

*Brewer*

*364704 Consol*  
NO. 36536-7-II

*[Signature]*

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

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**ALAN G. BREWER,**

**Appellant.**

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**BRIEF OF APPELLANT**

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 **ORIGINAL**

*PRM 12-14-07*

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court erred when it denied the defendant's motion to suppress because the search of an outbuilding next to the defendant's home violated United States Constitution, Fourth Amendment and Washington Constitution, Article 1, § 7. RP 11-87; SCP 1-2.<sup>1</sup>

2. The trial court denied the defendant his right to notice of the charges against him under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment when it granted a motion at the end of the state's case to amend the information to add an alternative means of committing a sentencing enhancement. RP 322-323, 349-356; CP 92-94.

3. The trial court violated the defendant's right to be free from double jeopardy under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment when it sentenced him on two crimes that merge. CP 96-112.

4. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution,

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<sup>1</sup>The record herein includes six volumes of verbatim reports numbered I, II, III, IV-A, IV-B, and V. Since the pages are continuously numbered, Appellant refers to them as "RP". "SCP" refers to supplemental clerk's papers filed with this brief.

Fourteenth Amendment when it entered judgment of conviction for offenses unsupported by substantial evidence. RP 11-390.

5. 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. CP 103.

#### *Issues Pertaining to Assignment of Error*

1. Does a trial court err under United States Constitution, Fourth Amendment and Washington Constitution, Article 1, § 7, if it denies a motion to suppress evidence the police seized from an outbuilding not included in a search warrant?

2. Does a trial court deny a defendant the right to notice of the charges against the defendant under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment if it grants a motion at the end of the state's case to amend the information to add an alternative means of committing a sentencing enhancement when the defense is unprepared to respond to the new allegation and prejudiced by this lack of preparation?

3. Does a trial court violate a defendant's right to be free from double jeopardy under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment if it sentences a defendant for two crimes that

merge?

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

5. 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 a defendant on notice of what conduct it prohibited?

## STATEMENT OF THE CASE

### *Factual History*

On June 16, 2003, agents of the Clark County Drug Task force executed a search warrant at 5910 N.E. 131<sup>st</sup> Street in Vancouver, looking for methamphetamine and evidence of methamphetamine manufacturing. RP 135-137. This property is a one acre lot belonging to a person by the name of Tanton Thorp. RP 11-13, 301-303 Mr. Thorp occupies the house and shop on the lot. *Id.* He rents out a separate mobile home that sits on a fenced corner of the lot. *Id.* The mobile home has a concrete deck next to it with an awning over the concrete deck. RP 11-42. Off to the side of the concrete deck and awning is a small shed with a window in the door. *Id.* The shed sits on its own foundation and is about one foot from the mobile home. RP 68, 84-85.<sup>2</sup> It has its own locked entrance, separate from the doors to the mobile home. RP 22-23.

In the affidavit given in support of the warrant, a police officer stated

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<sup>2</sup>Whether or not the shed shares a wall with the mobile home, or sits next to the mobile home and is attached by nails, or sits separate from the mobile home was an issue of substantial debate among the witnesses and the attorneys at a subsequent suppression motion. RP 1-87. Unfortunately, during the suppression motion neither party offered any relevant photographs into evidence to address this issue. *Id.* However, at trial, the state offered and the court admitted Exhibit 36, which is a color photograph the police took during the execution of the warrant showing that the shed sits separate from the mobile home at a distance of about one foot. Exhibit 36; RP 247, 313, 372.

that he had received information from a paid informant who claimed he had recently been in the mobile home and observed the occupants selling methamphetamine. CP 30-33 After receiving this information, the officer made a visual inspection of the property and was able to see the house, the shop, the mobile home, the deck, and the awning. RP 47. He was not able to see the shed near the mobile home. *Id.* As a result, neither the search warrant, nor affidavit given in support of the warrant mention the existence of the shed, asks for permission to search it, or grant permission to search it. CP 30-33, 34-35. Rather, the search warrant only gives permission to search the mobile home and the deck area. *Id.*

In fact the language used in the affidavit and search warrant is somewhat confusing in that both documents do mention the existence of “an adjacent shed with a gray tarp covering the roof and front of the shed.” CP 30-33, 34-35. At a subsequent hearing the officer who signed the supporting affidavit explained that because he could not get a good view of the property what he described in the affidavit as “an adjacent shed with a gray tarp covering the roof and front of the shed” was in fact the carport and awning. RP 44-47. He further explained that he did not know that the adjacent shed existed. *Id.*

Upon their entry into the mobile home while executing the search warrant the officers found the defendant Alan Brewer in the kitchen. RP 137.

They immediately seized his person, handcuffed him, and placed him in a patrol car outside.137-139. They then went to the master bedroom where they found Melissa Danielson in bed with one of her children. RP 135-137, 157-159. Ms Danielson had moved into the mobile home the preceding January when it was occupied by a person named Casey Norris, who had originally rented the property from Mr. Thorp. RP 302. Sometime in February the defendant Alan Brewer moved into the mobile home and Mr. Casey moved out. RP 201-303, 309. When Mr. Casey moved out he left a number of his belongings behind. RP 309-310. In June, the defendant and Ms Danielson were living in the mobile home with three children. RP 301, 358-360. The defendant was the father of all three of them and Ms. Danielson was the mother of the youngest two. RP 344-347.

When the officers found Ms Danielson in bed they had her get up, get dressed and come and sit down on the living room couch with her children. RP 159-160. After she did this one of the officers explained that they were executing a search warrant looking for methamphetamine and evidence of methamphetamine manufacturing. RP 137-139. Upon hearing this Ms Danielson pointed to a metal box in the master bedroom next to the bed. Inside the box the officer found syringes, pipes, and a small quantity of methamphetamine. *Id.* Inside the bedroom the officer also found a hot plate, a book on how to manufacture methamphetamine, and two blister packs with

pseudoephedrine tablets in them. RP 217-218, 232-248.

Sometime during the search, Ms Danielson also walked out on the concrete pad under the awning and pointed through the door window of the shed at a red suitcase. RP 159-160. The officers then entered the shed, opened the red suitcase and other containers, and found numerous items associated with manufacture of methamphetamine, including used coffee filters, striker plates, cooking dishes, containers with liquid in them, and condenser tubes. RP 161-173. Later analysis of these items revealed the presence of methamphetamine, iodine, and other chemicals associated with methamphetamine manufacturing. RP 265-292. The police also found a PUD bill and a prescription with Melissa Danielson's name on them. RP 56-57. At trial Mr. Thorp testified that at some point in time he had seen the defendant put the red suitcase in the storage shed. RP 310-311.

According to the police officers, during the execution of the search warrant Ms Danielson made the following statements: (1) she did not inject methamphetamine although she had smoked some the day before, (2) she did not manufacture methamphetamine around the children, and (3) she did not know what was in the shed because the defendant kept it locked and would not let her or the children go into it. RP 138, 143-146, 155. Following execution of the warrant the officers formally arrested the defendant and Ms Danielson and took them into custody. RP 302-345.

### *Procedural History*

By amended information filed October 13, 2006, the Clark County Prosecutor charged the defendant Alan Brewer and Melissa Danielson each with one count of possession of methamphetamine, one count of manufacturing methamphetamine, and one count of possession of pseudoephedrine with intent to manufacture methamphetamine. CP 9-11. The state further alleged that the defendant committed the second and third counts “when a person under the age of eighteen (18) was present” and that the second count was committed “within 1,000 feet of the perimeter of [a] school grounds . . . .” CP 9-11.

Following the filing of the original information, the defendant filed a motion to suppress all of the evidence seized during the execution of the warrant, arguing that (1) the affidavit failed to establish the reliability of the informant, and (2) that search of the shed was illegal in that the supporting affidavit did not mention its existence and the warrant did not authorize the police to search it. CP 15-20. The court later held a hearing on the motion during which the state called four witnesses, the defense called two, the state then called one in rebuttal. RP 11-87. During this hearing Mr. Thorp explained that the shed the officer searched had been built a number of years after the mobile home had been put in place. RP 11-20. While some of the other witnesses believed that the shed was attached to the side of the mobile

home, the defendant and Ms Danielson were adamant that it sat a few feet away from the mobile home. RP 20, 68, 81-84. Unfortunately, neither the state nor the defense offered any photographs of the trailer and property to clarify this point. RP 11-87. However, all of the witnesses were in agreement that there was no access to the shed from inside the trailer. *Id.*

Following this testimony and argument by counsel, the trial court denied the motion to suppress. SCP 1-2. The court later entered the following memorandum opinion in support of its decision.

The fact pattern of this particular case indicates that a search warrant was issued calling for the search of an appropriately described trailer as well as a shed, which turns out to be more appropriately described as a carport, with a tarp covering a portion of the carport as described in the search warrant. The officer in making the observations of the trailer could not from his angle observe the shed, which has been described as a garden shed/storage shed immediately adjacent to the trailer.

The shed has an independent entryway with a door and locking device. And from the testimony, it is difficult to tell whether the carport is actually attached to the trailer by nails or whether it is a short distance from the trailer as described by defendant Brewer. Even the widest area described by Danielson indicated it would be extremely difficult for a person to walk within that space dividing the trailer and the carport. The carport was an integral part of the trailer sharing in the same roof line as demonstrated in the exhibits admitted into evidence showing aerial view, which would make an exact location of the trailer extremely difficult to locate separate and apart from the trailer.

The utilization of the carport is available to the tenants of the trailer for their use as it clearly is within the curtilage of the trailer. The warrant not using the term "curtilage" is non-fatal. The unit in question is basically indistinguishable from the trailer in itself and is

subject to search. It is in keeping with the type of facilities that might be found during such search.

Motion for Suppression is denied as to both defendants as it clearly does not have a separate identifiable characteristic removing it from the trailer itself requiring additional authority for search. By oral ruling previously, Danielson has given consent, Brewer has not.

SCP 1-2.

The case later came on for trial with the state calling ten witnesses, who testified to the facts set out in the preceding *Factual History*. RP 135-385. The state's witnesses included a school district employee and a county GIS expert, who testified that there were a number of school bus stops within 1,000 feet of the property at 5910 N.E. 131<sup>st</sup> Avenue. RP 327-344. However, they did not testify that there was a school within 1,000 feet of 5910 N.E. 131<sup>st</sup> Avenue. *Id.* At the end of the state's case, the prosecutor moved to amend the information to change the allegation on the school zone enhancement to include a claim that the second charge was committed within 1,000 feet of a school bus stop. RP 321. The defense objected that this caused substantial prejudice in that they were not prepared to respond to such a claim because they had no opportunity to examine the stops and measure any claimed distances. RP 321-323. The court none the less granted the motion. RP 354-356.

Following the close of the state's case, the co-defendant Ms Danielson took the stand on her own behalf, followed by brief testimony by

Mr. Thorp. RP 357, 385. The court then instructed the jury with the defense objecting to the court's decision to instruct the jury on accomplice liability. RP 390, 391-391. Following argument by counsel, the jury retired for deliberation. RP 394-421. The jury later returned verdicts of guilty on each count, and special verdicts that the defendant had manufactured methamphetamine within 1,000 feet of a school bus stop and while minors were present, and that the defendant had possessed pseudoephedrine with intent to manufacture methamphetamine while minors were present. CP 85-90.

On a subsequent day, the court sentenced the defendant within the standard range on each count, and added 24 months for the enhancements. CP 96-112. The court also imposed 12 months of community custody, which included the following conduction among others:

- ☒ 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 103 (strikeout in original).

Following imposition of sentence, the defendant filed timely notice of appeal. CP 113.

## ARGUMENT

### **I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS BECAUSE THE SEARCH OF AN OUTBUILDING NEXT TO THE DEFENDANT'S HOME VIOLATED UNITED STATES CONSTITUTION, FOURTH AMENDMENT AND WASHINGTON CONSTITUTION, ARTICLE 1, § 7.**

Under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment, search warrants may only be issued upon a determination of probable cause by a neutral and detached magistrate. *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582, 585 (1999); *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976). Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched. *State v. Thein*, 138 Wash.2d at 140. Accordingly, “probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.” *Thein*, 138 Wn.2d at 140.

In addition, The Fourth Amendment prohibits the issuance of any warrant except one “particularly describing the place to be searched and the persons or things to be seized.” *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.Ct. 1013, 1016, 94 L.Ed.2d 72 (1987). The Washington Constitution

contains a similar requirement. *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984).

In the case at bar the police searched the mobile home in which the defendant lived, as well as the outside storage shed that sits about one foot away from the mobile home at the end of the concrete patio. The police searched this latter building even though the search warrant affidavit did not mention that it existed and the search warrant did not grant permission to search it. In an attempt to justify this search, the trial court relied upon the decision in *State v. Llamas-Villa*, 67 Wn.App. 448, 836 P.2d 239 (1992). As the following explains, the trial court's reliance upon this case was misplaced because it is factually distinguishable from the case at bar.

In *State v. Llamas-Villa, supra*, officers executed a search warrant for apartment 101 in an apartment complex at a specified address. After entering and searching apartment 101, an officer exited the front door and opened a door labeled "storage" located in the common hallway immediately to the right of the apartment door. Inside the storage room were several lockers, including one marked "101." The officer opened the locker, searched it, and found controlled substances inside. Because the storage room door was located next to apartment 101, the appellate court concluded that it was reasonable for the officers to believe that the storage area was appurtenant to and a part of the apartment.

In *Llamas-Villa*, the storage locker was not part of a separate structure and it was not located on property controlled by the defendant. In other words, it was not part of the curtilage to the defendant's apartment. By contrast, in the case at bar, the storage shed was a free standing structure on its own foundation with a separate outside entrance and was part of the curtilage. As the decisions in *State v. Kelley*, 52 Wn. App. 581, 762 P.2d 20 (1988), and *State v. Gebaroff*, 87 Wn.App. 11, 939 P.2d 706 (1997), illustrate, when an outside building is part of the curtilage of a property, the police may not search it as part of the search of another building on the same property unless (1) the supporting affidavit establishes probable cause to search that structure, and (2) the search warrant includes that structure as one to be searched. The following examines these two cases.

In *Kelley*, the Clark County Sheriff's Office obtained information from informants indicating that the defendant was operating a marijuana grow operation in a detached two-car garage, a detached four-car garage, and a detached barn all next to his house. Upon receipt of this information, the officer obtained a warrant. However, it only authorized the search of the Defendant's "one story, wood framed residence, green in color, with an attached carport," and it did not even mention the detached garages and barns. No information had been obtained indicating the existence of criminal activity in defendant's residence. During execution of the warrant, the

officers searched all of the structures, and found evidence of criminal activity in both the house, as well as the other buildings mentioned.

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

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

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

Similarly, in *State v. Gebaroff, surpa*, Division II of the Court of Appeals held that a probable cause to search a mobile home on a piece of property does not provide probable cause to search a separate travel trailer on the property. In this case, the police obtained information from a confidential informant indicating that he had recently purchased drugs in a mobile home at 45 Sudderth Road in Hoquiam. They then obtained a warrant to search that mobile home, as well as "any and all other buildings or structures on the

property” which included “three recreational travel trailers located to the rear of the mobile home.” Upon execution of the warrant, the police found drugs in one of the travel trailers, and arrested the defendant, who lived in the trailer. The defendant then moved to dismiss, arguing that even if probable cause supported the issuance of a warrant to search the mobile home, probable cause did not exist to justify a search of the travel trailer. The Court of Appeals agreed and reversed, stating as follows:

We considered a variant of this issue in *State v. Kelley*, 52 Wn.App. 581, 762 P.2d 20 (1988). The warrant in *Kelley* authorized the search of a residence with attached carport, but the police searched some outbuildings as well. *Kelley*, 52 Wn.App. at 584, 762 P.2d 20. We noted in *Kelley* the general principles that the police must execute a search warrant strictly within the bounds set by the warrant, and that a warrant describes a place with sufficient particularity ““if it identifies the place to be searched adequately enough so that the officer executing the warrant can, with reasonable care, identify the place intended,”” *Kelley*, 52 Wn.App. at 585, 762 P.2d 20 (quoting *State v. Cockrell*, 102 Wash.2d 561, 569-70, 689 P.2d 32 (1984)). Moreover, if a warrant authorizes the search of a house without mentioning outbuildings, either in the warrant itself or by incorporating such a reference in the affidavit, a search of the outbuildings is outside the scope. *Kelley*, 52 Wn.App. at 585-86, 762 P.2d 20.

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

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

In the case at bar the storage shed here at issue was not a part of the mobile home, it was not manufactured with the mobile home, there was no access to it from inside the mobile home, it had its own locking outside entrance, it sat on its own foundation, and it was located on the property the defendant rented. These facts find no similarity with those of *Llamas-Villa*. Rather, these facts place this case squarely within the holdings of *Kelly* and *Gebaroff*. Thus, since the supporting affirmation fails to mention the existence of this structure, and since the warrant itself does not authorize the search of this structure, the officers search of it violated the defendant's right to privacy under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment. Consequently, the trial court erred when it denied the defendant's motion to suppress.

**II. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO NOTICE OF THE CHARGES AGAINST HIM UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT WHEN IT GRANTED A MOTION AT THE END OF THE STATE'S CASE TO AMEND THE INFORMATION TO ADD AN ALTERNATIVE MEANS OF COMMITTING A SENTENCING ENHANCEMENT.**

Under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment "a defendant has the right to be informed of the charges against him and to be tried only for offenses charged." *State v. Peterson*, 133 Wn.2d 885, 948 P.2d 381 (1997). The essential purpose of the notice requirement is to ensure that a defendant can mount an effective

defense. *State v. Schaffer*, 120 Wn.2d 616, 845 P.2d 281 (1993). However, in spite of these provisions, under CrR 2.1(d), the trial court has discretion to allow the state to amend an information during its case in chief, if the defense is not substantially prejudiced, and at any time thereafter up until verdict if the amendment is to a lesser included offense. *State v. Pelkey*, 109 Wn.2d 484, 745 P.2d 854 (1987). The court rule on amendments states as follows:

(d) Amendment. The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

CrR 2.1(d).

In *State v. Hakimi*, 124 Wn.App. 15, 98 P.3d 809 (2004), the court stated as follows concerning this tension between CrR 2.1(d) and the constitutional right to notice.

As stated in *Pelkey*, former CrR 2.1(e) “necessarily operates within the confines of article 1, section 22.” *Pelkey*, 109 Wn.2d at 490, 745 P.2d 854. Thus, former CrR 2.1(e) is intended to fulfill the state constitution's notice provision by allowing a defendant the opportunity to adequately defend him or herself. *Pelkey* held that former CrR 2.1(e) must be interpreted to mean that “[a] criminal charge may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included offense.” *Pelkey*, 109 Wn.2d at 491, 745 P.2d 854. In *State v. Schaffer*, 120 Wn.2d 616, 845 P.2d 281 (1993), the Supreme Court declined to expand the reach of *Pelkey*'s per se rule to encompass amendments during the State's case in chief. *See also, State v. Wilson*, 56 Wn.App. 63, 65, 782 P.2d 224 (1989) (affirming trial court's grant of State's motion to add a third count of indecent liberties on the day of trial).

*State v. Hakimi*, 124 Wn.App. at 28.

The decision in *Hakimi* is instructive on what type of amendments during the state's case-in-chief do not prejudice the defense. In this case the state charged the defendant with three counts of first degree rape of a child. During trial the court allowed the state to amend one of the counts to first degree child molestation. Following conviction the defendant appealed, arguing that this amendment during the case in chief violated his constitutional right to notice. However, the court rejected this argument, finding as follows:

The State's amendment in this case did not jeopardize Hakimi's ability to defend himself. The State did not allege an additional count; its amendment reduced one count. The reduced charge arose out of the same factual scenario on which the original charge had been brought. Moreover, Hakimi was informed of the State's proposed amendment prior to the State's motion before the court. Hakimi fails to show that his substantial rights were prejudiced by the State's amendment during trial.

*State v. Hakimi*, 124 Wn.App. at 28.

By contrast, in the case at bar the trial court's decision to grant the state's motion to amend the school zone enhancement from an allegation of the commission of an offense "within 1,000 feet of a school" to the commission of an offense "within 1,000 feet of a school bus stop" caused substantial prejudice to the defendant. As his attorney and the co-defendant's attorney explained to the court when they made their objections, the failure to give advance notice of this charge had robbed them of the opportunity to

locate the alleged school bus stops and had robbed them of the opportunity to test the state's measurements. As such, the amendment during trial violated the notice requirements of Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment because it prevented the defendant from preparing of an effective defense. Consequently, this court should strike this enhancement.

**III. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 9, AND UNITED STATES CONSTITUTION, FIFTH AMENDMENT WHEN IT SENTENCED HIM ON TWO CRIMES THAT MERGE.**

The double jeopardy prohibitions found in both Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969); *United States v. Halper*, 490 U.S. 435, 104 L.Ed.2d 487, 109 S.Ct. 1892 (1989); *Dept. of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 128 L.Ed.2d 767, 114 S.Ct. 1937 (1994).

In order for two prosecutions or punishments to violate double jeopardy, they must both have arisen out of the same offense. *Blockberger v. United States*, 284 U.S. 299, 76 L.Ed.2d 306, 52 S.Ct. 180 (1932). In

*Blockburger*, the United States Supreme Court adopted a “same elements” test to determine whether the two punishments or prosecutions arose out of the same offense. In this case, the court stated as follows:

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied is whether *each* provision requires proof of an additional fact which the other does not . . . . A single act may be an offense against two statutes; and *if each statute requires proof of an additional fact which the other does not*, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

*Blockburger*, 76 L.Ed. at 309 (emphasis added; citations omitted).

By definition, a lesser included offense does not constitute one for which “additional facts” are required. On this issue, the Washington Supreme Court has stated as follows.

A person is not put in second jeopardy by successive trials unless they involve not only the *same act*, but also the *same offense*. There must be substantial identity of the offenses charged in the prior and in the subsequent prosecutions both in fact and in law. . . .

The rule is, however, subject to the qualification that the offenses involved in the former and in the latter trials need not be identical as entities and by legal name. It is sufficient to constitute second jeopardy if one is necessarily included within the other, and in the prosecution for the greater offense, the defendant could have been convicted of the lesser offense.

*State v. Roybal*, 82 Wn.2d 577, 582, 512 P.2d 718 (1973) (quoting *State v. Barton*, 5 Wn.2d 234, 237-38, 105 P.2d 63 (1940)); *See also State v.*

*Laviollette*, 118 Wn.2d 670, 675, 826 P.2d 684 (1992) (“If the elements of each offense are identical, or if one is a lesser included offense of the other, then a subsequent prosecution is barred.”) (citing *Brown v. Ohio*, 432 U.S. 161, 166, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977)).

For example, in *State v. Culp*, 30 Wn.App. 879, 639 P.2d 766 (1982), the Court of Appeals found a violation of double jeopardy in subsequent prosecutions for DWI and Negligent Homicide out of the same incident. In this case the defendant had been charged in Municipal Court with Negligent Driving and Driving While Intoxicated out of an incident in which a person was injured, and later died. Defendant eventually plead guilty to the DWI and a reduced charge from the Negligent Driving. Later she was charged with negligent homicide out of the same incident, and the State appealed the ultimate dismissal of the charges as a violation of double jeopardy. However, the court affirmed, noting that since the DWI and Negligent Driving charges contained no elements independent of the elements for the negligent homicide charge, allowing the state to pursue the latter after having prosecuted on the former would twice put the defendant in jeopardy on the former charges. Thus, the trial court correctly ruled that the state was barred from bringing the negligent homicide charges. *State v. Culp*, 30 Wn.App. at 882.

In the case at bar the state charged the defendant in the second and

third counts with manufacture of methamphetamine under RCW 69.50.401(2)(b), and possession of ephedrine with intent to manufacture methamphetamine under RCW 69.50.440 out of a single incident in which the police entered his home and found ephedrine tablets, a book on how to manufacture methamphetamine, and parts of a methamphetamine lab that had been used in the past to manufacture methamphetamine. As the following explains, these two offenses meet the “same elements” test when charged out of a single incident.

Under RCW 69.50.401(2)(b), it is a crime a “manufacture” methamphetamine. The term “manufacture” is defined in RCW 69.50.101(p), which states as follows:

‘Manufacture’ means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.

RCW 69.50.101(p).

Under these two statutes, a person is guilty of manufacture of methamphetamine if he or she produces, prepares, propagates, compounds, converts, or processes methamphetamine.

Under RCW 69.50.440, the crime of possession of ephedrine with intent to manufacture methamphetamine is defined as follows:

(1) It is unlawful for any person to possess ephedrine or any of its salts or isomers or salts of isomers, pseudoephedrine or any of its salts or isomers or salts of isomers, pressurized ammonia gas, or pressurized ammonia gas solution with intent to manufacture methamphetamine, including its salts, isomers, and salts of isomers.

RCW 69.50.440(1).

Under these statutes, it is possible to possess ephedrine with intent to manufacture methamphetamine by simply possessing ephedrine pills if the state has evidence of the *mens rea* of intent to manufacture. Thus, one may commit this offense without “manufacturing” methamphetamine. However, the opposite is not true. As the state’s witnesses testified in this case, there is only one substance that is the precursor to manufacturing methamphetamine. That drug is ephedrine (or pseudo-ephedrine). Thus, it is impossible to “manufacture” methamphetamine without “possessing ephedrine with the intent to manufacture methamphetamine” at the same time. Consequently, every crime of manufacturing methamphetamine has the lesser included offense of possessing ephedrine with intent to manufacture methamphetamine as an included offense. Thus, convicting a defendant of both manufacturing methamphetamine and possession of pseudoephedrine with intent to manufacture methamphetamine out of a single event violates the double jeopardy prohibition found in Washington Constitution, Article 1, § 9, and United States Constitution, Sixth Amendment.

**IV. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT OF CONVICTION FOR OFFENSES UNSUPPORTED BY SUBSTANTIAL EVIDENCE.**

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

For example, in *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), the defendant was charged and convicted of burglary. At trial, the state presented the following evidence: (1) during the evening in question, someone entered the victims’ home in Richland without permission and took a purse, which contained a wallet and a bank access card, (2) that the card was used in a cash machine in Kennewick (an adjoining city), at 4:30 that same morning, (3) that the victim’s wallet was found in a bag next to the cash machine, (4) that the bag had the defendant’s fingerprints on it, and (5) that the defendant’s fingerprints were also found on a piece of paper located by

a second cash machine where the card was used.

Following conviction, the defendant appealed, arguing that the state had failed to present substantial evidence to support the burglary conviction. The Court of Appeals disagreed, and affirmed. The defendant then sought and obtained review by the Washington Supreme Court, which reversed, stating as follows.

Second degree burglary is defined as follows:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle.

RCW 9A.52.030(1). We agree with petitioner that the State failed to sustain its burden of proof. The State's evidence proved only that petitioner may have possessed the recently stolen bank cards in Kennewick. *There was no direct evidence, only inferences*, that he had committed second degree burglary by entering the premises in Richland.

*State v. Mace*, 97 Wn.2d at 842 (emphasis added).

In the case at bar the state charged the defendant with possession of methamphetamine under RCW 69.50.4013, manufacture of methamphetamine under RCW 69.50.401(2)(b), and possession of ephedrine with intent to manufacture methamphetamine under RCW 69.50.440. As the following explains, the state failed to present substantial evidence on any of these charges.

In the first charge, the state had the burden of proving beyond a

reasonable doubt that the defendant, on the day in question, possessed methamphetamine. The only methamphetamine the police found was in a metal box sitting next to a bed that the defendant shared with the co-defendant. While the defendant had joint dominion over the bedroom in which the police found the box, there was no further evidence to connect the defendant with the box or the methamphetamine. Rather, the evidence presented at trial was that the co-defendant knew that there was methamphetamine in the box along with smoking devices, that she pointed it out to the police, and she admitted to the police that she had smoked methamphetamine the previous day. In light of these admissions, the defendant's mere joint dominion over the bedroom in which the police found the methamphetamine does not constitute substantial evidence that he exercised dominion and control over the methamphetamine itself. The decision in *State v. G.M.V.*, 135 Wn.App. 336, 144 P.3d 358 (2006), is instructive.

In *G.M.V.*, the state convicted a juvenile defendant of possession of an illegal firearm after the police searched a bedroom that the defendant had previously occupied in her parent's house. At the time the police found the contraband, the defendant had a bedroom in the basement. Following conviction, the defendant appealed, arguing that the evidence of previous dominion and control over the bedroom where the police found the illegal

firearm was not sufficient to sustain the conviction. The court of appeals agree, stating as follows:

To convict G.M.V. of possession of this shotgun, the State had to show that she constructively possessed it. Constructive possession means that the defendant exercised dominion and control. *Id.* Dominion and control over the premises in which contraband is found is but one factor. The defendant must also have dominion and control over the contraband itself. *Roberts*, 80 Wn.App. at 353-54, 908 P.2d 892. By establishing a defendant's dominion and control over the premises in which contraband is found, the State makes out a prima facie case sufficient to raise a rebuttable presumption of constructive possession of the contraband.

When a minor lives with her parents, however, we cannot presume dominion and control from her mere residence in the home. The fact that G.M.V. was a minor living with her parents means additional evidence of dominion and control was necessary.

*State v. G.M.V.*, 135 Wn.App. at 374 (citations omitted).

As this decision indicates, mere dominion and control over a premises occupied by another person who also has dominion and control over the premises is not sufficient to prove possession of contraband found in the premises. This is precisely the situation in the case at bar. Both the defendant and the co-defendant lived in the trailer and slept in the bedroom. Thus, they both had dominion and control over the premises where the contraband was found. However, while there was further evidence that the co-defendant exercised dominion and control over the methamphetamine in the box (her showing the police where it was and her admission of recent methamphetamine use), there was no showing that the defendant even knew

that the methamphetamine was present, much less that he exercised constructive possession of it. Thus, in the case at bar, as in *G.M.V.*, the state failed to present substantial evidence that the defendant possessed methamphetamine.

In the second and third charges the state had the burden of proving that the defendant “manufactured” methamphetamine and that he possessed ephedrine with intent to manufacture methamphetamine. In the case at bar the state did present substantial evidence that someone manufactured methamphetamine and that someone possessed ephedrine with the intent to manufacture methamphetamine. This evidence included two packets of pseudo-ephedrine tablets, a notebook on how to manufacture methamphetamine, both found in the bedroom, as well as a number of parts of a methamphetamine lab found in the storage shed. However, evidence that “someone” committed the offense is insufficient to prove that the defendant was that person under the facts of this case for the same reason that the evidence is insufficient to sustain a conviction for simple possession.

While the defendant was one of two people who exercised dominion and control over the premises where the incriminating evidence was found, there was no further evidence to prove that the defendant either knew that the evidence was present, or that he exercised dominion and control over it. By contrast, the evidence strongly supported a conclusion that the co-defendant

was the person who possessed the contraband. By her own admission she knew where the evidence was located, and her denial to the police that she “did not manufacture methamphetamine” around her children was an admission that she did commit this offense when they were not present. Consequently, the trial court violated the defendant’s right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgment against him for possession of methamphetamine, for manufacture of methamphetamine, and for possession of ephedrine with intent to manufacture methamphetamine.

**V. 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*, 136 Wn.App. 812, 150 P.3d 1167 (2007).

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, ~~pag~~ers, cellular phones, police scanners, and hand held electronic scheduling or data storage devices.

CP 103 (strikeout in original).

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. All types of telephones 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.

In this case, the state may argue that under the decision in *State v. Motter*, — Wn.App. —, 162 P.3d 1190 (2007), this issue is not yet ripe for adjudication because the state has not sought to sanction the defendant for a violation of this condition. The following addresses this argument. In *Motter*, 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.

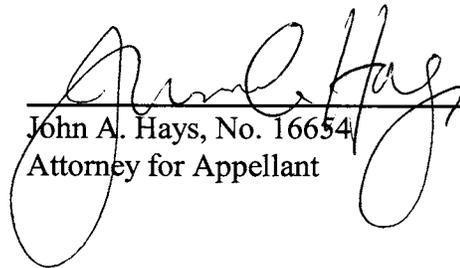
Under WAC 137-104-080 and the procedures by which community custody violations are no longer adjudicated in court, the effect of the decision in *Motter* is to deny a defendant procedural due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment by 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 evidence, when it entered judgment for offenses unsupported by substantial evidence, when it allowed the state to amend the information when the defendant was prejudiced by that amendment, and when it order a community custody condition that was so vague that it failed to put the defendant's on notice of the conduct it prohibited. As a result, this court should remand with instructions to dismiss all charges. In the alternative, the court should remand with instructions to vacate all of the convictions, grant the defendant's motion to suppress, and retry the defendant.

DATED this 14<sup>th</sup> day of December, 2007.

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, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**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,  
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CONSTITUTION,  
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**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.

**CrR 2.1(d)**

(d) Amendment. The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

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

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 vs. )  
 )  
 BREWER, Alan G. )  
 )  
 Appellant, )

**CLARK CO. NO: 06-1-01605-0  
APPEAL NO: 36536-7-II**

**AFFIDAVIT OF MAILING**

STATE OF WASHINGTON )  
 ) vs.  
 COUNTY OF CLARK )

CATHY RUSSELL, being duly sworn on oath, states that on the 14<sup>TH</sup> day of  
DECEMBER, 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

ALAN G. BREWER - #994247  
STAFFORD CREEK CORRECTIONS CTR.  
191 CONSTANTINE WAY  
ABERDEEN, WA 98526

STEVEN W. THAYER  
ATTORNEY AT LAW  
514 W. 9<sup>TH</sup> ST.  
VANCOUVER, WA 98660

and that said envelope contained the following:

- 1. BRIEF OF APPELLANT
- 2. SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS

1 3. AFFIDAVIT OF MAILING

2 DATED this 14<sup>TH</sup> day of DECEMBER, 2007.

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Cathy Russell  
CATHY RUSSELL

6 SUBSCRIBED AND SWORN to before me this 14<sup>th</sup> day of DECEMBER, 2007.

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

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