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A. ASSIGNMENTS OF ERROR

1. Trial court erred in denial of Appellant's Motion to Suppress (CP 8).
2. Trial Court erred denying Appellant's Motion to Sever (CP 8).
3. Trial court erred in denying Appellant's Motion to Dismiss the Firearm Allegation (CP 8).
4. Trial court erred in failure to give the Appellant's requested jury instructions on Possession of a Controlled Substance, Possession of a Firearm and introductory instruction on the right of a jury to send out written requests for instructions, pursuant to (CP 5)
5. Trial court erred in denying Appellant's objection during closing arguments of the States use of the term "pucker factor" and the courts denial of Appellant's objections to the Prosecutor requesting the jury speculate on facts not on record.
6. Trial court erred in denying Appellant's Motion for New Trial based on inconsistent jury verdicts (CP 12).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is Appellant in actual possession or constructive possession of a methamphetamine baggie located approximately six inches from his leg on a couch? He is a guest at the residence having been there less than an hour and denies ownership, use or contact with the methamphetamine.
2. Is Appellant unduly prejudiced by the court's failure to sever the Bail Jumping allegation from his Possession of a Controlled Substance allegations?
3. During Appellant's arrest he was in possession of an unloaded pistol stuck in the back of his belt that was not revealed until after he had been handcuffed and it fell out. Is this the proper firearm enhancement for Possession of a Controlled Substance or Bail Jump?
4. Is Appellant entitled to a jury instruction that advises the jury of the definition of actual possession, constructive possession and that mere proximity and momentary handling is insufficient to establish constructive possession?
5. Is Appellant entitled to a jury instruction that the firearm he was in possession of at the time of the commission of the offense he was convicted of had to have the capacity to inflict death, that there must be a connection between the Appellant, the crime of conviction and the firearm and if the connection is not satisfied by merely having a

- firearm easily accessible and ready for offense or defense use. The firearm must have a rational connection to the crime of conviction.
6. Is it prosecutorial misconduct for the State to argue during closing that there is a "pucker factor" when the officer sees a pistol, even though the Appellant has been handcuffed? The "pucker factor" is based on the argument on facts not in evidence concerning officer safety.
 7. The only paraphernalia admitted in Appellant's case was the methamphetamine baggie of which he was convicted of. The jury convicted Appellant of possession of methamphetamine in the bag, but not guilty of possession of the bag. Is this an inconsistent verdict warranting a new trial?

B. STATEMENT OF THE CASE

I. Procedural History

Appellant was charged by Information with Possession of Drug Paraphernalia (CP 1). His case was assigned to Judge Barbara Johnson, Department Six, Clark County Superior Court. The Information was Amended on March 30, 2006 and charged Appellant with an additional crime of Bail Jumping for failure to appear at a pre-trial hearing (CP 2).

Appellant filed a Motion to Suppress, Motion to Sever and a Motion to Dismiss (CP 16). The hearing was heard on April 11, 2006 before Judge

Johnson (RP Vol I, 1). The motion was denied. The Findings of Fact and Conclusions of Law denying the Appellant's motions were entered (CP 8).

Trial commenced on December 4, 2006 before Judge Roger Bennett, Department One, Clark County Superior Court. Appellant was found not guilty of Possession of Paraphernalia but guilty of Possession of a Controlled Substance. He was also found guilty of a Firearm Enhancement (CP 19). He was sentenced on June 5, 2007 to 55 months.

II. Motion to Suppress

The Motion to Suppress was heard on April 11, 2006 before Judge Barbara Johnson. Heard the same date was a Motion to Sever and then a Motion to Dismiss (RP Vol I, 3). A CrR 3.5 hearing was also heard on that same date (RP Vol I, 4-5).

Vancouver Police Officer Spencer Harris testified at the suppression hearing for the State (RP 6). He testified he has been working for the City of Vancouver for about six years and his current position is with the Neighborhood Response Team. On December 2, 2005 his team was out looking for wanted subjects by the name of Joseph Hanson and Landon Kush (RP 9). The "subjects were said to be located at 6208 NE 17th Avenue #G-55 in the City of Vancouver." Partnered with him was Department of Corrections Officer Joshua Sparks who was assigned to his team of officers. When Officer Harris knocked on the door at the location the door opened because it wasn't secured (RP 9). Officer Harris had his flashlight and looked inside the dark room and saw a subject sitting on the couch approximately six feet from the

front door (RP 10). Officer Harris testified he saw directly next to the subjects leg a "methamphetamine pipe" that appeared to be used and a small plastic baggie containing a white crystal substance, which he believed to be methamphetamine, based on his training and experience (RP 10). Officer Harris also saw a cell phone sitting next to the Appellant (RP 14.4). There was no one else in the room (RP 14.11). Officer Harris identifies the Appellant as the person he made contact with (RP 15.4), Officer Harris then walked into the apartment and told the male to stand up and the other two officer's that were with him walked in right behind him (RP 15.17). They detained Appellant, based on the items seen next to his leg and placed him in handcuffs. He moved the Appellant from where he was sitting on the couch to set him in a chair in the middle of the room. Officer Harris checked the chair and did not find any weapons. Within minutes of Appellant sitting down he sees the Appellant squirming around in the chair. He goes over to him, moves him forward and found a handgun directly behind the subjects back partially down the cushion of the chair where he was seated. (RP 16).

In talking to Appellant and others in the apartment he discovered all were visiting with the exception of Destiny Henning (RP 17.15-17.21).

Officer Harris read Appellant his constitutional rights in the patrol car (RP 19.20) (RP 22.11).

Appellant denied the methamphetamine pipe was his and denied the bag of methamphetamine was his (RP 24). The handgun was his father's who had given it to him about a month ago (RP 24.16). During cross-examination

Officer Harris acknowledged he had no idea Mr. Wharton would be at the apartment (RP 27.4). He admitted they didn't get a search warrant for the apartment and they didn't call out for reinforcements, such as the SWAT team (RP 28.1- 28.7). When asked if there was insufficient probable cause to get a warrant, he replied it was just a knock and talk to see if we found anybody there (RP 28.20). Appellant made no furtive movements, did not attempt to run nor to attempt to grab the controlled substance (RP 30.8 - 30.15). The officer was asked "did you have the specific articulable facts to show there is an exigent circumstance?" (RP 30.15) and the officer replied "yes, because anybody can pick up the drugs and run real quick and dump them in a sink which is about ten feet away." (RP 30.18). When asked specifically if he saw or had any facts or observed Mr. Wharton do anything to show he was going to take those drugs and run, the officer replied "just his non-compliance of acknowledging any question or looking at me, I thought was very suspicious" (RP 30.22 - 31.3). Officer Harris said Appellant did nothing except a "suspicious ignoring" (RP 31.6). Officer Harris did not draw his gun on the Appellant and didn't think he was a danger (RP 31.19).

The Appellant did nothing to assert ownership over the alleged methamphetamine, pipe and bindle (RP 32.16). Officer Harris testified he never gave the Ferrier warnings because of the immediate sequence of opening the door and seeing the pipe and going in to arrest the Appellant (RP 32 -33). The handgun the Appellant had in his possession did not have any

ammunition in the magazine, the chamber of the pistol or on the Appellant (RP 34.1).

On re-direct, the State asked Officer Harris "Officer Harris, in your experience in dealing with people involved in drugs, do you often find people involved with drugs to have guns or weapons on them. Officer Harris answered "yes." Appellant immediately objected on basis of relevancy and based on character evidence (RP 35.23). The Judge overruled the objection. Officer Harris was allowed to testify over objection that drug dealers carry guns for protection and from being ripped-off and to keep people from stealing their drugs or their money and because of paranoia from the methamphetamine (RP 36).

On cross-examination, Officer Harris admitted in most of his arrests for possession of methamphetamine, the vast majority do not possess handguns (RP 37). A higher percentage of dealers are likely to have handguns, but not the majority (RP 37 - 38).

Officer Sparks with the Department of Corrections testified on behalf of the State (RP 39). He is employed by the Department of Corrections and assigned to work with the Vancouver Police to assist with investigations on the Neighborhood Response Team. He testified he was behind Officer Harris (RP 45.19). He entered the apartment as a cover officer and cleared the rest of the apartment for "officer's safety." (RP 46.3). They encountered two more people in the back room and brought them to the main room where Officer

Harris was with the Appellant (RP 46.8). The two individuals he contacted did not claim ownership of the pipe or the methamphetamine (RP 47.13).

In cross-examination, Officer Sparks testified he takes his orders from Jeffrey Frice who is the supervisor at the Department of Corrections, but when he is with Vancouver he falls under the directives of Vancouver Police Officer Duane McNicholas (RP 50.21). He agreed he had no authority to arrest individuals not under Department of Corrections supervision (RP 51.16) unless he is directed to detain someone by the police (RP 51.21). He did say he was going to the apartment to do a probation check on Mr. Hanson and Mr. Kush.(RP 52.3). He considered the Department of Corrections to give him roving authority to check on any residence at anytime he happens to believe a probationer may be there (RP 53.13). When asked about the distinction between doing a knock and talk at the apartment and then doing a probation search he testified he was following Officer Harris into the house for officer safety purposes (RP 54.11). He was not going to the house to do a probationary search (RP 54.15) (RP 56.3).

Appellant testified at the suppression hearing (RP Vol I, 61). He resides in White Salmon Washington and his occupation is a carpenter. He visited 6208 NE 17th Avenue, Vancouver after receiving a phone call from an old high school friend asking him to pick her up so she could return to White Salmon (RP 61). He was there about an hour before the police came (RP 62.17). He was tired from working all day and he just laid down on the living room floor. He received a phone call that woke him up before the

police arrived (RP 62.9). He noticed the police when he looked over to the door and it was opened about two inches. He saw a flashlight and a gun and an officer was asking questions about peoples names. He said he didn't know what to tell him (RP 62.20). The officer came in and told him to stand up and put him in handcuffs and sat him down in a chair.

He did not acknowledge he was sitting next to any pipe or methamphetamine bindles (RP 63.2). The trial court took the case under advisement (RP 99). The court entered Findings of Facts and Conclusions of Law after an oral ruling on August 18, 2006 (CP 8). The Court denied the motion to suppress. It ruled entry was allowed on an exigent circumstance exception to the warrant requirement. State v. Ferrier 136 Wn.2d 105 (1998), knock and talk rules did not apply.

III. Trial

Trial commenced on December 4, 2006 before Judge Roger Bennett. He heard argument on Appellant's Motion to Sever Bail Jump and took it under advisement (RP Vol II, 4-8). The Motion to Sever was denied (RP Vol II, 10). The court granted Appellant's Motion in Limine in part, in that the State can not mention Joseph Hanson or Landon Kush's names, the individuals the officer's were looking for (RP Vol II, 12-13). The defense objected to identifying Joshua Sparks as a probation officer. The court overruled the objection (RP Vol II, 13-14). A jury was selected. The State's first witness was Officer Spencer Harris (RP Vol II, 21). He testified consistent with his testimony in the Motion to Suppress.

On cross-examination he did admit the residue he saw on the pipe could have been there for an unknown length of time (RP 53.6). He could not determine if the pipe had been used recently or not. On cross-examination he said there were no bullets in the handgun (RP 55.19) and that it was not capable of harming him as a firearm unless it had bullets in it (RP 55.21). After numerous questions he acknowledged there were no bullets on or around Mr. Wharton that could be used to hurt him (RP 56-57). The pistol had no capacity therefore to inflict any damage on him as an unloaded weapon, other than to be used as a hammer (RP 57.7). He described the room as having a chair and couch and some garbage around it (RP 57-58). He described the garbage as being miscellaneous papers and stuff (RP 58.5).

Officer Harris agreed Appellant did not have to the pistol to have the pipe, they were not connected together (RP 58.19).

Officer Harris testified on cross it was his policy to handcuff anyone he saw sitting next to a drug pipe, if in the case of Mr. Wharton, they are approximately six inches away (RP 59.23).

Department of Corrections Officer Joshua Sparks testified for the State (RP 63). He testified consistently with his testimony at the Motion to Suppress. During examination Mr. Sparks testified he was not one hundred percent sure his gun was not drawn (RP 74.24). He said the lighting in the room where Mr. Wharton was, on a scale of one to ten, a six with ten pitch black and zero bright sunlight (RP 71.10). He couldn't recall if Officer Harris was using his flashlight (RP 74.14). He also agreed Mr. Wharton did not do

anything hostile toward him (RP 73.22). At cross-examination Officer Sparks said Appellant could have been just waking up when he saw him (RP 75.15).

Mitchell Nesson testified for the Washington State Patrol Crime Lab (RP 76). He said the items were sent to him in the Appellants case. He testified the baggie he examined contained methamphetamine. He did not examine the pipe (RP 85.18).

Kit Abernathy of the Vancouver Police Department testified on behalf of the State (RP 86). He testified he had test-fired the weapon (RP 88-89). On cross he identified the weapon as a World War II German vintage Walther P-38 from the late 30's or early 40's (RP 91.19).

At close of Appellant's case he moved for mistrial because of the frequent references to the pipe as being a "methamphetamine pipe" without it actually being tested and verified it was a methamphetamine pipe (RP 35.25). The court granted Appellant's motion to dismiss count two, as to the pipe, because of insufficient evidence of use (RP 43.10). There has to be proof of unlawful use not mere possession. It was ruled however the plastic baggie is admissible as paraphernalia (RP 44.23). The court ruled the pipe is only admissible as circumstantial evidence (RP 45.9). The Appellant moved to dismiss the firearm enhancement because of insufficient evidence that it met the requirements of State v. Holt 119 Wn. App. 712, State v. Willis 153 Wn.2d 366 (RP 46.7). The Appellant also asked to dismiss the possession charge on the theory there is no constructive possession because of mere proximity to the baggie (RP 61.22). The court ruled this an actual possession

case as to the firearm or to the methamphetamine (RP 64.16). The court ruled there was sufficient evidence to go to the jury on the issue of whether Appellant was armed with a firearm . The evidence was sufficient to show actual possession of both the methamphetamine and the firearm and there is no requirement of any nexus instruction (RP 70.16).

In the Appellant's case Destiny Henning testified (RP 76). She has known the Appellant for around 9-10 years and grew up with him in White Salmon, Washington. She called him to come to Vancouver on the day of this incident to give her a ride back to White Salmon (RP 77). She was at the apartment when the officer's came, helping to clean the apartment. Mr. Wharton had been at the apartment approximately one hour before the police came(RP 70.21). During her clean up duties at the house she found a baggie and a pipe of suspect material. She found it in the kitchen and set it on the couch where she was stacking things to be picked up (RP 79.22). She was moving things from the back rooms out to the living room, as they were cleaning up. She testified the police did not question her about the methamphetamine or the pipe. She did not tell them she discovered it in the kitchen and placed it on the couch (RP 85.11).

Appellant testified on his own behalf (RP 86). It was consistent with his testimony at his suppression hearing. He testified he was confused about when he was suppose to show up in court (RP 94.9). He recalled his original attorney who told him he did not have to attend readiness hearing (RP 95.9). He did not appear for readiness hearing and did not appear for trial because

he was arrested in White Salmon on the warrant for failure to appear at readiness (RP 95-96). The Appellant agreed the State's Exhibit #7 was the scheduling order with his signature on it (RP 102.4) It was clear the document had two court dates, a readiness hearing and a trial date. He agreed the documents said the "Appellant shall personally appear on the date set forth above (RP 102-103). Appellant also testified the couch he was sitting on had a variety of plastic shopping bags, papers and garbage and such on it (RP 98.24 - 99.6).

When the parties were discussing the jury instructions the State began to take exception to the courts failure to give a constructive possession instruction (RP 122). The court asked if the State wanted to submit the case to the jury on possession of constructive possession. It asked the State to make an election. The State ultimately concluded it would go forward only a an actual possession instruction (RP 124.12). The State was advised if he proceeds on a constructive possession theory the court would dismiss his case for insufficient evidence (RP 124.22). The case could only go forward on an actual possession instruction (RP 124.21-125.9). Appellant took his exception (RP 125.20) for the courts failure to give WPIC 1.02, and Appellant took exception to the possession instruction (#10) (RP 126). The Appellant read into the record the instructions (RP 126.24). The instructions were in reference to possession and mere proximity, instruction on the firearms and the connection requirement. Then the parties presented their closing arguments (RP 134).

In rebuttal the State replied to the Appellant's argument the firearm was not loaded by asking the jury to picture any crime taking place, including assault or whatever crime they can think of. The Appellant objected to the jury considering any other crime (RP 168.25). The State continued and argued to the jury for any crime if you add a weapon it raised the "pucker factor." The Appellant objected and was overruled (RP 169.12). The State continued to argue even if the gun was unloaded it would cause an alarm loaded or unloaded. The Appellant objected and was overruled (RP 169.19). The State argued the presence of the gun by itself makes it a more serious situation.

The jury came back with a verdict on count one finding the Appellant guilty of the crime of possession of a controlled substance and that he was armed with a firearm at the time of possession (RP 172-173). The court polled the jury on both verdicts. The jury found the Appellant not guilty of the crime of possession of paraphernalia. The jury was polled and was unanimous (RP 173.15).

Appellant's Motion for New Trial or in the Alternative Arrest of Judgment was denied (CP 17). Appellant was sentenced to 55 months on June 5, 2007. The court ruled Appellant's range is 51-60 months, denying State's motion to add 18 month deadly weapon enhancement to standard range of 51-68 months. The court ruled it was already enhanced by RCW 9.94A.518.

C. ARGUMENT

Motion to Suppress Issues

Assignments of Error No. 1 Issues Related to Assignments of Error No. 1

Trial court erred in denial of Appellant's Motion to Suppress (CP 8). Is Appellant in actual possession or constructive possession of a methamphetamine baggie located approximately six inches from his leg on a couch? He is a guest at the residence having been there less than an hour and denies ownership of the methamphetamine. Does the exigent circumstance to the warrant requirement apply? Does probation search warrant exception apply?

Appellant's right to be free of unlawful search and seizure as protected by Article 1§ 7 of the Constitution of the State of Washington and the Fourth Amendment of the United States Constitution was violated.

Article 1 § 1 of the Constitution in the State of Washington, provides all political powers are inherent in the people, and the government derive their just political powers from the consent of the governed and are established to protect and maintain the individual rights. This is the premise to examine government action.

Article 7 provides no person shall be disturbed in his private affairs or home invaded without authority of law. The Fourth Amendment forbids unreasonable searches and seizures.

There is insufficient evidence of exigent circumstances to justify the entry. The trial court identified the eleven factors stated in State v. Terrovona 105

Wn.2d 632 (1986) and State v. Wolters 133 Wn. App. 297 (2006), in concluding there was exigent circumstances (CP 4). The eleven factors will be listed and discussed; (1) Was there a violent or grave offense involved? Trial court erred in concluding the possession of methamphetamine was a sufficient offense. The officer's at best saw a plastic bag and a pipe and did not have sufficient cause to believe there was a felony offense occurring. In any event mere possession should not be regarded enough for exigent circumstances. (2) The police have reason to believe the suspect is armed? There is no reason for the police to believe the Appellant was armed nor Mr. Kush or Hanson armed. They certainly didn't bring any back up to indicate they felt they might be armed and dangerous. The initial contact was to be simply a "knock and talk." (3) The officer's have trustworthy information the suspect was guilty? All the officer's had was officer Harris's observation of Appellant's mere proximity to alleged drug paraphernalia and a bindle. Trial court erred in believing this satisfies the prong. (4) The police have strong reason to believe the suspect is on the premises? The police had no idea the Appellant was going to be on the premise so the trial court erred in concluding this was the case. The reason to go to the premise to find Mr. Kush and Mr. Hanson appeared not to be sufficient to ask for a search warrant. The trial court erred in making a finding of this prong. (5) Is the suspect likely to escape if not swiftly apprehended? The trial court concluded Appellant had an opportunity to flee if the officer's delayed in getting the search warrant. However, the officer's could have surrounded the apartment.

(6) Was the police entry made peaceably? The officer's here just simply walked in. (7) Were the officer's in hot pursuit? There is no evidence the officer's were in hot pursuit of the Appellant or even Mr. Kush or Mr. Hanson. They were just reacting on some information that Mr. Kush and Mr. Hanson might be there. (8) Is there any evidence the appellant would flee? The trial court found there is no evidence the Appellant would flee. (9) Was there any evidence the Appellant was a danger to arresting officer? The court found there was no evidence. (10) Does the suspect have access to a vehicle? The court ruled the officer's did not know the Appellant did have such access. (11) Is there risk of the police losing evidence? The court found that had the police waited for a search warrant the evidence could have been destroyed. Although there was authority to control the scene while they were waiting for the warrant. The trial court erred in not finding this element when one of the officer's could have stayed to watch the scene while a warrant came. The crime and the circumstances do not justify an entry in the apartment because of exigent circumstances. All the officer's saw was a pipe with apparent residue, but the officer's had no idea if that was recent use or past use. The crime is for use of drug paraphernalia, not possession of drug paraphernalia. The baggie the officer testified was visible. His observation of a baggie with crystalline subject is not sufficient basis for a exigent circumstance search and avoidance of the warrant requirement.

Supporting cases are: Seattle v. Altschuler 53 Wn. App. 317 (1989), held where the defendant's observed by police running a red light and police

follow with their lights on. The defendant does not stop and drives to his garage. The officer runs in the garage as the door is closing and the defendant is charged with resisting arrest. The court held the hot pursuit of a fleeing suspect is not an exigent circumstance that would justify a warrantless entry of a home to arrest for a minor offense. Particularly when the police have locked the defendant's vehicle in the garage.

In State v. Ramirez 49 Wn. App. 814 (1987), the police smell marijuana smoke coming from a hotel room. They enter without a warrant and seize drugs. The court held the exigent circumstances of destruction of evidence does not apply were the crime is a misdemeanor.

Furthermore, Appellant's mere proximity to contraband is not probable cause or a well-founded suspicion to arrest him. Presence at the scene of a crime is not enough for dominion control.

As a result, the officer's had no authority to detain Appellant. There is no suggestion he is making violent moves or furtive gestures.

There are no grounds to handcuff the Appellant and detain him. Any evidence or statement seized from the Appellant should be suppressed.

Relevant cases of possession issue's are: State v. Amezola, 49 Wn.App 78 (1987), held that proof of Appellant's residence at premise where drugs are sold plus proof the drugs were not kept out of her presence is insufficient to the support of finding in constructive possession.

In State v. Hagen, 55 Wn. App 494 (1989), held that mere proximity to drugs is not enough to establish constructive possession.

In State v. Spruell, 57 Wn.App 383 (1990), held Appellants presence in a room where drugs are found, plus Appellants finger print on a plate where drugs were found, plus Appellant rising from the chair when the police break through the door, with a battering ram, is insufficient to establish actual possession. Absent proof of dominion and control of the residence where drugs are found, mere proximity, and momentary handling of drugs are insufficient proof to establish constructive possession.

MOTION TO SEVER ISSUES

Assignments of Error No. 2 **Issues Related to Assignments of Error No. 2**

Trial Court erred denying Appellant's Motion to Sever (RP Vol II, 10). Is Appellant unduly prejudiced by the court's failure to sever the Bail Jumping allegation from his Possession of a Controlled Substance allegations?

CrR 4.4 covers severance of offenses and Appellants. CrR 4.4(b) provides, "The court shall grant a severance of offenses whenever before trial or during trial with consent of the Appellant, the court determines that severance will promote a fair determination of the Appellant's guilt or innocence of each offense."

CrR 4.3 covers joinder of offenses. CrR 4.3(a) states, "Two or more offenses may be joined in one charging document. when they (1) Are of the same or similar character, even if not part of a single scheme or plan; or (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

The Bail Jump charge should not have been joined. It is not of the same or similar character and is not based on the same conduct or series of acts connected together.

Even if the Bail Jump is relevant to the determination of guilt or innocence as to Counts 1 and 2, its probative value is far exceeded by its inherent prejudicial effect. The jury may be highly likely to infer guilt simply because of the fact the Appellant failed to appear in court rather than the facts of the Appellant's case. The jury should not be allowed to determine facts of guilt from the Bail Jump because each count is a separate trial. Although evidence may be cumulative from one count to another, the Bail Jump charge has minimal relevance as to whether the Appellant committed the acts he is charged with in Counts 1 and 2.

Appellant is aware that in deciding whether to sever counts, the court may consider judicial economy, State v. York, 50 Wn. App. 446 (1988). However, the fact the court may consider judicial economy does not mean the concept of judicial economy requires a denial of Appellant's request for severance.

State v. Bythrow, 114 Wn.2d 713 (1990), held severance of counts is not automatically required when evidence in one count would not be admissible in a separate trial of the count. The defense must demonstrate undue prejudice. Because the State's case is weak on constructive and actual possession, and the slight relevance on the issue of guilt or innocence from Appellant's failure to appear at a pretrial hearing, Appellant is unduly

prejudicial. Count 3 should be severed from Counts 1 and 2 for a separate trial.

MOTION TO DISMISS FIREARM ENHANCEMENT

Assignments of Error No. 3
Issues Related to Assignments of Error No. 3

Trial court erred in denying Appellant's Motion to Dismiss the Firearm Allegation (CP 8). Is it prosecutorial misconduct for the State to argue during closing that there is a "pucker factor" when the officer sees a pistol, even though the Appellant has been handcuffed? The "pucker factor" is based on the argument on facts not in evidence concerning officer safety.

RCW 9.94A.533(3) provides, "In addition to the standard range time, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses."

RCW 9.94A.533(c) states the firearm enhancement for a Class C felony is eighteen months. RCW 9.41.010(1) defines a firearm. It states, "'Firearm' means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder."

RCW 9.94A.602 requires a special verdict when it is alleged an Appellant is armed with a firearm or deadly weapon. The jury must find the Appellant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

State v. Holt, 119 Wn. App. 712 (2004) and State v. Schelin, 147 Wn.2d 562 (2002), held for a deadly weapon enhancement the jury must be instructed they must find a nexus between the Appellant, the weapon and the crime to find deadly weapon enhancement.

Appellant's fact pattern is different than the usual fact pattern seen on the deadly weapon enhancement cases. The fact patterns are usually, (1) Appellant was in physical custody of a controlled substance and in the same vicinity of a firearm; or (2) Appellant was not in physical custody of the controlled substance and not in physical custody of a firearm but both are present in the building or vicinity. The issue is constructive possession. In Appellant's case he is in physical custody of the firearm but not in physical custody of the controlled substance. The focus of the court with the jury instructions was whether or not the jury should be instructed on the nexus element, that is the connection between the Appellant, the drug and the firearm. When Judge Bennett ruled it was an actual possession case because of mere proximity of the controlled substance he also ruled there is no requirement to prove a nexus between the Appellant, the drug and the firearm because it was an actual possession case (RP 70.16).

In Holt, a Division II case, it is noted at the bottom of page 726 and the top of 727 that, "For purposes of the firearm enhancement, a person is "armed" if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes" quoting State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993).

But, the Court noted, however, "A firearm enhancement also requires proof that a nexus existed between the Appellant, the weapon, and the crime." quoting State v. Schelin, 147 Wn.2d 562, 574, 55 P.3d 632 (2002).

Judge Bridgewater noted in Holt, at page 727, "Justice Alexander in State v. Schelin required the State "to affirmatively prove beyond a reasonable doubt that there is a nexus between the Appellant, the crime, and the deadly weapon". Justice Alexander's position suggests a nexus between the Appellant, the crime, and the weapon is neither an idle trial formality nor solely an appellate standard for ensuring justly imposed firearm enhancements. (At page 728) The Court held, "The nexus is, instead, an *element* of the enhancement requiring supportive proof beyond a reasonable doubt." (At page 728) The Court concludes there is no reason to deny the nexus requirement its status as an element of the enhancement. (At page 728)

The Court noted in footnote seven, "That the nexus element is not satisfied by merely having a firearm easily accessible and ready for offensive or defensive use." The Court requires instead, that "the firearm must also be shown to have some rational connection to the charged crime."

In other words, the mere circumstance of possession of a firearm in proximity of methamphetamine does not allow for a firearm enhancement in a simple possession case.

A person armed with a firearm if, at the time of commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use.

A "firearm" is a weapon or device, loaded or unloaded, from which a projectile may be fired by an explosive, such as gun powder."

It is insufficient evidence for a firearm enhancement to only show that the Appellant was simply in possession of an unloaded pistol when he was in proximity of a methamphetamine pipe and plastic baggie with alleged methamphetamine residue. Proximity to the drugs is not enough, even for constructive possession, there must be dominion and control. Even the minimal connection of dominion and control by ownership of the apartment over the alleged methamphetamine in the residence is lacking in the present case. Appellant requests the Court dismiss the firearm enhancement for insufficient evidence.

JURY INSTRUCTION ISSUES

Assignments of Error No. 4 **Issues Related to Assignments of Error No. 4**

Trial court erred in failure to give the Appellant's requested jury instructions on possession of a controlled substance and possession of a firearm (RP 125.20). The Appellant requests a specific jury instruction on the firearm enhancement and the court denied it. The requested instruction was "for a firearm to be a deadly weapon for purposes of special verdict, the plaintiff must prove beyond a reasonable doubt, Mr. Wharton was armed with the firearm at the time of the commission of the crime he is convicted of and the firearm had to the capacity to inflict death and from the matter in which it is used is likely to produce or may easily and readily produce death. There must be a connection between Mr. Wharton, the crime of conviction and the

firearm. The connection is not satisfied by having a firearm easily accessible and ready for offensive or defensive use. The firearm must have a rational connection to the crime of conviction."

As an alternative, Appellant also requested "firearm to be a deadly weapon, for purposes of a special verdict, the plaintiff must prove beyond a reasonable doubt that Mr. Wharton is armed with a firearm at the time of the commission of the crime he is convicted of. There must be a connection between Mr. Wharton, the crime of conviction, the firearm. The connection is not satisfied by having a firearm easily accessible and ready for offensive or defensive use. The firearm must have a rational connection to the crime and conviction."

The court gave instruction number 15 which provided "for purposes of special verdict, the state must prove beyond a reasonable doubt the Appellant was armed with a firearm at the time of the commission of the crime in Count 01, Possession of a Controlled Substance-Methamphetamine."

The court did not give the requested nexus instruction under either alternative Appellant instruction. Given the facts of this case, the nexus instructions are necessary so a juror can consider whether or not he is simply an individual exercising his constitutional right to bear arms may have wandered into the wrong place where drugs are present.

State v. Ague-Masters __ Wn. App. __, 34109-3-II, (April 17, 2007), the defendant appealed his conviction of Unlawful Manufacture of Methamphetamine in the Presence of a Minor while Armed with a Deadly

Weapon. Mr. Ague-Masters appealed the sufficiency of evidence for the enhancements. 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 fact finder could have found guilt beyond a reasonable doubt. An insufficiency claim admits the truth of the State's evidence and any reasonable inferences from it. Whether a person is armed is a mixed question of law and fact. The court held a person is armed if the weapon is easily accessible and readily available for use either for offenses or defenses purposes and there is a connection or nexus between the defendant, the weapon and the crime (At page 13). After reviewing recent case law, the court notes when determining the nexus between the weapon and the crime, it must examine the "nature of the crime, the type of weapon and the circumstances on which the weapon is found." (At page 14). In Ague-Masters case he was handcuffed outside his front door. There was a methamphetamine lab in a detached shed a hundred feet from the house with no evidence of a lab in the house. The deputies did not find any firearms in the shed but found 12 unloaded firearms and drug paraphernalia locked in a safe in the house. he deputies had already arrested Ague-Masters when they found the unloaded firearms in the safe. There was no evidence Ague-Masters had attempted or had used one of the firearms for offenses or defenses purposes. The court rejected the State's argument the firearm was easily accessible because had Ague-Masters chose to use them, he could have opened the safe, pulled one of the rifles and used it. Washington Courts have found a defendant is not armed even though he presumably could

have obtained a weapon by taking a few steps. The court found the evidence insufficient. The evidence is insufficient to show the firearms in the safe were easily accessible and readily available and Ague-Masters constructive possession of the firearms is not enough to show he was armed for purposes of the former RCW 9.94A.125. It vacated the deadly weapon enhancement (At page 15).

In State v. O'Neal 159 Wn.2d 500 (2007), once again addresses when is a defendant armed for the purpose of the deadly weapon enhancement. Mr. O'Neal had received firearm enhancements on a variety of drug charges. At the time of the arrest he was not holding a weapon. The court ruled there was sufficient evidence to uphold a jury determination the men were armed while committing the crimes. At page 503-504 the court noted a defendant is armed when he or she is within proximity of an easily and readily available deadly weapon for offenses or defenses purposes and when a nexus is established between the defendant, the weapon and the crime. Justice Chambers noted the defendant did not challenge the jury instructions at trial and such the inquiry was limited to whether there was sufficient evidence. Appellant in the present case has challenged the jury instructions. The State's theory was the AR-15 Rifle leaning against the wall and the pistol under the mattress were easily accessible and readily available to protect the continuing drug production operation. The court agreed the State did not have to establish with mathematical precision the specific time and place the weapons were readily available and easily accessible, as long as it was at the time of the crime (page

504-505). As to the nexus connection the court noted one defendant testified the pistol was loaded in case he needed it and the AR-15 was owned by a convicted felon who was not allowed to possess firearms. He testified they stood watch while the manufacturing production went on. The court concluded there was sufficient evidence for a jury to conclude the weapons were available to protect the manufacturing operation. The court noted the case was not like State v. Valdobinos 122 Wn.2d 270, where the police find an unloaded rifle in defendant's home, where they found cocaine. There was no evidence the gun had any connection to the crime and the firearm enhancement was vacated.

A significant note for Appellant's case is at footnote 3, the court said it may have been appropriate had the defendant, Mr. O' Neal, requested an instruction about the use of the words, connection or nexus to get one.

In State v. Eckenrode 159 Wn.2d 488 (2006), Justice Chambers, once again wrote on "the application of the weapon enhancements for the hard time for armed crime act." He recognized the State Constitution guarantees the right to bear arms under Article 1 § 24. To harmonize both legal commands and insure the people are not punished merely for exercising their constitutional right to establish a defendant was armed for purposes of sentencing enhancements, the State must prove the weapon was easily accessible and readily available for use and there was a nexus or connection to the defendant, the weapon and the crime. In Eckenrode the defendant failed to ask for the nexus instruction. The court held that generally bars relief on

that issue. They reviewed the record and found sufficient evidence of a connection between the defendant, the crime and the gun. The police had responded to the Eckenrode residence on a 911 call. Mr. Eckenrode had advised the dispatcher he was armed and prepared to shoot the intruder. By the time the police arrived the Eckenrode's and the housekeeper were sitting in lawn chairs. The deputies swept the house for intruders and found methamphetamine, dried marijuana, a loaded rifle, unloaded Ruger Pistol and an overwhelming smell of growing marijuana. The police obtained a search warrant, searched and found other signs of marijuana grow operations scattered throughout the house as well as 55 marijuana plants. Eckenrode was arrested outside his house. He challenged the grounds for the firearm enhancement for the first time on appeal arguing the jury did not find the nexus between him, the weapon and the crime. The court found sufficient evidence of a connection between Eckenrode, the weapon and the drug manufacturing operation to uphold the verdict.

As the principles above are applied to Appellant's case a nexus is required between him and the crime, which is possession of a controlled substance. The court erred in concluding State v. Esterlin 126 Wn. App 170, did not require a nexus requirement when the defendant had actual possession of the weapon. The Supreme Court's decision in Easterlin's case makes it clear there is still a nexus requirement (159 Wn2d 203 (2006)). Appellant specifically requested instructions for a nexus requirement. This is to avoid a situation where Appellant is in possession of an unloaded firearm and finds himself subject to

a weapon enhancement anytime he is in proximity of controlled substances. The court in Easterlin concluded the connection, the nexus between the defendant and the crime is a definition not an element of the crime (At page 204). The State urged the court to hold if there is actual possession of the weapon the state is never obligated to establish a connection between the Appellant, the weapon and the crime, on the theory if a person is in possession of a weapon he or she is "clearly armed" within a common understanding. (At page 209). The Supreme Court refused to go that far. Although, the State is likely correct and it may rarely need to go beyond the commonly used "readily accessible and easily available" instruction. It may be appropriate to give such greater instructions, depending on the case.

It said depending on the evidence it would not be error and perhaps would be appropriate for the court to instruct the jury there be a connection between the weapon and the crime to allow the parties to argue their theory of the case. The court gave an example in footnote 3, if an Appellant is in possession of a ceremonial weapon or a kitchen knife in a picnic basket, or it's a prop, or it's a farmer who carries a .22 caliber rifle in his gun rack, or some object that merely could be used as a weapon, it may be appropriate to allow the Appellant to argue to the trier of fact that he or she is not armed, as meant by the Washington law to allow the trier of fact to make that determination. The Appellant contends when the court refused the Appellant's instruction, he denied him opportunity to effectively argue he was not armed within the meaning of the law.

INCONSISTENT JURY VERDICT ISSUES

Assignments of Error No. 5 Issues Related to Assignments of Error No. 5

Trial court erred in denying Appellant's Motion for New Trial based on inconsistent jury verdicts (CP 12, 6). The only paraphernalia admitted in Appellant's case was the methamphetamine baggie of which he was convicted of. The jury convicted Appellant of possession of methamphetamine in the bag, but not guilty of possession of the bag. Is this an inconsistent verdict warranting a new trial?

The jury's verdict is inconsistent. The only methamphetamine in the case which was tested by the State Crime Lab was that which was in the small plastic baggie. The jury found the Appellant guilty of possession of methamphetamine. However, they also found him not guilty of possessing paraphernalia, which was the use of the plastic baggie. The plastic baggie is the only paraphernalia the jury was allowed to chose from. The purpose of the plastic bag was to possess, so it is inconsistent for the jury to say he was in possession of the bag in Count 1 but not in Count 2 when the paraphernalia in question was the bag the methamphetamine was in.

In State v. Rooth, 129 Wn. App. 761 (2005), the Court discussed inconsistent jury verdicts. In Rooth, erroneous jury instructions resulted in inconsistent verdicts. The Court noted that Washington adopted the rules set out in Dunn v. United States, 284 U.S. 390 (1932) for dealing with inconsistent verdicts. State v. Ng, 110 Wn.2d 32 (1988) held the Dunn rule establishes the unreviewable power of a jury to return a verdict of not guilty

for impermissible reasons. The court reaffirmed the rule that inconsistent jury verdicts are to be harmonized and upheld whenever possible. They acknowledged inconsistencies may result from jury mistake, compromise, or lenity. A verdict can stand if there was sufficient evidence to uphold the requirement. If there is insufficient evidence, then verdicts cannot stand.

Given the facts of this case, there is insufficient evidence to support a conviction of the Appellant for possession of methamphetamine in a baggie and then find the Appellant not guilty for the use of the baggie as paraphernalia to possess the methamphetamine. He cannot possess it unless it is in the baggie and he had to use the baggie to possess it.

PROSECUTORIAL MISCONDUCT ISSUES

Assignments of Error No. 6 **Issues Related to Assignments of Error No. 6**

Trial court erred in denying Appellant's objection during closing arguments of the State's use of the term "pucker factor" and the courts denial of Appellant's objections to the Prosecutor requesting the jury speculate on facts not on record (CP 12). Is it prosecutorial misconduct for the State to argue during closing that there is a "pucker factor" when the officer sees a pistol, even though the Appellant has been handcuffed? The "pucker factor" is based on the argument on facts not in evidence concerning officer safety.

At close, the Respondent argued facts not in evidence. It argued what it called the "pucker factor" referenced it's when the officer's see a pistol. This evidently, is a reference to a constriction of the anus from fear. It is not called for, for the least of reasons, there is no evidence of that in this case. There is

no evidence the officer saw the weapon until the Appellant had been handcuffed. The officer never saw the Appellant holding the weapon. The Respondent was arguing facts not in evidence, that is in reference to an officer seeing a weapon at any crime, as being worthy of an enhancement because of the pucker factor. This is inappropriate argument on facts not in evidence. State v. Grover 55 Wn. App. 923 (1989), held it was misconduct for prosecutors to violate his or her duty to refrain from using statements which are not supported by the evidence, mostly intended to prejudice the Appellant. For prosecutor's to refrain from inflaming the passions of a jury. In State v. Echevarria 71 Wn. App. 594 (1993), there were remarks about the war on drugs in closing argument and the court ruled this was misconduct because the remarks were inflammatory remarks.

D. RESPONSE TO STATE'S CROSS-MOTION ON CALCULATION OF OFFENDER SCORE

Appellant's presumptive standard range with no prior felony convictions is 0-6 months. He was found guilty of Possession of a Controlled Substance by the jury but not guilty of Possession of Paraphernalia. The statutory sentence is 5 years and it is a Class C felony.

RCW 9.94A.530 provides the intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard range. The additional time for each deadly weapon finding is specified by RCW 9.94A.533 shall be added to the entire standard range.

The standard sentencing range is defined at RCW 9.94A.510. RCW 9.94A.517 is in reference to the drug offense sentencing grid. RCW 9.94A.518 makes all deadly weapon findings a Level 3 offense. This elevates Appellant from a Level 1 offense (PCS).

RCW 9.94A.533 provides for adjustments to the standard range. It provides this section shall apply to the standard range as determined by RCW 9.94A.510 and RCW 9.94A.517.

RCW 9.94A.533 (3) is applicable to firearm enhancements. It provides the following additional time shall be added to the standard range to determine subsection two. Based on the felony crime of conviction as classified under RCW 9A.2.020. It adds five years to a Class A felony, three years to a Class B and eighteen months to a Class C felony.

In subsection D if the standard range exceeds the statutory maximum sentence of the offense, the standard statutory maximum offense shall be the presumptive range. If the additional firearm enhancement increases the sentence so it exceeds the statutory maximum for the offense the portion of the sentence representing the enhancement may not be reduced.

As a result by RCW 9.94A.533 as a Class C felony with a standard range of 0-6 months, 18 months should be added to each end of the 0-6 month standard range, for a standard range of 18-24 months.

Respondent will argue the Appellant's offender score is based on RCW 5.17 and is 51-68 months. Based on RCW 9.94A.518, Table 4 it describes at seriousness level 3, any offense under Chapter 69.50 RCW with a deadly

weapon special verdict under RCW 9.94A.602. These sections are in conflict. If the standard range to be added to as suggested by RCW 9.94A.533 is the Table in RCW 9.94A.517 then the state would have the court add 18 months to the standard range of 51-68 months at each end for a total of 69-86 months. It would exceed the Appellant's statutory maximum of 60 months.

This is counting the deadly weapon enhancement twice, once by adding the 18 months and once by increasing the seriousness level. It punishes the Appellant twice on the same facts and violates his right to be free of double jeopardy and multiple punishments for the same event. As protected by the State and Federal Constitutions. Legislature recognized the danger of double punishment in subsection RCW 9.94A.533 (f). An exception to the firearm enhancement occurs when the firearm is an element of the crime.

Legislature recognized State v. Workman 90 Wn.2d 443 (1978) prohibits double counting of an element of the offense with the purpose of proving existence of the crime and then using it to enhance the sentence without specific legislative intent to allow.

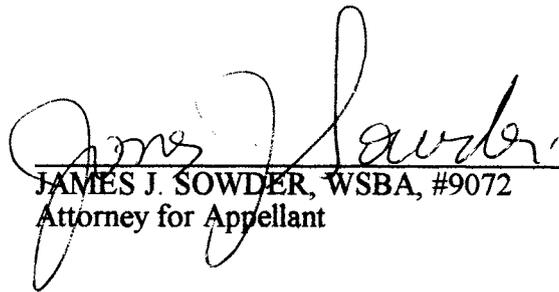
In resolving the discrepancy the rule of lenity should apply to give Appellant a standard range of 18-24 months. The trial court did not err in applying State v. Workman principals and did not add the firearm enhancement to the 51-68 month range.

E. CONCLUSION

Appellant requests in order of preference: (1) The case be dismissed for insufficient evidence as to possession of controlled substances. (2) The firearm

enhancements be dismissed because of insufficient evidence. (3) Dismissal because of prosecutorial misconduct in arguing facts not in evidence. (4) For a new trial with jury instructions that require the State to show a nexus between the Appellant, the crime and the firearm. (5) A ruling that if the firearm enhancement does apply, the rule of lenity requires the enhancement to be apply to the lowest available range for the Appellant, at Level 1.

Respectfully submitted this 31st day of May, 2007.



JAMES J. SOWDER, WSBA, #9072
Attorney for Appellant

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LOWELL MALCOLM WHARTON,

Appellant.

NO. 35767-4-II

DECLARATION OF MAILING

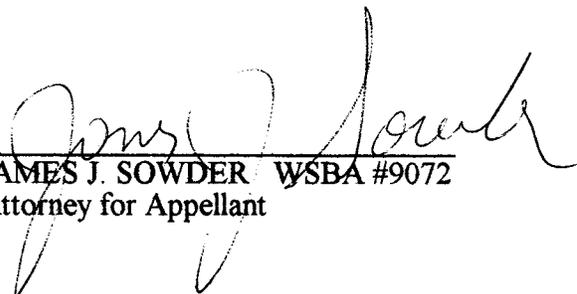
I, JAMES J. SOWDER, certify and declare under penalty of perjury under the laws of the State of Washington, on the 31st day of May, 2007, I personally mailed the APPELLANT'S BRIEF to David Ponzoha, Clerk, Court of Appeals; hand delivered a copy of same to the office of Deputy Prosecuting Attorney for Kasey Vu; and mailed a copy to Appellant, Lowell Malcolm Wharton at the below listed addresses.

Mr. Kasey Vu
Deputy Prosecuting Attorney
1200 Franklin St
Vancouver, WA 98660

Mr. Lowell Malcolm Wharton
P.O. Box 518
White Salmon, WA 98672

Mr. David Ponzoha
Clerk of the Court of Appeals
Division II, Suite 300
950 BROADWAY
Tacoma, WA 98402

DATED this 31 day of May, 2007.


JAMES J. SOWDER WSBA #9072
Attorney for Appellant

DECLARATION OF MAILING