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Court of Appeals No. 39603-3-II  
Thurston County No. 08-1-01591-6

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**JOSEPH SULLIVAN, III**

**Appellant.**

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**BRIEF OF APPELLANT**

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**A. ASSIGNMENTS OF ERROR**

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**V. MR. SULLIVAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.**

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**I. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN MR. SULLIVAN’S CONVICTION FOR POSSESSION OF MARIJUANA WITH THE INTENT TO DELIVER.**

**II. MR. SULLIVAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING WHEN HIS ATTORNEY FAILED TO ARGUE THAT COUNTS I AND II ENCOMPASSED SAME CRIMINAL CONDUCT.**

**C. STATEMENT OF THE CASE**

Joseph Sullivan, III, pled guilty to possession of marijuana with intent to deliver. CP 3. As part of his plea agreement, he entered into a contract with the Narcotics Task Force in Thurston County (TNT) to do several things. CP 14-19. In taking the plea, the trial court noted that there was no factual basis for the charge. RP (4-21-09), p. 4, 7. The

deputy prosecutor, in supplementing the record, stated: “As I understand it, Your Honor, he was visiting the home of a friend and within that home there was 172 grams of marijuana packaged in several baggies.” RP (4-21-09), p. 5. The deputy prosecutor later reiterated that Mr. Sullivan was merely a guest in the home in which the homeowner was charged with possession of marijuana with intent to deliver. RP (4-21-09), p. 7. The trial court asked Defense Counsel whether Mr. Sullivan was stipulating to the fact that he possessed marijuana and Defense Counsel replied: “Your Honor, were this case to go to trial, that is a rendition of the facts that the State would put before the jury and be likely to prove beyond a reasonable doubt.” RP (4-21-09), p. 8. The court said: “You know, the marijuana was in other people’s bedroom, but you’re going to accept it *In Re: Barr* type situation?” Defense Counsel replied “Yes.” The court said it would accept the plea on those grounds. RP (4-21-09), p. 8. He was not sentenced at that time, pending his completion of his contract with TNT. CP 18. The agreement with TNT provided that if Mr. Sullivan failed to complete his obligations, he agreed that his plea would be withdrawn and the original charges would be re-filed. CP 18. His guilt would then be decided in a non-jury trial, called a “stipulated bench trial” in the agreement. CP 18 (Part III, paragraph C). The agreement called for the trial court to “read the law enforcement/investigating agency’s reports to

determine the confidential informant/Defendant's guilt or innocence." CP 18 (Part III, paragraph C). In paragraph (a) of Part III, Mr. Sullivan was required to stipulate to the "accuracy and sufficiency of the law enforcement/investigating agency reports as they relate to the allegations/charges listed above in Section II, Para. (3) (a). CP 17-18.

On July 15, 2009 Mr. Sullivan was brought back before the court because he failed to live up to the terms of his contract with TNT. RP (7-15-09), p. 3. At that time, the deputy prosecutor submitted Findings of Fact and Conclusions of Law for Trial Without Jury. CP 11-13. In the opening paragraph, the document stated "Pursuant to agreement of the parties that this case may be decided based upon a reading of the police reports attached hereto and incorporated by reference, and defendant's agreement that said reports are sufficient for a finding of guilt, the court has reviewed said police reports and enters the following [findings of fact.] CP 11.

The court then entered the following findings of fact:

1. This court has jurisdiction over the parties and subject matter;
2. On April 20, 2009, the Defendant entered into a Memorandum of Agreement with the State of Washington to act as a Confidential Informant. The Memorandum of Agreement between the parties has been filed and is incorporated into these findings. Pursuant to this agreement,

the Defendant would be allowed to enter a plea to a lesser offense and would receive a lesser sentence if he were to successfully fulfill his obligations under the terms of the agreement. The agreement further provided that should the Defendant fail to meet any of his obligations according to the terms of the agreement then the Defendant must allow the withdrawal of the previously entered guilty plea. Furthermore, the parties would submit his case for a stipulated facts bench trial on all available charges outlined in the agreement. The Defendant also stipulated the Law Enforcement/Investigative Agency reports shall be used to determine the defendant's guilt on those charges. The Defendant stipulated that the facts contained in the reports are sufficient for a trier of fact to find him guilty of all the charges. See, Att. 1.

3. On April 21, 2009, the Defendant was allowed to enter a plea of guilty to one count of Possession of a Controlled Substance, Marijuana, with Intent to Deliver. Sentencing was set over and the defendant was released from custody to allow him to fulfill the obligations outlined in the Memorandum of Agreement.

4. The defendant did not fulfill any of his obligations under the terms of this Memorandum of Agreement. According to the terms of the Memorandum of Agreement the defendant stipulates the previously entered guilty plea shall be withdrawn.

5. The State and Defendant have stipulated the Court may review the official investigative packet and the Court has done so. See, Att. 2.

6. On or about August 29, 2008, in Thurston County, Washington, the Defendant knowingly possessed a controlled substance, Methamphetamine, with the intent to deliver to another person.

7. On or about August 29, 2008, in Thurston County, Washington, the Defendant knowingly possessed a controlled substance, Marijuana, with the intent to deliver to another person.

8. On November 12, 2008, the Defendant failed to appear for court as required after having been previously charged with a Class B and C felony and having been released by a court order or admitted to bail with the knowledge of a subsequent personal appearance before the court on November 12, 2008.

CP 11-12.

The court further entered the following Conclusions of Law:

1. This court has jurisdiction over the parties and subject matter;
2. The Defendant has not fulfilled his obligations under the terms of the Memorandum of Agreement.
3. The Defendant's previously entered guilty plea on April 21, 2009 to one count of Possession of a Controlled Substance, Methamphetamine is withdrawn.

4. The Defendant's stipulation of guilt and the factual basis outlined in the Law Enforcement Investigatory Packet are sufficient evidence to prove the defendant's guilt beyond a reasonable doubt.

5. The Defendant is Guilty beyond a reasonable doubt of the offense of (I) Possession of a Controlled Substance, Methamphetamine with Intent to Deliver, (II) Possession of a Controlled Substance, Marijuana with Intent to Deliver, and (III) Bail Jumping.

CP 12-13.

The State filed the Third Amended Information reflecting the above charges. CP 10. At the non-jury trial, the court took a moment to review the memorandum of agreement. RP (7-15-09), p. 5. The court confirmed that she was to read the police reports to determine guilt, and mere moments later found a factual basis to find Mr. Sullivan guilty of unlawful possession of marijuana with intent to deliver, "all arising out of *his home* on August 29<sup>th</sup>, 2008." RP (7-15-09), p. 5-6.

The police reports, attached to the Findings of Fact and Conclusions of Law and found at CP 20-23, indicate that officers executed a search warrant at 5105 Gentle Ridge Dr. SE in Thurston County, the home of Deanna and Richard Stewart. CP 20. Mr. Sullivan was at the

home along with four other people. CP 20. Along with the owners of the home, the Stewarts, another guest by the name of Jason Hay was there, as well as the Stewarts' daughter. CP 20. One of the officers recognized Mr. Sullivan and knew him to have a warrant. CP 20. Once the warrant was confirmed, Mr. Sullivan was searched incident to arrest and found to have a glass-smoking device with white residue in his rear pocket, which Mr. Sullivan admitted was recently used to smoke methamphetamine. CP 20. The officers asked Mr. Sullivan what else in the home belonged to him, and he pointed to three duffle bags and a locked safe. CP 20. The officers searched the duffle bags and the locked safe (after obtaining the key from Mr. Sullivan), and found one small black digital scale, three small Ziploc baggies containing methamphetamine, three glass smoking devices with a burnt round end and a white smaller end, one Pepsi can containing several more empty small Ziploc baggies and an orange straw/spoon, and one more black digital scale.<sup>1</sup> CP 21.

Regarding the marijuana, 175 grams of dried marijuana, marijuana seeds packaged in several separate baggies and vials, a small digital scale and a ledger showing names and dollar amounts was found in Deanna and Richard Stewart's bedroom. CP 21.

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<sup>1</sup> Defense Counsel initially filed a motion to suppress the evidence obtained from the illegal search of the duffel bags and the locked box but the motion was abandoned for unknown reasons prior to the plea agreement.

When the police booked Mr. Sullivan into jail, possession of marijuana with intent to deliver was, unsurprisingly, not one of the charges he was booked on. CP 23.

Mr. Sullivan came to sentencing with four points, and was sentenced with an offender score of six because the unlawful possession of methamphetamine with intent to deliver and unlawful possession of marijuana with intent to deliver (Counts I and II) were not treated as same criminal conduct and scored separately. CP 78-82. Defense counsel did not ask the court to consider whether Counts I and II encompassed same criminal conduct. RP (7-15-09), p. 7-10. Mr. Sullivan specifically did *not* waive his right to appeal. RP (7-15-09), p. 13-14. This timely appeal followed. CP 88.

#### **D. ARGUMENT**

##### **I. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN MR. SULLIVAN'S CONVICTION FOR POSSESSION OF MARIJUANA WITH THE INTENT TO DELIVER.**

The Memorandum of Agreement required Mr. Sullivan to stipulate to the accuracy and legal sufficiency of the facts contained in the police report. The Findings of Fact and Conclusions of Law similarly required Mr. Sullivan to stipulate to the accuracy and legal sufficiency of the facts contained in the police report. (It is important to note that the "Findings of Fact" found at CP 11-12 do not contain any explicit facts about the

underlying drug charges. While findings of fact numbers 6 and 7 purport to speak to those charges, they should properly be viewed as conclusions of law. Further, Mr. Sullivan did not stipulate to the accuracy or legal sufficiency of the findings of fact found in that document; he stipulated to the accuracy and legal sufficiency of the facts contained in the *police report*.) The accuracy of the facts in the police report is not at issue in this appeal; they are accurate, and Mr. Sullivan stipulated as much. At issue here is that those facts are not legally sufficient to sustain Mr. Sullivan's conviction for possession of marijuana with intent to deliver.

Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency

admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

The police report in this case contains not a scintilla of evidence that Mr. Sullivan either actually or constructively possessed marijuana. Mr. Sullivan was a guest in the Stewart home, and all of the evidence pertaining to the marijuana charge was found in the Stewarts' bedroom. The police report does not suggest that Mr. Sullivan was found anywhere near the marijuana, had ever possessed it, or even knew it was there.

When contraband is not in the personal custody of an individual charged with possession, he is not in actual possession of the contraband but can be found in constructive possession provided he has dominion and control over the goods. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Dominion and control means the object can be reduced to actual possession immediately. *State v. Turner*, 103 Wn.App 515, 521, 13 P.3d 234 (2000); *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Mere proximity to the object is not enough to establish constructive possession. *Jones*, 146 Wn.2d at 333. No single factor is dispositive of determining dominion and control but rather the totality of the circumstances must be considered. *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977); *State v. Porter*, 58 Wn.App. 57, 60, 791 P.2d 905

(1990); *State v. Collins*, 76 Wn.App. 496, 501, 886 P.2d 243, *review denied* 126 Wn.2d 1016, 894 P.2d 565 (1995) .

In *State v. Callahan*, *supra*, Seattle police officers went to a houseboat to serve a search warrant, finding the defendant and another man in the living room sitting at a desk. On the desk were various pills and hypodermic needles, and on the floor between the two men was a cigar box filled with drugs. Drugs also were found in the kitchen and bedroom. *Callahan*, 77 Wn. 2d at 28. The defendant denied that any of the drugs belonged to him, although he did admit to handling the drugs earlier in the day. He also admitted ownership of two guns, two books on narcotics and a measuring scale that were found in the search. *Callahan*, 77 Wn.2d at 28. The court ruled that the evidence was insufficient to convict the defendant of either actual or constructive possession of the drugs. The court found that the only evidence that the defendant had actual physical possession of the drugs was his admission to handling the drugs earlier that day and his close proximity to them at the time of the arrest. This was insufficient to sustain a finding of actual possession, the court said, stating that “such actions are not sufficient for a charge of possession since possession entails actual control, not a passing control which is only a momentary handling.” *Callahan*, 77 Wn.2d at 29.

The court also found the evidence insufficient to sustain a finding of constructive possession because the defendant had no dominion and control over the drugs. The court held that despite evidence that the defendant had been staying on the houseboat for the preceding 2-3 days, that he owned several items found during the search that were related to drug use, that most of the drugs were found near the defendant and that he admitted to handling the drugs earlier in the day, the evidence was insufficient to show dominion and control over the drugs. *Callahan*, 77 Wn.2d at 31.

In *State v. Spruell*, 57 Wn.App. 383, 788 P.2d 21 (1990), Seattle police served a search warrant at the home of Spruell, finding defendants McLemore and Hill in the kitchen. On the kitchen table officers found among other things, white powder which later proved to be cocaine. They also found white powder on the floor of the kitchen and white powder residue strewn throughout the kitchen. A plate found in the kitchen bore no cocaine residue but did bear a fingerprint of defendant Hill, the appellant in *Spruell*. *Spruel* at 384.

On appeal, the court found the evidence was insufficient to establish that defendant Hill was in actual or constructive possession of any drugs. Hill was not seated at the table where the drugs were found, nor were there any drugs on the plate on which his fingerprint was found.

*Spruel*, at 386-87. The court found that Hill's fingerprint on the plate proved only that he at some point touched the plate, and said it had no more weight on the issue of actual possession than the defendant's admission in *Callahan* that he had previously handled the drugs. *Spruell* 386. Turning to the issue of constructive possession, the *Spruell* court also found insufficient evidence to sustain Mr. Hill's conviction. Specifically, they found no evidence that Hill had dominion and control over the premises, beyond his presence in the kitchen which was insufficient. *Spruell* at 388. Further, they found no evidence that Hill had dominion and control over the drugs themselves. They reiterated that mere proximity to the drugs and evidence of momentary handling is not enough to establish constructive possession. *Spruell* at 388.

Here, the evidence that Mr. Sullivan actually or constructively possessed the marijuana in the Stewarts' bedroom does not even approach the level of evidence in both *Callahan* and *Spruell*, where there was an admission to past possession (*Callahan*) and a fingerprint found on a plate that held the drugs (*Spruell*). Here, there is no evidence in the record about how long Mr. Sullivan had been inside the Stewart house; there is no evidence he ever set foot inside the Stewarts' private bedroom; there is no evidence he was ever in the presence of the marijuana and indeed no evidence he even knew the marijuana was there. So non-existent is the

evidence that Mr. Sullivan actually or constructively possessed marijuana that during the original plea the court characterized it as an *In re Barr* plea, and Defense Counsel agreed with that characterization.

*In re Barr* pleas are pleas in which a defendant pleads guilty to a related lesser charge for which there is no factual basis in order to avoid conviction on the greater offense. “The choice to plead to such lesser charges is voluntary if it is based on an informed review of all the alternatives before the accused. *See North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160 (1970). What must be shown is that the accused understands the nature and consequences of the plea bargain and has determined the course of action that he believes is in his best interest. *See Williams v. State*, 316 So.2d 267 (Fla.1975). *See also, State v. Majors*, 94 Wash.2d 354, 616 P.2d 1237 (1980).” *In re Barr*, 102 Wash.2d 265, 270, 684 P.2d 712 (1984). In order for such a plea to be valid, the plea bargain must be fully disclosed. Further, “the trial court must find a factual basis to support the original charge, and determine that defendant understands the relationship of his conduct to that charge. Defendant must be aware that the evidence available to the State on the original offense is sufficient to convince a jury of his guilt.” *In re Barr* at 270.

Here, the defendant was not convicted after a guilty plea. The original guilty plea was withdrawn, and he was tried before a judge in a

non-jury trial. While reliance on *In re Barr* is acceptable for a guilty plea, there is no mechanism for finding sufficient evidence, *at trial*, for a crime the defendant did not commit by relying on *In re Barr*. Further, *In re Barr* requires that some benefit flow to the defendant, namely conviction on a lesser, uncommitted offense in order to avoid conviction on the greater offense. Here, where was the benefit that flowed to Mr. Sullivan? He was convicted of all three charges, only two of which he actually committed. Reliance on *In re Barr* does not satisfy the due process requirement that the evidence be sufficient to for a finding of guilt beyond a reasonable doubt where a defendant is convicted at trial.

That Mr. Sullivan stipulated that these facts were legally sufficient to sustain a finding of guilt to this charge is inapposite: A reviewing Court is not bound by a defendant's stipulation to the legal sufficiency of facts. *State v. Drum*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (Jan. 21, 2009); *State v. Neff*, 163 Wn.2d 453, 460, 181 P.3d 819 (2008); *State v. Rowe*, 93 Wn.2d 277, 609 P.2d 1348 (1980). In finding that Mr. Sullivan's "stipulation to guilt" was "sufficient evidence to prove the defendant's guilt beyond a reasonable doubt," the trial court erred. CP 12 (Conclusion of Law No. 4). In *State v. Drum* the Supreme Court reaffirmed the long standing principal that "[a] stipulation of law as to an issue of law is not binding on this court; it is the province of this court to decide the issues of law." *Drum* at

\_\_\_, citing *State v. Vangerpen*, 125 Wn.2d 782, 792, 888 P.2d 1177 (1995). (See also *In re Pers. Restraint of Cadawaller*, 155 Wn.2d 867, 875, 123 P.3d 456 (2005), holding that a defendant could not stipulate to a persistent offender life sentence where no facts established the appropriateness of that sentence.) Finally, whether the evidence is sufficient to support a conviction is an issue of law. *Drum* at \_\_\_; *State v. Knapstad*, 107 Wn.2d 346, 351-52, 729 P.2d 48 (1986); *State v. Sullivan*, 143 Wn. 2d 162, 171 n. 32, 19 P.3d 1012 (2001).

Here, for the reasons set forth above, the evidence is insufficient to sustain Mr. Sullivan's conviction for possession of marijuana with intent to deliver. His stipulation to the sufficiency of the evidence is of no consequence to this case. His conviction on Count II should be reversed and dismissed with prejudice.

**II. MR. SULLIVAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING WHEN HIS ATTORNEY FAILED TO ARGUE THAT COUNTS I AND II ENCOMPASSED SAME CRIMINAL CONDUCT.**

Mr. Sullivan received ineffective assistance of counsel where his attorney failed to argue that his convictions for simultaneous possession of methamphetamine and marijuana with intent to deliver did not encompass same criminal conduct. Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case.

*Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

An attorney is deficient if his performance falls below a minimum objective standard of reasonableness. "Representation of a criminal defendant entails certain basic duties...Among those duties, defense counsel must employ 'such skill and knowledge as will render the trial a reliable adversarial testing process.'" *State v. Lopez*, 107 Wn.App. 270, 275, 27 P.3d 237(2001), citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984).

RCW 9.94A.589 (1)(a) codifies the principal of "same criminal conduct." It states:

Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current

offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

RCW 9.94A.589 (1) (a).

In drug cases, where a defendant is convicted of simultaneously possessing two separate drugs with intent to deliver, the offenses encompass same criminal conduct. In *State v. Garza-Villareal*, 123 Wn.2d 42, 49, 864 P.2d 1378 (1993), the Supreme Court held both that convictions for delivery of cocaine and heroin in the same transaction encompassed same criminal conduct, and convictions for possession of cocaine and heroin with the intent to deliver in the same criminal transaction encompassed same criminal conduct. Likewise, in *State v. Vike*, 125 Wn.2d 407, 885 P.2d 824 (1994), the Court held that simultaneous simple possession of more than one controlled substance encompass same criminal conduct. The offenses must involve the same statutory mental state. *State v. Williams*, 135 Wn.2d 365, 368, 957 P.2d 216 (1998); *State v. Porter*, 133 Wn.2d 177, 181-84, 942 P.2d 974 (1997).

Here, should this Court disagree with Appellant and conclude that the evidence was sufficient to prove that he unlawfully possessed

marijuana with intent to deliver, there is no dispute that his “possession” of the marijuana occurred at the same time and place as his possession of methamphetamine. Further, the victim of both crimes is the same, namely the public at large. *Williams* at 367; *Porter* at 181. The only substantive difference between these two convictions was the fact that Mr. Sullivan simply did not commit possession of marijuana with intent to deliver, as argued in Part I, *supra*. Assuming he had committed that offense, his conviction for that offense unquestionably encompassed the same criminal conduct as his conviction for simultaneous possession of methamphetamine.

There is no legitimate tactical reason for defense counsel to have failed to argue that Counts I and II encompassed same criminal conduct. Mr. Sullivan was no longer bound to any particular sentencing recommendation as his plea had been withdrawn. The only conceivable reason that defense counsel did not argue that these offenses encompassed same criminal conduct is because he was unaware that they did. This constitutes deficient performance. That Mr. Sullivan was prejudiced by his attorney’s deficient performance is evident from his sentence; he was sentenced as though he had an offender score of six when he should have been sentenced with an offender score of five. Mr. Sullivan received

ineffective assistance of counsel at sentencing as should be granted a new sentencing hearing.

**E. CONCLUSION**

Mr. Sullivan's conviction on Count II should be reversed and dismissed with prejudice. Alternatively, Mr. Sullivan should be granted a new sentencing hearing.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of January, 2010.

  
\_\_\_\_\_  
ANNE M. CRUSER, WSBA No. 27944  
Attorney for Mr. Sullivan

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

STATE OF WASHINGTON,	)	Court of Appeals No. 39603-3-II
	)	Thurston County No. 08-1-01591-6
Respondent,	)	
	)	
vs.	)	AFFIDAVIT OF MAILING
	)	
JOSEPH SULLIVAN, III,	)	
	)	
Appellant.	)	

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ANNE M. CRUSER, being sworn on oath, states that on the 25<sup>th</sup> day of January 2010, affiant placed a properly stamped envelope in the mails of the United States addressed to:

Carol La Verne  
Thurston County Deputy Prosecuting Attorney  
2000 Lakeridge Dr. S.W.  
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AND

David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

AND

Joseph Sullivan, III

**Anne M. Cruser**  
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