RP 254-255]. However, the State on cross-examination then questioned Wheeler, based on his assertion on direct that he became addicted to methamphetamine in 2004, as to when he began smoking methamphetamine leading to the State's intent to impeach him with his prior convictions previously agreed as inadmissible. [Vol. III RP 285-286]. Wheeler immediately objected given the prior agreement with the State, but the court inexplicably ruled that Wheeler had opened the door to this impeachment. [Vol. III RP 286-298].

Initially in considering the trial court's decision allowing this impeachment, the trial court did not perform the required analysis of the Alexis factors on the record. Moreover, the only reason the trial court admitted these prior convictions over Wheeler's objection was because he

had opened the door to this form of impeachment. [Vol. II RP 247-251; Vol. III RP 254-255]. However, contrary to the trial court's ruling, Wheeler only testified to when he became addicted to drugs—he never testified on direct as to when he began to use drugs rather this was something the State brought up and exploited on cross in order to bring in prior convictions thereby circumventing its own agreement with Wheeler—Wheeler did not open the door to this form of “impeachment” where these prior convictions were per se inadmissible under ER 609. Therefore, the trial court's admission of the evidence at issue was error. State v. Rivers, 129 Wn.2d at 706.

“An erroneous ruling under ER 609(a) is reviewed under the nonconstitutional harmless error standard.” State v. Rivers, 129 Wn.2d at 706. This court examines such errors to if the error, within reasonable probability, materially affected the outcome of the trial. *See State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

It is within reasonable probability that but for the admission of the evidence of Wheeler's prior drug convictions, the jury may have acquitted him. The admission of the evidence allowed the jury to infer that he was not a credible witness.

The fact that Wheeler had previously been convicted of drug possession was not relevant to any issue at trial and was highly prejudicial.

“Evidence of drug use on other occasions ... is generally inadmissible on the ground that it is impermissibly prejudicial.” State v. Tigano, 63 Wn. App. 336, 344-45, 818 P.2d 1369 (1991), *reviewed denied*, 118 Wn.2d 1021 (1992). The use and possession of drugs are not probative of truthfulness because they have little to do with a witness’s credibility. State v. Wilson, 83 Wn. App. 546, 553-54, 922 P.2d 188 (1996), *review denied*, 130 Wn. 2d 1024 (1997). The prejudice was particularly significant here because the questioning by the State concerning Wheeler’s prior convictions did not even amount to “impeachment by mere contradiction.” See Jacqueline’s Wash., Inc. v. Mercantile Stores Co., 80 Wn.2d 784, 788-89, 498 P.2d 870 (1972). The State was simply allowed to elicit the fact that Wheeler had prior drug convictions where he had never denied the same—no doubt because he mistakenly believed that the State would honor its agreement not to bring up these convictions while testifying truthfully as to his drug use.

In the end, this case essentially turned on whom the jury was going to believe. Wheeler’s credibility was at issue and he testified to his lack of knowledge of the drugs found hidden in the lockbox (Count II), and denied delivering any drugs to Mathis (Count I) while admitting to possessing the heroin (Count III). Because his story is plausible, particularly given Mathis’s own credibility issues—denying then

admitting to a sexual relationship with Wheeler and doing methamphetamine with Wheeler contrary to her “contract” as a confidential informant during the “buy”—the admission of the prior offenses presented only impeachment evidence disputing Wheeler’s credibility, and there is a reasonable probability the improper admission of the evidence prejudiced the jury against Wheeler, with the result that his convictions should be reversed.

- (8) THE TRIAL COURT ERRED IN FAILING TO GRANT WHEELER’S MOTION FOR MISTRIAL ON COUNT IV AFTER ITS IMPROPER COMMENTS ON THE EVIDENCE AND IN FAILING TO GRANT WHEELER’S MOTION FOR A NEW TRIAL ON COUNT II WHERE THE STATE FAILED TO SUSTAIN THE BURDEN OF PROOF IT ASSUMED TO PROVE BEYOND A REASONABLE DOUBT THAT WHEELER UNLAWFULLY POSSESSED A CONTROLLED SUBSTANCE WITH THE INTENT TO DELIVER ON APRIL 21<sup>ST</sup>.

A trial court’s decision whether or not to grant a mistrial is reviewed for an abuse of discretion. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992). In making this determination, this court applies a three-step test to determine if the trial irregularity may have influenced the jury: “(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction.” State v.

Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987) (citing State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983)).

Here, regarding Wheeler’s motion for mistrial as to Count IV (tampering with a witness), the trial abused its discretion in failing to grant a mistrial on this count. First, the irregularity was serious—what could be more serious than a court injecting itself into the trial process to the detriment of one party. Second, the irregularity (the court’s comments on the evidence) cannot be brushed aside as of no consequence given the totality of the evidence where the court’s comments went directly to its perception of the credibility of the only two witnesses supporting the State’s charge of tampering with a witness (Tetreat could be recalled to support/corroborate Mathis’s testimony). Finally, even though the court gave Wheeler’s curative instruction, this was not sufficient given the court’s admission that its comments were not “prudent” and that this charge essentially came down to whether the jury believed Tetreat and Mathis compared to Wheeler’s denial. Any action by the court that potentially tipped the balance in favor of the State required the court to grant Wheeler’s motion for a mistrial on Count IV.

Similarly, a trial court’s ruling on a motion for a new trial will not be disturbed absent abuse of discretion. State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). An abuse of discretion occurs when a trial court

makes a decision not supported by the facts or makes a decision that is contrary to law. *See State ex rel Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971) (a trial court's discretion is abused when the trial court's decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.)

Here, the trial court denied Wheeler's motion for a new trial on Count II. In doing so the court failed to realize that the to-convict instruction on this count became the law of the case, set forth an uncharged alternative of committing Count II, and that it, the court, had failed to give a unanimity instruction on this count. In other words, the State assumed the burden of proving beyond a reasonable doubt that the crime occurred on April 21<sup>st</sup>. There was no evidence of this. Therefore the court abused its discretion in failing to grant Wheeler's motion.

(9) THE CUMMULATIVE EFFECT OF THE ERRORS CLAIMED HEREIN MATERIALLY AFFECTED THE OUTCOME OF WHEELER'S TRIAL AND REQUIRES REVERSAL OF HIS CONVICTIONS.

An accumulation of non-reversible errors may deny a defendant a fair trial. *State v. Perrett*, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). The cumulative error doctrine applies where there have been several trial errors, individually not justifying reversal, that, when combined, deny a defendant a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390

(2000). Here, for the reasons argued in the preceding sections of this brief, even if any one of the issues presented standing alone does not warrant reversal of Wheeler's convictions, the cumulative effect of these errors materially affected the outcome of his trial, and his convictions should be reversed, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

(10) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO FIND WHEELER GUILTY BEYOND A REASONABLE DOUBT OF UNLAWFUL DELIVERY OF A CONTROLLED SUBSTANCE (COUNT I), UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH THE INTENT TO DELIVER (COUNT II), UNLAWFUL POSSESSION OF CONTROLLED SUBSTANCE (COUNT III), AND TAMPERING WITH A WITNESS (COUNT IV).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of

logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, the State charged and Wheeler was convicted of four counts—unlawful delivery of a controlled substance (Count I), unlawful possession of a controlled substance with intent to deliver (Count II), unlawful possession of a controlled substance (Count III), and tampering with a witness (Count IV). The State bore the burden of establishing beyond a reasonable doubt that Wheeler was guilty of these crimes. This is a burden the State cannot sustain.

First, regarding Count I (unlawful delivery of a controlled substance), the sum of the State’s evidence against Wheeler was the testimony of Mathis that Wheeler gave her the methamphetamine that she turned over to the police as part of her work as a confidential informant. However, Mathis is not credible in that she failed to inform the police that she had smoked methamphetamine with Wheeler, which was in violation of any confidential informant agreement she had with the police. Moreover, Mathis initially denied a sexual relationship with then admitted the same. Finally, during the time that the alleged delivery occurred Mathis and Wheeler had contact with at least two other individuals (as

even observed by the police) either of whom could have given Mathis the methamphetamine she turned over to the police. Given these facts it cannot be said beyond a reasonable doubt that Wheeler delivered a controlled substance to Mathis.

Second, regarding Count II (unlawful possession of a controlled substance with the intent to deliver) and Count III (unlawful possession of a controlled substance), the sum of the State's evidence against Wheeler was the fact that ten bindles of methamphetamine and other items related to drug sales (Count II) and two bindles of heroin—an amount for personal use (Count III) were found in a lockbox where Mathis told police controlled substances would be found during a search pursuant to a warrant. However, there was no evidence, other than Wheeler's mere presence at the scene, that he in fact lived where these items were found or had any dominion and/or control over these items. Given these facts it cannot be said beyond a reasonable doubt that Wheeler was guilty of Counts II and III.

Finally, regarding Count IV (tampering with a witness), the sum of the State's evidence against Wheeler was the testimony of Mathis and Tetrealt that Wheeler had talked of his case to Tetrealt saying that if Mathis didn't appear it wouldn't go forward and that Tetrealt conveyed this to Mathis, who was frightened. However, Wheeler testified that while

he talked to Tetreal he did not ask or want him to convey anything to Mathis—it was merely “jailhouse” talk. Given these facts it cannot be said beyond a reasonable doubt that Wheeler tampered with a witness.

This court should reverse and dismiss Wheeler’s convictions on all four counts.

E. CONCLUSION

Based on the above, Wheeler respectfully requests this court to reverse and dismiss his convictions.

DATED this 22<sup>nd</sup> day of May 2007.

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COURT OF APPEALS  
DIVISION II

CERTIFICATE OF SERVICE

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STATE OF WASHINGTON

~~BY Oath of perjury under~~  
DEPUTY

Patricia A. Pethick hereby certifies under the laws of the State of Washington that on the 22<sup>nd</sup> day of May 2007, I delivered a true and correct copy of the Petition for Review to which this certificate is attached by United States Mail, to the following:

Daniel Wheeler  
DOC# 285814  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

Jim Powers  
Thurston County Dep. Pros. Atty.  
2000 Lakeridge Drive SW  
Olympia, WA 98502  
(and the transcript)

Signed at Tacoma, Washington this 22<sup>nd</sup> day of May 2007.

Patricia A. Pethick  
Patricia A. Pethick