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DIVISION II

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STATE OF WASHINGTON
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NO. 36423-9-II

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

STATE OF WASHINGTON,

Respondent,

vs.

AMY SUZANNE ZIMMER,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. Officer Slyter's seizure of the defendant driver's licence without justification constituted an illegal seizure of her person in violation of Washington Constitution, Article 1, § 7.

2. The trial court denied the defendant her right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it failed to grant a motion for severance of counts and thereby allowed the state to present inadmissible, unfairly prejudicial evidence of similar bad acts.

3. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, when it imposed a community custody condition so vague that it does not put the defendant on notice of what conduct it prohibited.

4. This court's refusal to address Argument 3 as not ripe will violate the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, as well as the defendant's right to effective appellate review under Washington Constitution, Article 1, § 22.

Issues Pertaining to Assignment of Error

1. Does an officer's seizure of a person's driver's licence without justification constitute an illegal seizure of the person in violation of Washington Constitution, Article 1, § 7?

2. Does a trial court deny a defendant the right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it fails to grant a motion for severance of counts and thereby allows the state to present inadmissible, unfairly prejudicial evidence of similar bad acts?

3. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it imposes a community custody condition so vague that it does not put the defendant on notice of what conduct it prohibited?

5. Does the court of appeals' refusal to address a constitutional challenge to a community custody condition as not ripe for adjudication violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, as well as the defendant's right to effective appellate review under Washington Constitution, Article 1, § 22 when such review cannot be had in any other forum, particularly before the Department of Corrections?

STATEMENT OF THE CASE

On May 7, 2005, Camas Police Officer Douglas Slyter, while in uniform, was on routine patrol driving along SE Crown Road just outside the city of Camas when he saw a small Toyota pickup parked facing the closed gate of LaCamas Lake Park. RP 4-6. The gate has a "no parking" sign on it. RP 7-8. The defendant Suzanne Zimmer was under the vehicle working on the front drive line, and a person by the name of Justin Taggert was nearby. *Id.* After stopping his vehicle, Officer Slyter asked if there was a problem and if they needed help. *Id.* The defendant replied that she was having problems with her vehicle, that she was working on it, and that they did not need any help. *Id.* Upon hearing this Officer Slyter warned the defendant that she could not leave the vehicle where it was. *Id.* He then asked the defendant and Mr. Taggert for their names, which they both gave. RP 8.

Officer Slyter's purpose in getting the names was to run them for outstanding warrants, which he did upon returning to his patrol car. RP 171. In the meantime, the defendant removed the front drive line from her vehicle, placed it in the bed of the truck, then got in to leave. RP 10. Mr. Taggert got into the passenger seat. *Id.* As the defendant began to back the truck away from the gate, Officer Slyter got word that there was an active warrant out of Hood River, Oregon for Mr. Taggert. RP 9. Upon hearing this Officer Slyter gave a hand signal for the defendant to stop, which she did. RP 10. He then

walked up to the driver's side of the truck and ordered the defendant to produce her license. RP 12-13, 26, 37. She handed it to Officer Slyter. *Id.* After taking the defendant's license, Officer Slyter walked around to the passenger side of the vehicle and ordered Mr. Taggert to get out. RP 12-13. Mr. Taggert complied and Officer Slyter arrested him on the warrant. *Id.* About this time a second Officer by the name of Karosich arrived on the scene to assist. *Id.* At no point in time did Officer Slyter believe that the defendant or Mr. Taggert had committed any crime, or that the defendant's vehicle had contraband or any evidence of any kind in it. RP 18, 28.

After placing Mr. Taggert in a patrol car, Officer Slyter and Officer Karosich returned to the defendant's vehicle, told her they were going to search it, and ordered her to get out. RP 12-13. She refused, arguing that they had no lawful authority to search her vehicle. *Id.* They responded that they did and that they would arrest her for obstructing if she did not exit her truck. *Id.* She again refused and when she did, the officers arrested her for obstructing and forcibly removed her from her truck. *Id.* They then searched the truck, finding a small amount of methamphetamine in a baggie in the defendant's purse. RP 14. According to Officer Slyter, the defendant admitted that the substance was methamphetamine and that it belonged to her. RP 15-16.

Once the officers had finished searching the defendant's truck, Officer

Slyter took her to the Camas Police Station. RP 15-16, 76-77. Once at the police station Officer Slyter continued interrogating the defendant. *Id.* He also field tested the suspected methamphetamine and got a positive reaction. CP 29-31. He then released the defendant, stating that he was going to submit the methamphetamine to the crime lab for testing. RP 15-16, 76-77.

Almost sixteen months later, on August 29, 2006, Officer Scott Boyles was on duty in the City of Camas when he saw a female drive by in a truck. RP 83-85. When he did, he ran the license plate number and determined that the truck was registered to the defendant. *Id.* Upon receiving this information, Officer Boyles stopped the truck and verified that the defendant was driving. *Id.* Officer Boyles then placed the defendant under arrest based upon the same facts out of which Officer Slyter had arrested the defendant in May of 2005. *Id.* After arresting the defendant he searched her truck and found a small plastic baggie containing methamphetamine residue. RP 85-86. According to Officer Boyles, the defendant admitted that the baggie belonged to her. RP 86-87.

Two days after the Camas Police Officer's second arrest of the defendant based upon the same incident, the Clark County Prosecutor charged the defendant with one count of possession of methamphetamine on May 7, 2005. CP 3-4. The defendant later filed a motion to suppress the evidence from the May 7th incident, arguing that the officers did not have a

legal basis to request the defendant and her passenger's name, and that the state had no legal basis to search the defendant's vehicle even if he did arrest the passenger. CP 5-12. The prosecutor responded to this motion one week later by amending the information to add a second count of possession of methamphetamine for the residue Officer Boyles claimed he found in the defendant's truck when he arrested her on August 29, 2006. CP 13-14.

The court subsequently heard testimony and argument on the defendant's motion. CP 1-43, 67-107. Following argument the court denied the relief requested. CP 29-32. The defendant responded with a motion for reconsideration. CP 48-110. The defendant also moved to sever the counts, arguing that there was no factual connection between the two, and that the likelihood of unfair prejudice was high. CP 44-47. The court denied both the motion for reconsideration and the motion to sever. CP 29-31, RP 51-57. The case later came on for trial before a jury with the state calling five witnesses, and the defendant calling one (herself.). RP 129-216, 232-277. Following this testimony, the court instructed the jury and counsel presented argument. RP 283-306. The jury returned verdicts of guilty on both counts. CP 164-165.

At a later date the court imposed a sentence within the standard range, along with a term of community custody and the following community custody requirement, among others:

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- ☒ Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held electronic scheduling or data storage devices.

CP 179.

The defendant thereafter filed timely notice of appeal. CP 188.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTIONS TO SUPPRESS EVIDENCE THE POLICE SEIZED IN VIOLATION OF THE DEFENDANT'S RIGHT TO PRIVACY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7 AND UNDER UNITED STATES CONSTITUTION, FOURTH AMENDMENT.

Under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment warrantless searches are per se unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized as a fruit of that warrantless detention unless the prosecution meets its burden of proving that the search falls within one of the various "jealously and carefully drawn" exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988).

As one of the exceptions to the warrant requirement, the police need not have probable cause in order to justify a brief investigatory stop. *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). However, in order to justify such action, the police must have a "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51, 61 L.Ed.2d 357, 99 S.Ct. 2637 (1979) (emphasis added). Subjective good faith is not sufficient. *Terry v. Ohio*, 392

U.S. at 22, 20 L.Ed.2d at 906, 88 S.Ct. at 1880. *See generally* R. Utter, *Survey of Washington Search and Seizure Law: 1988 Edition*, 11 U.P.S. Law Review 411, § 2.9(b) (1988). Furthermore, the stop is only reasonable to the point that “the limited violation of individual privacy” is outweighed by the public’s “interests in crime prevention and detection” *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979).

Another exception to the warrant requirement allows the police to search a defendant or the interior of the defendant’s vehicle upon arrest. *State v. Smith*, 88 Wn.2d 127, 559 P.2d 970 (1977); *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986). However, in order to justify a warrantless search under this exception to the warrant requirement, the state has the burden of proving that the arrest was both “valid” and “custodial.” *State v. Hehman*, 90 Wn.2d 45, 578 P.2d 527 (1978); *State v. McKenna*, 91 Wn.App. 554, 958 P.2d 1017 (1998).

In the case at bar, the defendant argues that the trial court erred when it denied the defendant’s motion to suppress based upon the following two arguments: (1) the officer took the defendant’s driver’s license without legal justification and thereby illegally seized her person, and (2) the same officer illegally searched the defendant’s vehicle which she was driving upon the arrest of a passenger on an out-of-state warrant. The following presents these two arguments.

(1) Officer Slyter's Seizure of the Defendant Driver's Licence Without Justification Constituted an Illegal Seizure of Her Person in Violation of Washington Constitution, Article 1, § 7.

The stop of an automobile is a seizure of its occupants and must be measured against the limitations found in Washington Constitution Article 1, § 7, and United States Constitution, Fourth Amendment. *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986). In addition, although the initial stop of a vehicle might be valid, once the initial justification ends, any further detention violates the driver and occupant's right to privacy. *State v. Tijerina*, 61 Wn.App. 626, 811 P.2d 241, *review denied*, 118 Wn.2d 1007 (1991).

For example, in *State v. Tijerina, supra*, a police officer stopped the defendant's vehicle for crossing the fog line. After the stop, the driver produced a valid license and registration, and the officer decided not to issue a citation. The officer then asked the driver to consent to a search of the vehicle. After obtaining consent, the officer searched the vehicle, found drugs, and arrested the defendant. The Court of Appeals said the following concerning the validity of the search.

The stop of an automobile is a seizure of its occupants and must therefore be reasonable. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). In evaluating investigative stops, the court must determine: (1) Was the initial interference with the suspect's freedom of movement justified at its inception? (2) Was it reasonably related in scope to the circumstances which justified the interference in the first place? *Terry v. Ohio*, 392 U.S. 1, 19-20, 20 L.Ed.2d 889, 88

S.C.T. 1868 (1968); *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984). In determining the proper scope of the intrusion, the court considers (1) the purpose of the stop, (2) the amount of physical intrusion, and (3) the length of time the suspect is detained. *Williams*, at 740.

Here, the initial stop of Mr. Tijerina for crossing over the fog line was justified. The sergeant's request to verify Mr. Tijerina's license and registration was reasonably related to the purpose of the stop. However, once the sergeant made the decision not to issue a citation and returned the driver's license and registration to Mr. Tijerina, any further detention had to be based on articulable facts from which the sergeant could reasonably suspect criminal activity. *State v. Gonzales*, 46 Wn.App. 388, 394, 731 P.2d 1101 (1986).

State v. Tijerina, 61 Wn.App. at 628-29.

Similarly, in *State v. Cantrell*, 70 Wn.App. 340, 853 P.2d 479 (1993), a state patrol officer stopped a vehicle for speeding, obtained the driver's license and registration, and issued a speeding citation. After issuing the citation, the officer asked the driver if he had any contraband in the vehicle. The officer then obtained the driver's consent to search, found drugs in the car, and arrested the passenger. The passenger later moved to suppress, which motion the trial court denied. Following conviction, the defendant appealed, and the court of appeals reversed. The court stated:

To this point, our case is essentially indistinguishable from *Tijerina*. Here, as in *Tijerina*, the initial traffic stop was justified. Once the purpose of the stop was fulfilled by issuance of a speeding ticket, however, the trooper had no right to detain the car's occupants further absent articulable facts giving rise to a reasonable suspicion of criminal activity. As in *Tijerina*, the trooper failed to provide such facts. His unexplained desire to start searching the car for containers of alcohol is, if anything, even less defensible than the trooper's

unreasonable suspicion in *Tijerina* that the presence of motel soap in a vehicle occupied by Hispanics indicated the presence of drugs.

State v. Cantrell, 70 Wn.App. at 344.

Similarly, in the case at bar, even if Officer Slyter was justified in stopping the defendant's vehicle in order to arrest the passenger. However, he had no justification for demanding and taking the defendant's driver's license as he did not suspect her of having committed any crime or infraction. In this case, as in *Tijerina*, Officer Slyter exceeded the valid scope of the detention. Instead of simply ordering the passenger to get out of the vehicle, which he had a right to do, he seized the defendant by taking her driver's license. Thus, in the same manner that the continued detention in *Tijerina* violated the defendant's right to privacy in *Tijerina*, thereby invalidating the subsequent consent to search, so the continued detention in the case at bar violated the defendant's right to privacy, thereby invalidating the subsequent search. Consequently, in the same manner that the evidence should have been suppressed in *Tijerina*, so in the case at bar, the evidence should have been suppressed.

In this case the state may argue that Officer Slyter's continued detention of the defendant was justified for "officer safety" reasons as outlined in *State v. Mendez*, 137 Wn.2d 208, 970 P.2d 722 (1999). However, as the following examination of this case explains, the claim of "officer

safety” is not a magical incantation that the police and the prosecution can invoke to inevitably justify an unreasonable detention such as the one in this case. The following examines this case.

In *Mendez*, two police officers in a patrol car saw a vehicle run a stop sign. The officers pulled behind the vehicle and activated their overhead lights. The vehicle that had committed the infraction then stopped and two juvenile males got out. As the police officers approached, the passenger started to walk away. As he did, one of the officers ordered him to get back in the vehicle. The passenger then ran away and one of the officers pursued him. That officer eventually caught the passenger and arrested him for obstructing. In a search incident to arrest, the officer found drug paraphernalia on the passenger. The state later charged the passenger with obstructing and possession of drug paraphernalia.

At a combined trial and motion hearing the defendant argued that the evidence seized during the search of his person should be suppressed because he had not committed a crime and his arrest was illegal. The court denied the motion and found him guilty of both counts. On review the court of appeals affirmed, finding that under the decisions in *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), and *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997), ordering the passenger to stay in a vehicle during a stop for a traffic infraction was a *de minimus*

intrusion into the passenger's privacy rights and did not violate the Fourth Amendment. The defendant then sought and obtained review by the Washington Supreme Court.

In its analysis the court declined to review the case solely under the Fourth Amendment. Rather, the court relied upon the enhanced privacy rights available under Washington Constitution, Article 1, § 7. Under this provision the court held as follows:

Where the officer has probable cause to stop a car for a traffic infraction, the officer may, incident to such stop, take whatever steps necessary to control the scene, including ordering the driver to stay in the vehicle or exit it, as circumstances warrant. This is a *de minimis* intrusion upon the driver's privacy under Art. I, § 7. See *Kennedy*, 107 Wash.2d at 9, 726 P.2d 445.

However, with regard to passengers, we decline to adopt such a bright line, categorical rule. A police officer should be able to control the scene and ensure his or her own safety, but this must be done with due regard to the privacy interests of the passenger, who was not stopped on the basis of probable cause by the police. An officer must therefore be able to articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens, for ordering a passenger to stay in the vehicle or to exit the vehicle to satisfy Art. I, § 7. This articulated objective rationale prevents groundless police intrusions on passenger privacy. But to the extent such an objective rationale exists, the intrusion on the passenger is *de minimis* in light of the larger need to protect officers and to prevent the scene of a traffic stop from descending into a chaotic and dangerous situation for the officer, the vehicle occupants, and nearby citizens.

State v. Mendez, 137 Wn.2d at 220.

Applying this standard to the facts before it the court in *Mendez*

vacated the conviction and remanded the case with instructions to grant the motion to suppress. The court held;

We hold the trial court erred in finding the stop of Mendez satisfied Terry. We further hold the officers did not meet the objective rationale test under Art. I, § 7 we have articulated in this case that would allow them to order Mendez back into the vehicle. Officer Hartman testified he had no suspicions Mendez had engaged or was about to engage in criminal conduct. Neither officer testified that Mendez's actions in reaching inside his clothing aroused any suspicion. Besides, Mendez did not reach inside his clothing until after he had been seized by Officer Hensley's command to return to the car. "Obviously, once an individual is 'seized,' no subsequent events or circumstances can retroactively justify the 'seizure.'" *State v. Stinnett*, 104 Nev. 398, 760 P.2d 124, 126 (1988).

State v. Mendez, 137 Wn.2d at 224.

In the case at bar, Officer Slyter seized the defendant's vehicle and person when he got out of his vehicle and signaled for the defendant to stop. The court found this action reasonable and not violative of the defendant's right to privacy under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment because the officer had just confirmed the existence of an arrest warrant for the defendant's passenger. Appellant does not dispute this holding. However, what appellant does argue is that the officer acted outside the law when, instead of going to the passenger side of the vehicle and ordering the passenger to get out and submit to arrest, the officer approached the driver's side of the vehicle, demanded that the defendant produce her driver's license, and then physically took the

defendant's driver's license. The officer had no justification for this action as he had no reason to believe that the defendant had committed any crime or infraction. In fact, it is hard to find any rational reason for the officer's actions other than his determination that he would seize the defendant's person until he decided that he was willing to give her back her driver's license.

In demanding the defendant's driver's license and taking it with him, the officer illegally seized the defendant's person and prevented her from leaving the scene, should she have chosen to do so. In fact, had he simply told her that he was going to search the vehicle upon the arrest of the passenger without demanding and seizing the defendant's license, the defendant might well have decided to collect her purse, which the officer did not have a right to search, and either walk away or wait patiently while the officer performed the search. Since the contraband here at issue was found in her purse, but for the illegal seizure of the defendant's person, the officer would have found no justification for the search. As a result, the trial court erred when it refused to grant the defendant's motion to suppress evidence.

(2) Officer Slyter's Search of the Defendant's Vehicle Without a Warrant upon the Arrest of a Passenger on an Out-of-State Warrant Violated the Defendant's Right to Privacy under Washington Constitution, Article 1, § 7.

In the case at bar, the state argued and the court held that the officer's

search of the defendant's vehicle following the arrest of the passenger on an out-of-state warrant did not violate the defendant's right to privacy under Washington Constitution, Article 1, § 7. Although the court did not articulate the reason for this belief, this is actually the current state of the law under this court's decision in *State v. Cass*, 62 Wn.App. 793, 796-97, 816 P.2d 57 (1991), *review denied*, 118 Wn.2d 1012, 824 P.2d 491 (1992). In fact, a careful review of evolving case law interpreting privacy rights under Washington Constitution, Article 1, § 7, in the context of vehicle searches suggests that the decision in *State v. Cass* is no longer good law and should be reversed. The following presents this argument.

Under Article 1, § 7 of the Washington Constitution warrantless searches are per se unreasonable. *State v. Simpson, supra*. As such, the courts of this state will suppress the evidence seized unless the search falls within one of the various "jealously and carefully drawn" exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759-60, 61 L.Ed.2d 235, 99 S.Ct. 2586 (1979)). In the case at bar, the State implicitly argued that the search of the defendant's vehicle fell within the exception set out in *State v. Stroud, supra*, as later applied under the decision in *State v. Cass, supra*. As the following explains, however, the *Cass* court's interpretation of *Stroud* was in error.

In *Stroud*, two Lewis County Deputies observed a parked vehicle with the engine running and lights on next to a vending machine in a closed gas station early one morning. The officers arrested both occupants (one of whom was standing close to the car and the other of whom was standing in the open passenger door), handcuffed them, and placed them in the back of the patrol car. The officers then returned to the car and searched it, finding guns and drugs. The suspects were later convicted of possession of methamphetamine and being felons in possession of a firearm. They appealed, arguing that the trial court erred when it denied their motion to suppress the evidence the officer's seized from their vehicle. The Washington State Supreme Court affirmed the convictions, adopting the following "bright line standard" for determining whether a warrantless automobile search made incident to arrest complies with state constitutional requirements:

During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.

State v. Stroud, 106 Wn.2d at 152.

The purpose of this holding was "to create an easily applied rule, while at the same time striking a 'reasonable balance' between the need for

effective police enforcement and the protection of individual rights.” *State v. Boyce*, 52 Wn.App. 274, 277, 758 P.2d 1017 (1988) (citing *Stroud*, at 153). The scope of the rule, however, has never been completely clear. For example, in *State v. Stortroen*, 53 Wn.App. 654, 660, 769 P.2d 321 (1989), the Court states that *Stroud* authorizes the “warrantless search of a passenger compartment incident to the *driver’s* arrest . . .” (emphasis added). By contrast, in *State v. Grover*, 55 Wn.App. 252, 260, 777 P.2d 22 (1989), the Court stated that *Stroud* authorizes the “warrantless search of an automobile after arrest of its ‘*occupants*.’” (emphasis added). While these two characterizations did not necessarily conflict, they did illustrate a question not directly addressed before *Cass*. The question was: Did *Stroud* allow the warrantless search of an automobile when only the passenger is arrested on an outstanding warrant when neither the driver or passenger was suspected of having committed a crime? Five years after *Stroud*, Division II of the court of appeals answered this question in the affirmative in *State v. Cass*, *supra*.

In *Cass*, a police officer saw the defendant driving her vehicle down the road during the daytime. He did not suspect her or the passengers of any criminal activity. However, the officer did recognize one of the backseat passengers, ran his name, and confirmed the existence of an outstanding arrest warrant for him. Based upon this information, the officer stopped the

defendant's vehicle, ordered the passenger out, arrested him, and searched the vehicle incident to the arrest of the passenger. This search uncovered illegal drugs belonging to the defendant and the officer arrested her. The court later convicted the defendant following an unsuccessful suppression motion and the defendant appealed, arguing that the search of her vehicle could not be justified as an extension of a proper vehicle search under *Stroud*. However, the court rejected this argument, holding as follows:

As yet, no Washington court has applied the rationale of *Stroud* to a situation where a passenger but not the driver of a car is arrested. See *State v. Grover*, 55 Wn.App. 252, 777 P.2d 22, review denied, 113 Wn.2d 1032, 784 P.2d 531 (1989) (substantial possibility that the driver and occupants of car committed burglary); *State v. Quintero-Quintero*, 60 Wn.App. 902, 808 P.2d 183 (1991) (search incident to lawful arrest of habitual traffic offender lawful); *State v. Boyce*, 52 Wn.App. at 274, 758 P.2d 1017 (search of vehicle after arrestee in custody and en route to police station unlawful); *State v. Stortroen*, 53 Wn.App. 654, 769 P.2d 321 (1989) (search incident to noncustodial arrest for misdemeanor traffic offense unlawful).

Because Jendry was in handcuffs in the back of a police car, one might assume that there was no immediate threat to the officer's safety or any possibility of escape. However, these two factors did not sway the *Stroud* court and, hence, we refuse to look to the specific facts and circumstances of this case. The *Stroud* court sought to eliminate any such case by case analysis because of the difficult burden it places on police officers "who must make a decision with little more than a moment's reflection." *Stroud*, 106 Wn.2d at 151, 720 P.2d 436. Consequently, the trial court correctly interpreted the *Stroud* decision in its refusal to suppress the evidence before it.

State v. Cass, 62 Wn.App. at 797.

In making this decision, court in *Cass* appeared to be more concerned

about drawing in inapplicable set of facts within purview of the bright line rule from *Stroud* than it did in analyzing the principles underlying *Stroud* and then determining whether the facts before it really fit within the logic of the decision. .

In *Stroud*, the Court took the opportunity to review and replace its prior decision from *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983), and was careful to recognize the tension between the need for effective and safe police work and the need for individual privacy. At the time the court decided *Stroud*, *Ringer* was the controlling case on vehicle searches, and it stated that absent actual exigent circumstances, the police could not search a suspect's vehicle without a warrant. While this rule was undoubtedly the best, at least in theory, to correctly balance a defendant's right to privacy under Washington Constitution, Article 1, § 7, against the legitimate function of the police to uncover evidence and protect themselves, it was unworkable in practice because it required an *ad hoc* application to a multitude of factual scenarios. On this point, Professor LaFave commented:

A highly sophisticated set of rules . . . requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."

State v. Stroud, 106 Wn.2d at 151 (quoting LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": the Robinson Dilemma,

1974 Sup.Ct.Rev. 127, 142). In recognition of this problem, the *Stroud* Court found that “[t]o weigh the actual exigent circumstances against the actual privacy interests on a case-by-case basis would create too difficult a rule to allow for both effective police enforcement and also protection of individual rights.” *Stroud*, at 152. Thus, the Court adopted the ruling in *Stroud* in order to strike a “reasonable balance” between the legitimate needs of society in effective police work and the heightened privacy rights recognized under Washington Constitution, Article 1, § 7.

This “reasonable balance” desired by the Court in *Stroud* is undoubtedly met when either the driver/owner of the vehicle alone is arrested, or the driver/owner is arrested in conjunction with a passenger. These indeed were the facts from *Stroud*. In one sense, it might be said that the fact of the arrest acts to reduce the driver/owner’s legitimate expectation of privacy in his or her automobile. However, when the police are allowed to make a warrantless search of a person’s automobile simply because a passenger has an outstanding warrant, the balance in *Stroud* becomes unreasonable.

In such a case, the warrantless search of a vehicle not only intrudes upon a legitimate privacy interest of the driver/owner, but it does so with a much lessened legitimate need by the police to search. First, the police certainly would not expect to find evidence of a crime because the person

being arrested only committed a crime in the past, not in the present. Second, the person being arrested is only a transitory rider in the vehicle, and may well have little contact in it. Thus, there would be no reason to believe that it would be the repository of evidence, contraband, or weapons.

In *Cass*, the majority decision either failed or refused to even consider this analysis. In his dissent, Judge Alexander pointed out this lack of analysis, stating as follows:

The majority stresses what they believe is the necessity for a "bright line" rule in cases such as this so that police officers are not burdened with having to make case by case decisions as to whether a search of a car is justified. They appear to be attracted to a rule that says any car in which a passenger is arrested may be searched as incident to the arrest of that passenger. Such a rule, in my opinion, not only goes beyond *Stroud*, but is far too intrusive to be tolerated. I reach that conclusion for several reasons. First, our Supreme Court has recognized that a person in possession of a vehicle has a legitimate expectation of privacy and is entitled to the heightened protection afforded by Article I, § 7 of our State Constitution. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). In addition, the car being searched was not, so far as we know, the property of the person under arrest. It seems obvious and almost beyond debate that the property rights of persons who are not under arrest should be accorded more sanctity than should the property rights of persons under arrest. We should be slower, therefore, to disturb the personal affairs and property rights of persons who are not under arrest. A more reasonable balance between the privacy rights of individuals who are not under arrest and the need for effective law enforcement can and should be struck. Extending the rule announced in *Stroud*, which permits the search of a car incident to the arrest of the driver of that car, to cases such as this is not a reasonable balance.

State v. Cass, 62 Wn.App. at 798-799 (Judge Alexander, dissenting).

The dissent in *Cass* was careful to point out that there certainly could

be circumstances under which the police would be justified in searching a vehicle incident to the arrest of a passenger, particularly if the passenger had just committed a crime, or there was reason to believe that the passenger was armed or possessed evidence or contraband. However, the dissent went on to explain that under the circumstances in which a passenger is arrested on an outstanding warrant, without some other justification, the subsequent search of the passenger/owner's vehicle was far too violative of the driver's owner's rights. The dissent stated:

Plainly, there were no facts or circumstances that justified this substantial intrusion into Cass's personal affairs. There was no warrant for Cass's arrest and during the course of the stop [s]he did nothing that would suggest that he or anyone else in his car was doing anything unlawful. Indeed, there was no more justification for a search of his car, after Jendry was removed from it, than there was to search the next car coming down the road. The search of Cass's car was nothing more than a fishing expedition and it violated Cass's right of privacy as guaranteed by our State's constitution. The evidence seized as a result of this search should have been suppressed.

State v. Cass, 62 Wn.App. at 799 (Judge Alexander, dissenting).

Since the 1991 decision in *Cass*, our courts have addressed privacy rights under Washington Constitution, Article 1, § 7 in the context of vehicle searches in a number of cases. For example, in *State v. Porter*, 102 Wn.App. 327, 6 P.3d 1245 (2000), the court held that when the police arrest a person who has left a motor vehicle they may not justify the a search of the vehicle under *Stroud*. In is *State v. White*, 135 Wn.2d 761, 958 P.2d 982 (1998), the

court held that the search of the trunk area of a motor vehicle cannot be justified under *Stroud* even though the truck can be opened by a latch in the passenger compartment. In *State v. Parker*, 139 Wn.2d 486, 987 P.2d 783 (1998), the court held that the police cannot search the personal belongings of passengers during a search otherwise justified under *Stroud*. Similarly, in the context of vehicle detentions during a routine traffic stops, the police may not detain passengers, ask for identification, or even ask for their names. *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004); *State v. Mendez, supra*. All of these cases evince a desire by the courts to limit and restrict the scope of searches and seizures in the context of vehicle searches under *Stroud* and they cast considerable doubt upon the continued validity of the decision in *State v. Cass*.

The decision in *Parker, supra*, is particularly apropos to the court's analysis in this case. In *Parker*, the defendants from three separate cases obtained consolidated review by the supreme court from decisions of the court of appeals holding that the police had not violated the defendant's rights under Washington Constitution, Article 1, § 7, when they searched the defendants' personal belongings following the arrest of the driver of the vehicles in which the defendant's were passengers. In each case, the police knew the property they were searching belonged to the defendants, who were not themselves under arrest. However, the trial court and the courts of appeal

had held in each case that the searches were justified under *Stroud* because the containers searched (two purses and a jacket, respectively) were unlocked and in the passenger compartment, even though they did not belong to the drivers who were arrested.

In addressing the holding of the lower courts in this case, the court first noted that (1) Washington Constitution, Article 1, § 7, provided significantly more privacy protection during vehicle searches than did United States Constitution, Fourth Amendment, and (2) the searches at issue had been made without warrants and were presumptively illegal. On the former issue, the court noted: “preexisting Washington law indicates a general preference for greater privacy for automobiles and a greater protection for passengers than the Fourth Amendment....” *State v. Parker*, 139 Wn.2d at 495 (quoting *Mendez*, 137 Wn.2d at 219)). On the latter issue the court stated:

Initially, we reiterate that “[a]ny analysis of article I, section 7 in Washington begins with the proposition that warrantless searches are unreasonable per se.” This is a strict rule. Exceptions to the warrant requirement are limited and narrowly drawn. The State, therefore, bears a heavy burden to prove the warrantless searches at issue fall within the exception it argues for.

State v. Parker, 139 Wn.2d at 498 (citations omitted).

With this as the underlying theme, the court began its analysis by noting that “[i]ndividual constitutional rights are not extinguished by mere

presence in a lawfully stopped vehicle.” *Parker*, at 498. Thus, mere presence in the vehicle does not justify a search of an individual’s person or possessions. Concerning possessions, the court noted:

Although we have not specifically addressed the issue under article I, section 7, we have recognized that readily recognizable personal effects are protected from search to the same extent as the person to whom they belong. Personal items may be “so intimately connected with” an individual that a search of the items constitutes a search of the person. Personal effects need not be worn or held to fall within the scope of protection.

State v. Parker, 139 Wn.2d at 498-499 (citations omitted).

The court then explained that the legal justification for searching a vehicle following the arrest of the driver (the need to uncover evidence of the crime for which the defendant was arrested) did not apply to a search of the passenger’s person or possessions. The court noted:

As to the potential loss of evidence, under the facts presented here there was no evidence to be lost. The defendants were not under arrest. Thus, without some further predicate, no evidence could lawfully be seized from them. Furthermore, where individuals are arrested for driving with license suspended, there is simply no evidence of the crime to be hidden or lost. *Cf. Knowles v. Iowa*, 525 U.S. 113, 119 S.Ct. 484, 488, 142 L.Ed.2d 492 (1998) (The need to discover and preserve evidence is not present where defendant was stopped for speeding. “No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car.”) (emphasis added).

State v. Parker, 139 Wn.2d at 503 (some citations and footnote omitted).

Based upon this analysis, the court found no justification in *Stroud* for the searches before it. The court held:

“The word ‘automobile’ is not a talisman in whose presence the Fourth Amendment fades away and disappears.” *Coolidge v. New Hampshire*, 403 U.S. 443, 461-62, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Nor do the heightened protections of article I, section 7 fade away or disappear within the confines of an automobile. A rule that protects nonarrested, nonsuspected third parties and their recognizable personal effects against categorical searches based merely on presence in an automobile in which somebody else is arrested strikes the proper balance between the significant privacy interests of innocent third parties and the exigencies that may be faced by officers at the scene of an automobile stop and arrest.

Pursuant to *Stroud*, officers may lawfully search a vehicle passenger compartment incident to the arrest of the driver. Pursuant to our rationale above, officers may assume all containers in the vehicle are lawfully subject to search. If, however, officers know or should know certain containers within the vehicle belong to nonarrested occupants, such containers may not be searched absent an independent, objective basis to believe the containers hold a weapon or evidence.

State v. Parker, 139 Wn.2d at 505.

In the case at bar, the defendant was an innocent third-party situated near a person who was arrested, just as the defendants in *Parker* were innocent third parties situated near a person who was arrested. In addition, in the case at bar, the officer had no reason to believe and did not believe that he would find evidence related to the “crime” for which he was arresting the passenger (outstanding warrant) in the defendant’s vehicle, just as the officers in *Parker* had no reason to believe and did not believe that they would find evidence related to the “crimes” for which he was arresting the drivers in the defendants’ personal possessions. Further, just as the defendants in *Parker*

maintained a reasonable privacy interest in their personal possessions (two purses and a jacket), so the defendant in the case at bar maintained a reasonable privacy interest in her personal property (her vehicle).

In fact, the defendant in this case arguably maintained a greater privacy interest in her vehicle than did the defendants in *Parker* to their purses and jacket because she was more intimately connected to her vehicle. In *Parker* the defendants maintained intimate contact with their possessions because they were in close proximity to them. In the case at bar, the defendant was actually sitting inside her vehicle as the driver at the time the police stated that they were going to search it. In *Parker*, the court's decision supports the conclusion that a person as a driver of his or her own motor vehicle maintains a heightened privacy interest in the integrity of what is in our society an item of personal property with which we hold a unique personal connection. The *Parker* court quoted the following from *City of Seattle v. Mesiani*, 110 Wn.2d 454, 456-57, 755 P.2d 775 (1988), on this point:

An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were

the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed

State v. Parker, 139 Wn.2d at 495 (Citing Mesiani, 110 Wash.2d at 457 (quoting *Delaware v. Prouse*, 440 U.S. 648, 662-63, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (footnote omitted))).

In the case at bar the defendant also felt that “greater sense of security and privacy” in her motor vehicle, and bitterly disputed the officer’s legal authority to invade her privacy. Given the fact that there was little or no logical justification for the search based upon (1) the fact that the officer had arrested the passenger on an outstanding warrant and did not anticipate finding any evidence of a crime, and (2) the fact that the officer had no reason to believe that the vehicle contained any weapons, there is no justification for the search under *Stroud*. Consequently, the defendant in this case invites the court to reverse its decision in *Cass*.

II. THE TRIAL COURT DENIED THE DEFENDANT HER RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT FAILED TO GRANT A MOTION FOR SEVERANCE OF COUNTS AND THEREBY ALLOWED THE STATE TO PRESENT INADMISSIBLE, UNFAIRLY PREJUDICIAL EVIDENCE OF SIMILAR BAD ACTS.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968),

both our state and federal constitutions do guarantee all defendants a fair trial, untainted from prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). As part of this right to a fair trial, a defendant is entitled to a severance of counts if the joinder of the counts is “so manifestly prejudicial as to outweigh the concern for judicial economy.” *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991). Under such circumstances in which the unfair prejudice outweighs the concern for judicial economy, the failure to grant a motion to sever requires reversal unless the state can prove that the error was harmless beyond a reasonable doubt. *State v. Mitchell*, 117 Wn.2d 521, 817 P.2d 898 (1991) (failure to grant severance held harmless beyond a reasonable doubt).

In determining whether or not the trial court’s refusal to grant a severance of counts denied the defendant the right to a fair trial, the court considers the following factors:

Factors that tend to mitigate any prejudice from a joinder of counts include: (1) the strength of the State’s evidence on each of the counts; (2) the clarity of the defenses on each count; (3) the propriety of the trial court’s instruction to the jury regarding the consideration of evidence of each count separately; and (4) the admissibility of the evidence of the other crime. *Watkins*, 53 Wn.App. at 269, 766 P.2d 484; *State v. Gatalski*, 40 Wn.App. 601, 606-07, 699 P.2d 804, review denied, 104 Wash.2d 1019 (1985). These same factors are applied by reviewing courts to determine if a trial court’s denial of a severance motion was unduly prejudicial. *State v. Eastabrook*, 58 Wn.App. 805, 812, 795 P.2d 151, review denied, 115 Wash.2d 1031, 803 P.2d 325 (1990).

State v. Cotten, 75 Wn.App. 669, 687, 879 P.2d 971 (1994).

As the court instructs in *State v. Cotton*, the first factor to consider when evaluating the trial court's refusal to sever counts is "the strength of the state's evidence on each count." In this case, the state's evidence was much stronger on Count I than it was on Count II. In Count I the state had a police officer who testified to the jury that the defendant admitted possessing a useable amount of methamphetamine. His testimony was supported by the baggie of methamphetamine found in the defendant's vehicle. By contrast, the state's evidence was not as compelling on Count II, particularly given the fact that the officer did not find a usable amount of methamphetamine. Certainly the state had sufficient evidence on Count II to convict, but the jury was still entitled to believe the defendant's testimony and find her not guilty on Count II. Thus, by failing to sever, the trial court allowed the state to use its stronger evidence on Count I to improperly bolster its case in Count II.

The second factor is the clarity of defense on each count. In this case, the defendant took the stand on her own behalf and unambiguously denied possession of either baggie of methamphetamine. By failing to sever, the court made it very difficult for the jury to independently review the evidence in Count II and give the defendant a fair trial on this count. The following rhetorical question illustrates this point. If the jury believed that the defendant knowingly possessed methamphetamine in Count I, then how

would the jury be able to ignore this evidence and fairly evaluate the defense on Count II? Obviously the jury could not make such a distinction.

The third factor is “ the propriety of the trial court’s instruction to the jury regarding the consideration of evidence of each count separately.” In this case the trial court gave the following instruction on this point:

INSTRUCTION NO. 2

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 143.

The deficiency in this instruction centers on the failure to tell the jury that it could not use the evidence from one count when considering the other count. The jury was not told what evidence was associated with a specific count and what evidence was not associated with a specific count. Thus, the jury was free to use the evidence from one count to support a conviction in the second count. As was previously mentioned it would be impossible for almost any juror to ignore this evidence when considering the defendant’s claims. Thus, this instruction falls short in attempting to get the jury to parse out which evidence it could consider in Count I and which evidence it could consider in Count II.

The fourth factor this court should consider in determining the issue of severance of counts is “the admissibility of the evidence of the other

crime.” As concerns this fourth factor, it should be noted that none of the evidence concerning the possession in Count I was admissible in Count II because it’s sole purpose would be to convince the jury that the defendant must have been guilty of possession in Count II because the evidence in Count I showed the defendant’s propensity to commit such a crime. It is fundamental under our adversarial system of criminal justice that “propensity” evidence, usually offered in the form of prior convictions or prior bad acts, is not admissible to prove the commission of a new offense. See 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b), wherein it states that “[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.” Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a “criminal type,” and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

Similarly, Tegland goes on to note that “the courts are reluctant to allow the State to prove the commission of a crime by evidence that the defendant was associated with persons or organizations known for illegal activities.” 5 Karl B. Tegland, at 124.

For example, in *State v. Pogue*, 104 Wn.App. 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court’s permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state’s request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: “It’s true that you have had cocaine in your possession in the past, isn’t it?” The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible

to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed the conviction and remanded the case for a new trial.

In addition, even if the state can prove some relevance in evidence that has the tendency to convince the jury that the defendant was guilty because of his propensity to commit crimes such as the one charged, the trial court must still weight the prejudicial effect of that evidence under ER 403.

This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies

within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), Acosta was charged with first degree robbery, second degree theft, taking a motor vehicle, and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert, who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion, the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination of the expert, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction, Acosta appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals addressed the issue of the relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least

ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

The decision in *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987), also explains why evidence of similarly crimes denies a defendant the right to a fair trial. In *Escalona*, the defendant was charged with Second Degree Assault while armed with a deadly weapon, in that he allegedly threatened another person with a knife. In fact, Defendant had a prior conviction for this very crime, and prior to trial the court had granted a defense motion to exclude any mention of this conviction. During cross-examination, defense counsel asked the complaining witness about a prior incident in which four people (not including the defendant) had assaulted him, and whether or not he was nervous on the day of the incident then before the court. The complaining witness responded: "This is not the problem. Alberto [the defendant] already has a record and had stabbed someone." *State v. Escalona*, 49 Wn.App. at 253. After this comment, defense counsel moved for a limiting instruction, which the court gave, and then moved for a mistrial, which was denied. Following conviction, defendant appealed,

arguing that the court abused its discretion in refusing to grant his motion for mistrial.

In analyzing the defendant's claim, the court first found that the error was "extremely serious" in light of the fact that it was inadmissible under either ER 404(b) or ER 609, and particularly in light of the "paucity of credible evidence against [the defendant]" and the inconsistencies in the complaining witness's allegations, which almost constituted the state's entire case. Similarly, the court had no problem under the second *Weber* criterion finding that the statement was not cumulative of other properly admitted evidence, since the trial court had specifically prohibited its use.

The decisions in *Pogue*, *Acosta* and *Escalona* each explain the unfair prejudice that arises in the minds of the jury when the state is allowed to elicit evidence that the defendant previously committed the same time of crime with which he is now charged. The case at bar presents another example of this unfair prejudice. In the same manner that the defendants in *Pogue*, *Acosta* and *Escalona* were all denied a fair trial, so the defendant in the case at bar is entitled to a new trial.

III. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT IMPOSED A COMMUNITY CUSTODY CONDITION SO VAGUE THAT IT DOES NOT PUT THE DEFENDANT ON NOTICE OF WHAT CONDUCT IT PROHIBITED.

Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, "a statute is void for vagueness if its terms are 'so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.'" *State v. Worrell*, 111 Wn.2d 537, 761 P.2d 56 (1988) (quoting *Myrick v. Board of Pierce Cy. Comm'rs*, 102 Wn.2d 698, 707, 677 P.2d 140 (1984)). This rule applies equally to conditions of community custody, which had the effect of a criminal statute in that their violation can result in a new term of incarceration. *State v. Simpson, supra*.

As the Washington Supreme Court explained in *State v. Aver*, 109 Wn.2d 303, 745 P.2d 479 (1987), the test for vagueness rests on two key requirements: adequate notice to citizens and adequate standards to prevent arbitrary enforcement. In addition, there are two types of vagueness challenges: (1) facial challenges, and (2) challenges as applied in a particular case. *State v. Worrell*, 111 Wn.2d at 540. In *Aver*, the court explained the former challenge as follows:

In a constitutional challenge a statute is presumed constitutional

unless its unconstitutionality appears beyond a reasonable doubt. *Seattle v. Shepherd*, 93 Wash.2d 861, 865, 613 P.2d 1158 (1980); *Maciolek*, 101 Wash.2d at 263, 676 P.2d 996. In a facial challenge, as here, we look to the face of the enactment to determine whether any conviction based thereon could be upheld. *Shepherd*, 93 Wash.2d at 865, 613 P.2d 1158. A statute is not facially vague if it is susceptible to a constitutional interpretation. *State v. Miller*, 103 Wash.2d 792, 794, 698 P.2d 554 (1985). The burden of proving impermissible vagueness is on the party challenging the statute's constitutionality. *Shepherd*, 93 Wash.2d at 865, 613 P.2d 1158. Impossible standards of specificity are not required. *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wash.2d 455, 465, 722 P.2d 808 (1986).

State v. Aver, 109 Wn.2d at 306-07.

In the case at bar the defendant argues that the following community custody condition the court imposed in this case violates due process because it is void for vagueness.

- ☒ Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held electronic scheduling or data storage devices.

CP 179.

In this provision the phrase "any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances" is hopelessly vague. Literally, any item from a toothpick up to a dump truck could qualify under this phrase. The following gives a few examples. Any type of telephone can and are used to facilitate the transfer of drugs. Is the defendant prohibited

from using any type of telephone? Any type of motor vehicle can be used for the transfer of drugs. Is the defendant prohibited from using motor vehicles? Blenders can be used to pulverize pseudoephedrine tablets as the first step in manufacturing methamphetamine. Is the defendant prohibited from using a blender? Matches are often used as a source of phosphorous in the manufacture of methamphetamine. Is the defendant prohibited from using or possessing matches? Cigarette paper is sometimes used to smoke marijuana. Is the defendant prohibited from possessing cigarette paper? Baggies are often used to contain controlled substances. Is the defendant now forced to only use waxed paper to wrap her sandwiches? Except waxed paper can also be used to make bindles, as can glossy pages out of magazines. Perhaps the defendant will be in violation if she possesses waxed paper or magazines with glossy pages. The list is endless and the reason it is endless is because the phrase "any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances" is so vague as to leave the defendant open to violation at the whim of his probation officer. Consequently, this condition is void and violates the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

IV. THIS COURT'S REFUSAL TO ADDRESS ARGUMENT II AS NOT RIPE WILL VIOLATE THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, AS WELL AS THE DEFENDANT'S RIGHT TO EFFECTIVE APPELLATE REVIEW UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22.

In a recent decision this court ruled that constitutional arguments such as these are not ripe for decision given the fact that the state had not sought to sanction the defendant for violation of any of the conditions the defendant herein claims are improper. In this case, *State v. Motter*, — Wn.App. —, 162 P.3d 1190 (2007), a defendant convicted of first degree burglary appealed his sentence, arguing that the trial court imposed a number of community custody conditions that violated certain constitutional rights and which were not authorized by the legislature. One of these conditions prohibited the defendant from possessing “drug paraphrenalia” which the court said included such items as cell phones and data recording devices. This court refused to address this condition on the basis that the issue was not ripe for decision. This court held:

Moreover, Motter's challenge is not ripe. In *State v. Massey*, 81 Wn. App. 198, 200, 913 P.2d 424 (1996), the defendant challenged a condition that he submit to searches. This court held that the judicial review was premature until the defendant had been subjected to a search he thought unreasonable. And in *State v. Langland*, 42 Wn. App. 287, 292-93, 711 P.2d 1039 (1985), we held that the question of a law's constitutionality is not ripe for review unless the challenger was harmed by the law's alleged error. Here, Motter claims that the court order could prohibit his possession of innocuous

items. But Motter has not been harmed by this potential for error and this issue therefore is not ripe for our review. It is not reasonable to require a trial court to list every item that may possibly be misused to ingest or process controlled substances, items ranging from pop cans to coffee filters. Thus, we can review Motter's challenge only in context of an allegedly harmful application of this community custody condition. This argument is not properly before this court and we will not address it.

State v. Motter, 162 P.3d at 1194.

The defendant herein argues that this decision, while appropriate at the time of *Massey* and *Langland*, is inappropriate now, and that by applying it in *Motter* and applying it in the case at bar this court violates the defendant's right to procedural due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment by denying the defendant appellate review as guaranteed under Washington Constitution, Article 1, § 22. The following presents this argument.

A criminal defendant does not have a federal constitutional due process right to either post-conviction motions or to appeal. *Rheuark v. Shaw*, 628 F.2d 297, 302 (5th Cir.1980), *cert. denied*, 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365 (1981). However, once the state acts to create those rights by constitution, statute or court rule the protections afforded under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, have full effect. *In re Frampton*, 45 Wn.App. 554, 726 P.2d 486 (1986). For example, once

the state creates the right to appeal a criminal conviction, in order to comport with due process, the state has the duty to provide all portions of the record necessary to prosecute the appeal at state expense. *State v. Rutherford*, 63 Wn.2d 949, 389 P.2d 895 (1964). The state also has the duty to provide appointed counsel to indigent appellants. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

In Washington a criminal defendant has the right to one appeal in a criminal case under both RAP 2.2 and Washington Constitution, Article 1, § 22. *State v. French*, 157 Wn.2d 593, 141 P.3d 54 (2006). Thus, this right includes the protections of procedural due process. At a minimum, procedural due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment requires notice and the opportunity to be heard before a competent tribunal. *In re Messmer*, 52 Wn.2d 510, 326 P.2d 1004 (1958). In the *Messmer* decision the Washington State Supreme Court provided the following definition for procedural due process.

We have decided that the elements of the constitutional guaranty of due process in its procedural aspect are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case; also to have the assistance of counsel, if desired, and a reasonable time for preparation for trial.

In re Messmer, 52 Wn.2d at 514 (quoting *In re Petrie*, 40 Wn.2d 809, 246 P.2d 465 (1952)).

In *Massey* and *Langland* the defendant's procedural due process right "to be heard or defend before a competent tribunal" was not violated even though the court found the defendant's constitutional challenge to certain probation conditions was not ripe. The reason is that in these cases the defendants had the right to contest the constitutionality of those conditions before the court in the future were the Department of Corrections to seek to sanction the defendant for failure to comply with conditions the defendant felt were unconstitutional. The problem with the decision in *Motter*, and the problem in the case at bar, is that probation violation claims are no longer adjudicated in court. Rather, they are adjudicated before a Department of Corrections hearing officer who only has the authority to determine (1) what the conditions were, (2) whether or not DOC has factually proven a violation of those conditions, and (3) what the appropriate sanction should be if the violation was proven.

Under WAC 137-104-050 the Department of Corrections has adopted procedures whereby defendants accused of community custody violations are tried before a DOC hearing officer on the claims of violation, not before a court. The first two sections of this code section provide as follows:

- (1) Offenders accused of violating any of the conditions or

requirements of community custody will be entitled to a hearing, prior to the imposition of sanctions by the department.

(2) The hearing shall be conducted by a hearing officer in the department's hearing unit, and shall be considered as an offender disciplinary proceeding and shall not be subject to chapter 34.05 RCW, the Administrative Procedure Act.

WAC 137-104-050.

There is no provision under this administrative code, nor under any of the other sections of WAC 137-104 to allow the defendant to challenge the constitutionality of community custody conditions that the court imposed. In addition, while this administrative code section does grant the right to appeal, it does not grant the defendant the right at the appellate level to challenge the constitutionality of the community custody conditions imposed by the court.

This section, WAC 137-104-080, states as follows:

(1) The offender may appeal the decision of the hearing officer within seven calendar days to the appeals panel. The request for review should be submitted in writing and list specific concerns.

(2) The sanction shall be reversed or modified if a majority of the panel finds that the sanction was not reasonably related to the: (a) Crime of conviction; (b) Violation committed; (c) Offender's risk of reoffending; or (d) Safety of the community.

(3) The appeals panel will also examine evidence presented at the hearing and reverse any finding of a violation based solely on unconfirmed or unconfirmable allegations.

WAC 137-104-080.

Under WAC 137-104-080 and the procedures by which community

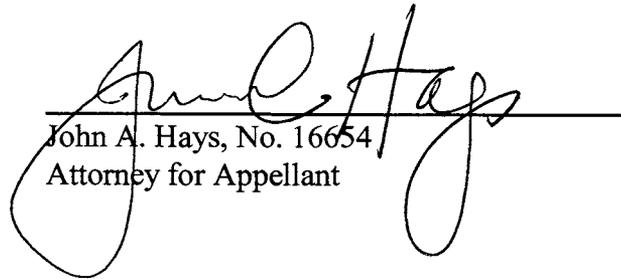
custody violations are no longer adjudicated in court, the effect of the decision in *Motter* is to deny a defendant procedural due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment by refusing to hear constitutional challenges to community custody provisions at the direct appeal level (not ripe), and then refuse to hear constitutional challenges at the violation level under WAC 137-104 (no authority to hear the claim). Thus, to comport with minimum due process, this court should find that the defendant's constitutional challenges to community custody conditions may be heard as part of a direct appeal from the imposition of the sentence.

CONCLUSION

The trial court erred when it denied the defendant's motion to suppress and the defendant's motion to sever. Consequently, the defendant is entitled to a new trial on severed counts and with instructions to the trial court to grant the motion to suppress. In the alternative, the defendant is entitled to have the vague community custody condition stricken from his judgment and sentence.

DATED this 9th day of November, 2006.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

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

**WASHINGTON CONSTITUTION
ARTICLE 1, § 7**

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

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

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

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

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

WAC 137-104-050

(1) Offenders accused of violating any of the conditions or requirements of community custody will be entitled to a hearing, prior to the imposition of sanctions by the department.

(2) The hearing shall be conducted by a hearing officer in the department's hearing unit, and shall be considered as an offender disciplinary proceeding and shall not be subject to chapter 34.05 RCW, the Administrative Procedure Act.

WAC 137-104-080

(1) The offender may appeal the decision of the hearing officer within seven calendar days to the appeals panel. The request for review should be submitted in writing and list specific concerns.

(2) The sanction shall be reversed or modified if a majority of the panel finds that the sanction was not reasonably related to the:

- (a) Crime of conviction;
- (b) Violation committed;
- (c) Offender's risk of reoffending; or
- (d) Safety of the community.

(3) The appeals panel will also examine evidence presented at the hearing and reverse any finding of a violation based solely on unconfirmed or unconfirmable allegations.

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DIVISION II

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

STATE OF WASHINGTON,
Respondent,

vs.

AMY S. ZIMMER,
Appellant,

CLARK CO. NO: 06-1-01661-1
APPEAL NO: 36423-9-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON
COUNTY OF CLARK } vs.

DONNA BAKER, being duly sworn on oath, states that on the 9TH day of NOVEMBER, 2007, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

ARTHUR CURTIS
PROSECUTING ATTORNEY
1200 FRANKLIN ST.
VANCOUVER, WA 98668

AMY S. ZIMMER - #800686
MISSION CREEK CORR CTR FOR WOMEN
3420 SAND HILL RD.
BELLFAIR, WA 98528

and that said envelope contained the following:

- 1. BRIEF OF APPELLANT
- 2. AFFIDAVIT OF MAILING

DATED this 9TH day of NOVEMBER, 2007

DONNA BAKER

SUBSCRIBED AND SWORN to before me this 9th day of NOVEMBER, 2007.



Heather Chittock
NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 11-04-2009