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COURT OF APPEALS

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STATE OF WASHINGTON

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**NO. 40401-0-II**

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

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**BRENDA J. ZILLYETTE,**

**Appellant.**

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**BRIEF OF APPELLANT**

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**John A. Hays, No. 16654  
Attorney for Appellant**

**1402 Broadway  
Suite 103  
Longview, WA 98632  
(360) 423-3084**

DISTRICT

**TABLE OF CONTENTS**

	Page
A. TABLE OF AUTHORITIES .....	iv
B. ASSIGNMENT OF ERROR	
1. Assignment of Error .....	1
2. Issue Pertaining to Assignment of Error .....	2
C. STATEMENT OF THE CASE	
1. Factual History .....	3
2. Procedural History .....	4
D. ARGUMENT	
<b>I. THE TRIAL COURT DENIED THE DEFENDANT DUE     PROCESS UNDER WASHINGTON CONSTITUTION,     ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION,     FOURTEENTH AMENDMENT, WHEN IT FOUND HER     GUILTY OF CONTROLLED SUBSTANCE HOMICIDE     BECAUSE THE EVIDENCE PRESENTED AT TRIAL DID     NOT ESTABLISH A CORPUS DELECTI FOR THAT     CRIME .....</b>	<b>7</b>
<b>II. THE DEFENDANT’S CONVICTION SHOULD BE     VACATED AND THE CHARGE DISMISSED BECAUSE     THE STATE’S FAILURE TO ALLEGE ALL THE     ELEMENTS OF THE CRIME CHARGED VIOLATED THE     DEFENDANT’S RIGHT TO BE INFORMED OF THE     NATURE AND CAUSE OF THE ACCUSATION AGAINST     HER UNDER WASHINGTON CONSTITUTION, ARTICLE     1, § 22, AND UNITED STATES CONSTITUTION, SIXTH     AMENDMENT .....</b>	<b>17</b>
E. CONCLUSION .....	26

F. APPENDIX

1. Washington Constitution, Article 1, § 3 .....	27
2. Washington Constitution, Article 1, § 22 .....	27
3. United States Constitution, Sixth Amendment .....	28
4. United States Constitution, Fourteenth Amendment .....	28
5. RCW 10.58.035 .....	29

## TABLE OF AUTHORITIES

Page

### *Federal Cases*

<i>Hudson v. Louisiana</i> , 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981) . . . . .	7
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) . . . . .	7
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) . . . . .	8

### *State Cases*

<i>Bremerton v. Corbett</i> , 106 Wn.2d 569, 723 P.2d 1135 (1986) . . . . .	9, 10
<i>State v. Anderson</i> , 96 Wn.2d 739, 638 P.2d 1205 (1982) . . . . .	7
<i>State v. Ashurst</i> , 45 Wn.App. 48, 723 P.2d 1189 (1986) . . . . .	9
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983) . . . . .	7
<i>State v. Bernal</i> , 109 Wn.App. 150, 33 P.3d 1106 (2001) . . . . .	14-16
<i>State v. Bonds</i> , 98 Wn.2d 1, 653 P.2d 1024 (1982), <i>cert. denied</i> , 464 U.S. 831 (1983) . . . . .	17, 19
<i>State v. Dow</i> , 168 Wn.2d 243, 227 P.3d 1278 (2010) . . . . .	8, 9, 11, 12
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980) . . . . .	8
<i>State v. Hamrick</i> , 19 Wn.App. 417, 576 P.2d 912 (1978) . . . . .	9
<i>State v. Holt</i> , 104 Wn.2d 315, 704 P.2d 1189 (1985) . . . . .	17-19
<i>State v. Johnson</i> , 100 Wn.2d 607, 674 P.2d 145 (1983) . . . . .	17
<i>State v. Kjorsvik</i> , 117 Wn.2d 93, 812 P.2d 86 (1991) . . . . .	19, 20

<i>State v. Moore</i> , 7 Wn.App. 1, 499 P.2d 16 (1972) .....	8
<i>State v. Munson</i> , 7 Wash. 239, 34 P. 932 (1893) .....	9
<i>State v. Ray</i> , 130 Wn.2d 673, 926 P.2d 904 (1996) .....	9
<i>State v. Taplin</i> , 9 Wn.App. 545, 513 P.2d 549 (1973) .....	8

***Constitutional Provisions***

Washington Constitution, Article 1, § 3 .....	7
Washington Constitution, Article 1, §22 .....	17
United States Constitution, Sixth Amendment .....	17
United States Constitution, Fourteenth Amendment .....	7

***Statutes and Court Rules***

RAP 2.5 .....	8
RCW 10.58.035 .....	10-12, 16
RCW 69.50.204 .....	21
RCW 69.50.206 .....	21
RCW 69.50.208 .....	21
RCW 69.50.210 .....	21
RCW 69.50.212 .....	21
RCW 69.50.401 .....	20-24
RCW 69.50.402 .....	23
RCW 69.50.415 .....	12, 13, 22, 23

## ***ASSIGNMENT OF ERROR***

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

1. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it found her guilty of controlled substance homicide because the evidence presented at trial did not establish a *corpus delecti* for that crime. RP 8-163.

2. The defendant's conviction should be vacated and the charge dismissed without prejudice because the state's failure to allege all the elements of the crime charged in the information violated the defendant's right to be informed of the nature and cause of the accusation against her under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. CP 1-2.

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

1. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it finds that defendant guilty of controlled substance homicide when the evidence presented at trial does not establish a *corpus delecti* for that crime?

2. Under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, should a defendant's conviction be vacated and the charge dismissed without prejudice if the information fails to allege all of the elements of the crime charged even under an expansive interpretation of the charging document?

## STATEMENT OF THE CASE

### *Factual History*

On the evening of April 1, 2009, Rich Green returned home from work to find his 18-year-old son Austin Burrows dead in his bedroom of a methadone overdose. RP 10-11, 67-81<sup>1</sup>. Mr. Green had spoken to his son the previous evening at about 11:00 pm and he seemed fine. RP 9-10. A subsequent blood test revealed that Austin also had alprazolam and the metabolite of clonazepam in his blood. RP 67-81, 81-92. Methadone is an opiate used to treat pain. *Id.* It is also prescribed to heroin addicts to prevent the symptoms incident to withdrawal. *Id.* Alprazolam, commonly known as Xanax, is an anti-anxiety medication. *Id.* While Austin Burrows did not have a prescription for either methadone or alprazolam, the defendant Brenda Zillyette did. RP 52-67. In fact, she had refilled her prescriptions for both medications at 4:28 pm the previous day, receiving 45 five milligram methadone pills, and some 1 milligram alprazolam tablets. *Id.* The day after Austin's death, the defendant's boyfriend gave the pill bottles to the police. RP 50. There were a few methadone and alprazolam tablets in the bottles. RP 50, 92-95.

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<sup>1</sup>“RP 11/12/09 [page #] refers to the verbatim report of the hearing held on the date indicated. “RP [page #] refers to the verbatim report of the trial held on February 1, 2010.

In fact, the defendant and Austin Burrows had become acquainted a few months before his death. RP 99-104. According to one of Austin's friends, about two months prior to Austin's death, he, the defendant, and Austin had "hung out" and ingested drugs together a couple of times. *Id.* Another friend had seen Austin and the defendant in a truck together about two weeks before Austin's death. RP 37-39. However, no person saw the defendant and Austin either together or in the vicinity of each other for two weeks prior to Austin's death. RP 8-163.

During the evening of March 31<sup>st</sup>, Austin sent a picture of his hand full of pills to a few friends over their cell phones. RP 24-25, 26-31, 31-37. Some of the pills were 5 milligram methadone tablets and 1 milligram alprazolam tablets. RP 57. According to the defendant's boyfriend, the defendant was home for about an hour on the evening of March 31<sup>st</sup>, sometime around 9:00 pm. She then left and returned at about midnight or 1:00 am. RP 45-46.

### ***Procedural History***

By information filed September 9, 2009, the Grays Harbor County Prosecutor charged the defendant Brenda J. Zillyette with one count of controlled substance homicide. CP 1-2. The information alleged as follows:

I, H. Steward Menefee, Prosecuting Attorney for Grays Harbor County, in the name and by the authority of the State of Washington, by this Information do accuse the defendant of the crime of

CONTROLLED SUBSTANCE HOMICIDE, committed as follows:

THAT THE SAID DEFENDANT, Brenda J. Zillyette, in Grays Harbor County, Washington, on or about March 31,-April 1, 2009 did unlawfully deliver a controlled substance to Austin Burrows in violation of RCW 69.50.401, which controlled substance was subsequently used by Austin Burrows, resulting in his death;

CONTRARY TO RCW 69.50.415 and against the peace and dignity of the State of Washington.

CP 1 (capitals in original).

Prior to trial, the defense moved to dismiss, arguing that the state's evidence filed to establish a corpus delicti for the crime charged, and that absent a corpus delicti, the state could not produce substantial evidence to support the charge, even though the defendant had made numerous statements that she had shared her methadone tablets with the defendant the night before his death. CP 16-18, 19-32. The trial court denied the motion. RP 11/12/09 1-22. The case later came on for trial before the bench, defendant having waived her right to a jury trial. CP 77-80.

At trial, the state called 15 witnesses, who testified to the facts contained in the preceding factual history. *See* Factual History. In addition, a number of these witnesses testified that the defendant had told them that she had provided the methadone that the defendant had ingested prior to his death. RP 48-51, 102-103, 106-107, 123, 128; Exhibit 5. Following the state's witnesses, the defense called a medical expert and a police officer. RP

137, 161. The defendant did not testify. RP 1-163. After the close of the defendant's case, the parties presented their closing arguments, and the court then found the defendant guilty. RP 164-172. The court later sentenced the defendant to 55 months in prison, which was within the standard range. CP 91-99. The defendant thereafter filed timely notice of appeal. CP 101-102.

## ARGUMENT

### **I. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT FOUND HER GUILTY OF CONTROLLED SUBSTANCE HOMICIDE BECAUSE THE EVIDENCE PRESENTED AT TRIAL DID NOT ESTABLISH A CORPUS DELECTI FOR THAT CRIME.**

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. If substantial evidence does not support a finding that each and every element of the crime charged is proved beyond a reasonable doubt, then any remedy other than dismissal with prejudice violates a defendant’s right under Washington Constitution, Article 1, § 9 and United States Constitution, Sixth Amendment to be free from double jeopardy. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982); *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981).

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). Since this denial of due process constitutes a “manifest error of constitutional magnitude” under RAP 2.5(a)(3), any conviction not supported by substantial evidence may be attacked for the first time on appeal. *Id.* “Substantial evidence” in this context 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)). 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); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

Based upon a recent decision by the Washington State Supreme Court in *State v. Dow*, 168 Wn.2d 243, 227 P.3d 1278 (2010), the substantial evidence rule as just set out now has an exception, which can be stated as follows: If the evidence presented at trial includes statements made by the *delicti* defendant, those statements cannot be considered in determining the existence of substantial evidence unless the remaining evidence establishes

a corpus delicti for the crime charged. The following examines the corpus delicti rule and how the decision in *Dow* affects an examination of substantial evidence.

Under the traditional *corpus delicti* rule, a defendant's extrajudicial statements may not be admitted into evidence absent independent proof of the existence of every element of the crime charged. *State v. Ashurst*, 45 Wn.App. 48, 723 P.2d 1189 (1986). The "*corpus delicti*" usually involves two elements: "(1) an injury or loss (*e.g.*, death or missing property) and (2) someone's criminal act as the cause thereof." *Bremerton v. Corbett*, 106 Wn.2d 569, 573-74, 723 P.2d 1135 (1986). Although the independent proof of the crime charged need not be sufficient to support a conviction, the state must present "evidence of sufficient circumstances which would support a logical and reasonable inference" that the charged crime occurred. *Id.* at 578-79; *State v. Hamrick*, 19 Wn.App. 417, 576 P.2d 912 (1978).

Washington courts have followed this rule of evidence since statehood. *See e.g. State v. Munson*, 7 Wash. 239, 34 P. 932 (1893). Over the years, the Washington Supreme Court has repeatedly refused the state's requests to replace it with the "trustworthiness" standard applied in federal courts. *See State v. Ray*, 130 Wn.2d 673, 679, 926 P.2d 904 (1996) ("[T]his Court has previously considered the arguments for adopting the "trustworthiness" standard, and it has consistently declined to abandon the

*corpus delicti* rule”).

In *Bremerton v. Corbett*, *supra*, the court gave the following history behind this common law rule of evidence.

The *corpus delicti* rule was established by the courts to protect a defendant from the possibility of an unjust conviction based upon a false confession alone. The requirement of independent proof of the *corpus delicti* before a confession is admissible was influenced somewhat by those widely reported cases in which the “victim” returned alive after his supposed murderer had been tried and convicted, and in some instances executed. It arose from judicial distrust of confessions generally, coupled with recognition that juries are likely to accept confessions uncritically. This distrust stems from the possibility that the confession may have been misreported or misconstrued, elicited by force or coercion, based upon mistaken perception of the facts or law, or falsely given by a mentally disturbed individual. Thus, it is clear that the *corpus delicti* rule was established to prevent not only the possibility that a false confession was secured by means of police coercion or abuse but also the possibility that a confession, though voluntarily given, is false.

*City of Bremerton v. Corbett*, 106 Wn.2d at 576-577 (citations omitted).

In 2003, the Washington Legislature passed RCW 10.58.035 in order to modify the traditional *corpus delicti* rule to allow the admission of a defendant’s statements if reliable. The first section of this statute states:

(1) In criminal and juvenile offense proceedings where independent proof of the *corpus delicti* is absent, and the alleged victim of the crime is dead or incompetent to testify, a lawfully obtained and otherwise admissible confession, admission, or other statement of the defendant shall be admissible into evidence if there is substantial independent evidence that would tend to establish the trustworthiness of the confession, admission, or other statement of the defendant.

RCW 10.58.035(1).

The second paragraph of this rule creates four non-exclusive factors the court “shall” consider in determining whether or not a defendant’s statement will be admissible under the statute. This second section states:

(2) In determining whether there is substantial independent evidence that the confession, admission, or other statement of the defendant is trustworthy, the court shall consider, but is not limited to:

(a) Whether there is any evidence corroborating or contradicting the facts set out in the statement, including the elements of the offense;

(b) The character of the witness reporting the statement and the number of witnesses to the statement;

(c) Whether a record of the statement was made and the timing of the making of the record in relation to the making of the statement; and/or

(d) The relationship between the witness and the defendant.

RCW 10.58.035(2).

While an initial review of RCW 10.58.035 might indicate that it has replaced the *corpus delicti* rule in its entirety, any such conclusion would be inaccurate. The reason is that the *corpus delicti* rule has always addressed two issues. The first is the admissibility of evidence. The second is the sufficiency of evidence to sustain a conviction. As the Washington State Supreme Court explained in *State v. Dow, supra*, the new statute addresses only the former issue of the admissibility of a defendant’s statement. Thus, while a defendant’s statements would not have been admissible under the

*corpus delicti* rule, they might now be admissible if the requirements of RCW 10.58.035 are met. However, absent independent proof of the existence of the crime charged, under the *corpus delicti* rule, those statements would still be insufficient to sustain a conviction. In *Dow*, the court stated the following on this issue:

Subsection (4) provides that “[n]othing in this section may be construed to prevent the defendant from arguing to the jury or judge in a bench trial that the statement is not trustworthy or that the evidence is otherwise insufficient to convict.” RCW 10.58.035 (emphasis added). This subsection establishes that the legislature has left intact the requirement that a defendant cannot be convicted without sufficient evidence to establish every element of the crime, which is consistent with the *corpus delicti* doctrine and our cases. Considering RCW 10.58.035’s plain language, we hold that any departure from the traditional *corpus delicti* rule under RCW 10.58.035 pertains only to admissibility and not to the sufficiency of evidence required to support a conviction. The *corpus delicti* doctrine still exists to review other evidence for sufficiency, i.e., corroboration of a confession. That is, the State must still prove every element of the crime charged by evidence independent of the defendant’s statement.

*State v. Dow*, 168 Wn.2d at 253-254 (citation omitted).

In the case at bar, the evidence presented at trial did not establish a *corpus delicti* for every element of the crime of controlled substance homicide. Consequently, substantial evidence does not support the decision. The following examines the elements of the crime of controlled substance homicide in the light of the evidence presented at trial.

In RCW 69.50.415, the legislature defined the crime of controlled

substance homicide. This statute provides as follows:

(1) A person who unlawfully delivers a controlled substance in violation of RCW 69.50.401(2) (a), (b), or (c) which controlled substance is subsequently used by the person to whom it was delivered, resulting in the death of the user, is guilty of controlled substances homicide.

RCW 69.50.415.

Under this statute, the crime of controlled substance homicide includes three elements: (1) the defendant delivered one of the “controlled substances” listed in RCW 69.50.401(2)(a), (b), or (c) to another person, (2) the person to whom the defendant delivered that listed “controlled substance” thereafter ingested it, and (3) the person who ingested that “controlled substance” then died from its effects. The problem with the evidence in the case at bar (absent the defendant’s statements) is that it fails to establish the first two elements of the offense.

The evidence presented at trial, absent the defendant’s statements, establishes the following facts: (1) at 11 pm on 3/31/09, Rich Green spoke with his 18-year-old son Austin Burrows, who seemed fine; (2) the next evening, Mr. Green found Austin dead from a methadone overdose; (3) Austin Burrows also had alprazolam and a metabolite of clonazepam in his blood; (4) the defendant became acquainted with Austin Burrows a few months before his death; (5) about two months prior to Austin’s death, he, the defendant, and a third party “hung out” and ingested drugs together; (6)

about two weeks before Austin's death, a person saw Austin and the defendant together in a truck; (7) on 3/31/09 the defendant filled prescriptions for 45 methadone pills and for alprazolam; (8) during the evening of 3/31/09, Austin sent a picture of his hand with pills in it, including methadone and alprazolam, to a few friends over their cell phones; (9) on 3/31/09, the defendant was gone from her home from around 9:00 pm to midnight or 1:00 am; (10) a day or two after Austin's death, the defendant's boyfriend gave the police the defendant's prescription bottles, which only contained 4 methadone pills and 4 alprazolam pills; and (11) the day after Austin's death, the defendant tried to kill herself by overdosing on drugs. As an examination of the decision in *State v. Bernal*, 109 Wn.App. 150, 33 P.3d 1106 (2001), reveals, these facts do not establish a corpus delicti for the crime of controlled substance homicide.

In *Bernal*, the state charged the defendant with controlled substance homicide and delivery of heroin, after the 14-year-old son of her boyfriend died of a heroin overdose in the trailer she provided for her boyfriend's son. Following the death, the defendant had admitted that she had sold the boy the heroin he had used. The defendant later successfully moved to dismiss the charge, arguing that the state's evidence failed to establish a corpus delicti for the delivery. When the trial court agreed and dismissed, the state appealed, arguing that the evidence indicated that someone had delivered heroin to the

decedent, and that this evidence was sufficient to prove the corpus delicti of the offense. However, the court of appeals disagreed, holding as follows:

Bernal does not dispute that the State produced evidence sufficient to support a finding that Reid's use of heroin resulted in his death. The remaining question is the same for both counts: Did the State produce evidence, independent of Bernal's statements, sufficient to support a finding that the heroin was delivered to Reid by someone else?

The State did not produce such evidence. The record shows that Reid was found dead of a heroin overdose. Excepting Bernal's statement, the record shows absolutely nothing about how Reid acquired the heroin that caused his death. We can speculate that he acquired it by delivery, by stealing it, by finding it, or by some other means-but the record gives no rational basis for inferring one possibility over the others.

According to the dissent, it is simply speculation unsupported by evidence that Reid could have found or stolen the heroin. We agree entirely-but it is equally speculative to infer that Reid obtained the heroin by delivery. There is simply no evidence, independent of Bernal's statements, from which to infer how Reid obtained heroin.

Washington's corpus delicti rule has not been satisfied, and the trial court correctly dismissed the case. Its judgment is affirmed

*State v. Bernal*, 109 Wn.App. at 153-154.

The evidence presented in the case at bar, absent the defendant's statements, is equally as speculative as to how Austin Burrows obtained the methadone he ingested. Certainly the defendant had filled a prescription for methadone the day before Austin died of a methadone overdose, but there was no evidence presented that they were the methadone tablets that Austin obtained. The defendant might have given some of her methadone to Austin,

or Austin might have stolen some of the methadone from the defendant, or Austin might have stolen methadone from another person, or Austin might have found the methadone. The problem is that the evidence presented at trial is equally as speculative on each possibility, particularly since there was no evidence at all presented that even put the defendant and Austin together, or even in the same proximity, within two weeks prior to his death.

In *Bernal*, the court held that it was simply speculation to conclude that someone delivered heroin to the decedent. Thus, there was no *corpus delecti* for the offense, and no basis to admit the defendant's statements into evidence. So in the case at bar, it was simply speculation to conclude that someone delivered methadone to Austin, let alone that it was the defendant. Thus, in the case at bar, as in *Bernal*, there was also no *corpus delecti* for the crime of delivery. As a result, even though the defendant's statements were properly admitted under RCW 10.58.035, under the decision in *Dow*, there was no substantial evidence to support the conviction for controlled substance homicide. As a result, this court should reverse the conviction and remand with instructions to dismiss with prejudice.

**II. THE DEFENDANT'S CONVICTION SHOULD BE VACATED AND THE CHARGE DISMISSED BECAUSE THE STATE'S FAILURE TO ALLEGE ALL THE ELEMENTS OF THE CRIME CHARGED VIOLATED THE DEFENDANT'S RIGHT TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HER UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.**

In *State v. Bonds*, 98 Wn.2d 1, 16, 653 P.2d 1024 (1982), *cert. denied*, 464 U.S. 831 (1983), the Washington Supreme Court held that an information is constitutionally defective and violates a defendant's right to due process "if it omits a specified element of a statutory crime." Furthermore, unlike a claim of vagueness in the charging instrument, which may only be raised on appeal if preserved through a motion to make more definite and certain, *State v. Johnson*, 100 Wn.2d 607, 674 P.2d 145 (1983), the claim that an information fails to allege all the specified elements of a statutory crime may be raised for the first time on appeal. *State v. Holt*, 104 Wn.2d 315, 704 P.2d 1189 (1985). The appropriate remedy upon the finding of a defective information is vacation of the conviction and dismissal without prejudice. *Id.* The decision in *Holt* illustrates this point.

In *Holt*, the defendant was charged with selling child pornography, among other offenses, and convicted of the lesser included offense of selling obscene material. He then appealed, arguing that the information charging child pornography failed to allege two of the elements of that crime. The

state responded with two arguments: (1) that Defendant had failed to preserve the error for appeal, and (2) even though the information did fail to allege two of the statutory elements, the error was cured by the use of jury instructions that identified every element of the crime charged. The Supreme Court rejected both of these arguments, reversed the conviction, and remanded with instructions to dismiss without prejudice. In its decision, the court first noted the general rule that “[t]he omission of any statutory element of a crime in the charging document is a constitutional defect which may result in dismissal of the criminal charges.” *Holt*, 104 Wn.2d at 320. It then went on to note that the error could have been eliminated by an amendment to the information. On this point the court stated:

CrR 2.1(defendant) allows the State to move to amend the information at any time prior to the final verdict, if substantial rights of the defendant are not prejudiced by the amendment. That court rule provides the proper procedure in a case such as this where the information fails to charge any crime at all. Notably, the State in the present case was allowed to amend the information twice, but still did not include the necessary statutory elements of the crime.

*State v. Holt*, 104 Wn.2d at 321.

Since the state had failed to amend the information and include the omitted elements, dismissal was required. The court then went on to reject the argument that this error can be cured by a jury instruction.

The information failed to state these elements, making the information constitutionally defective. That defect cannot be cured by proper jury instructions. Further, [the defendant] was not required

to request a bill of particulars, nor to take any other action to preserve his right to challenge the constitutionality of the information on appeal. Accordingly, on these grounds we reverse the Court of Appeals and order the charges against [Defendant] dismissed.

*State v. Holt*, 104 Wn.2d at 322-23.

Finally, in *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991), the Washington State Supreme Court refined the rule in *Bonds*, and *Holt*, and explained that if the defense objects pretrial, the court must strictly construe the information against the state; whereas, if the defense first objects post-trial, the court will liberally construe the information to the benefit of the state.

In *Kjorsvik*, the defendant was convicted of First Degree Robbery under an information that alleged that he “did unlawfully take personal property . . . .” *Kjorsvik*, 117 Wn.2d at 96. For the first time on appeal, the defendant argued that his conviction should be reversed because the information failed to allege the “essential” (court created) element of intent (e.g. that he “intentionally” took personal property as opposed to “unlawfully” taking personal property). In its opinion, the court specifically adopted the rule that an information is defective unless it alleges all of the “essential” elements of the crime, regardless whether the elements were statutorily or judicially created. The court then went on to note that in determining whether or not the essential elements are alleged, it will employ

a liberal interpretation of the information if the issue is raised for the first time on appeal, and a strict interpretation of the information if the issue was raised pretrial. The court stated as follows on this issue:

In the present case, however, the information charged that the defendant unlawfully, with force, and against the shopkeeper's will, took the money while armed with a deadly weapon. It is hard to perceive how the defendant in this case could have unlawfully taken the money from the cash register, against the will of the shopkeeper, by use (or threatened use) of force, violence and fear while displaying a deadly weapon and yet not have intended to steal the money. The case before us is thus clearly distinguishable from *Hicks*. Giving the information charging this defendant a liberal construction in favor of its validity, reading it as a whole and in a common sense manner, we conclude that it did inform the defendant of all the elements of robbery.

*State v. Kjorsvik*, 117 Wn.2d at 111.

In the case at bar, the state charged the defendant with controlled substance homicide under in the RCW 69.50.415. In determining what the elements are for this offense, it is first necessary to review RCW 69.50.401.

This statute states:

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

RCW 69.50.401.

Under RCW 69.50.101(d), the term "controlled substance" is defined as "a drug, substance, or immediate precursor included in Schedules I through V as set forth in federal or state laws, or federal or board rules." Schedules

I through V are defined in RCW 69.50.204, .206, .208, .210, and .220 respectively.

While RCW 69.50.401(1) makes it a crime to deliver any “controlled substance” to another person, section (2) of that statute sets out different penalties for the crime depending upon the type or class of the controlled substance delivered. This section of the statute states:

(a) A controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam, including its salts, isomers, and salts of isomers, classified in Schedule IV, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine;

(b) Amphetamine, including its salts, isomers, and salts of isomers, or methamphetamine, including its salts, isomers, and salts of isomers, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine. Three thousand dollars of the fine may not be suspended. As collected, the first three thousand dollars of the fine must be deposited with the law enforcement agency having responsibility for cleanup of laboratories, sites, or substances used in the manufacture of the methamphetamine, including its salts, isomers, and salts of isomers. The fine moneys deposited with that law enforcement agency must be used for such clean-up cost;

(c) Any other controlled substance classified in Schedule I, II, or III, is guilty of a class C felony punishable according to chapter 9A.20 RCW;

(d) A substance classified in Schedule IV, except flunitrazepam, including its salts, isomers, and salts of isomers, is guilty of a class C felony punishable according to chapter 9A.20 RCW; or

(e) A substance classified in Schedule V, is guilty of a class C felony punishable according to chapter 9A.20 RCW.

RCW 69.50.401(2).

With RCW 69.50.401 in mind, one can now turn to RCW 69.50.415 in order to determine what the elements are for the crime of controlled substance homicide. This statute provides as follows:

(1) A person who unlawfully delivers a controlled substance in violation of RCW 69.50.401(2) (a), (b), or (c) which controlled substance is subsequently used by the person to whom it was delivered, resulting in the death of the user, is guilty of controlled substances homicide.

RCW 69.50.415.

Under this statute, the crime of controlled substance homicide includes three elements: (1) the defendant delivered one of the “controlled substances” listed in RCW 69.50.401(2)(a), (b), or (c) to another person, (2) the person to whom the defendant delivered that listed “controlled substance” thereafter ingested it, and (3) the person who ingested that “controlled substance” then died from its effects. By contrast, if the “controlled substance” the defendant delivered and the decedent ingested was one that

falls within the categories listed in RCW 69.50.402(e)&(f), then the defendant has not committed the crime charged, because RCW 69.50.415 specifically limits its application to the delivery of those controlled substances listed in sections (a), (b), and (c). Herein lies the error in the information in the case at bar since it fails to allege the delivery of a controlled substance listed in sections (a), (b), or (c) of RCW 69.50.

In the case at bar, the information the state filed alleged the following:

I, H. Steward Menefee, Prosecuting Attorney for Grays Harbor County, in the name and by the authority of the State of Washington, by this Information do accuse the defendant of the crime of CONTROLLED SUBSTANCE HOMICIDE, committed as follows:

THAT THE SAID DEFENDANT, Brenda J. Zillyette, in Grays Harbor County, Washington, on or about March 31,-April 1, 2009 did unlawfully deliver a controlled substance to Austin Burrows in violation of RCW 69.50.401, which controlled substance was subsequently used by Austin Burrows, resulting in his death;

CONTRARY TO RCW 69.50.415 and against the peace and dignity of the State of Washington.

CP 1.

The deficiency in this information is glaringly apparent after reviewing the definition for the offense of controlled substance homicide in RCW 69.50.415, particularly after examining the five different categories of controlled substances found in RCW 69.50.401(2). By failing to allege that the “controlled substance” the defendant delivered was one of those

controlled substances listed in RCW 69.50.401(2)(a), (b), or (c), the state failed to allege a crime. Had the state at least included a claim that the “controlled substance” the defendant delivered was methadone, the state might be able to defend a post-conviction notice attack on the basis that methadone was one of the listed drugs, even though the information did not specifically allege this fact. However, the state did not even include this allegation.

An analogy can be drawn to an information that alleges that one delivered a “medication” to another person, thereby violating RCW 69.50.401. While it is true that many, if not most, controlled substances listed in the five schedules defined by the legislature are “medications” which physicians in this state prescribe to patients, many “medications” are sold over the counter and are not listed or regulated under RCW 69.50. Thus, by alleging that a defendant delivered a “medication,” an information would not be alleging a crime, having failed to include the essential element that the “medication” was a controlled substance.

Similarly, in the case at bar, the allegation that the defendant delivered a “controlled substance” to another person also fails to allege an essential element of the offense charged because it fails to alleged that the “controlled substance” was one of the limited classes of such substances included in the crime. Thus, even with a liberal interpretation of the information, it still

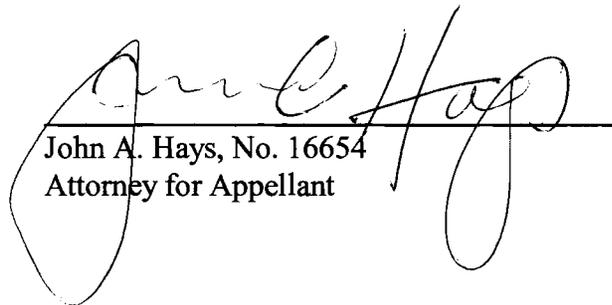
failed to allege a crime, and it left the defendant without notice of what conduct the state alleged constituted the crime charged. As a result, the defendant's conviction should be vacated, and the charge dismissed without prejudice.

## CONCLUSION

Substantial evidence does not support the conviction for the crime of controlled substance homicide. As a result, this court should vacate the defendant's conviction and remand with instructions to dismiss. In the alternative, the court should dismiss without prejudice because the information fails to allege an offense.

DATED this 10<sup>th</sup> day of July, 2010.

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, § 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,  
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.

**RCW 10.58.035**  
**Statement of defendant--Admissibility**

(1) In criminal and juvenile offense proceedings where independent proof of the corpus delicti is absent, and the alleged victim of the crime is dead or incompetent to testify, a lawfully obtained and otherwise admissible confession, admission, or other statement of the defendant shall be admissible into evidence if there is substantial independent evidence that would tend to establish the trustworthiness of the confession, admission, or other statement of the defendant.

(2) In determining whether there is substantial independent evidence that the confession, admission, or other statement of the defendant is trustworthy, the court shall consider, but is not limited to:

(a) Whether there is any evidence corroborating or contradicting the facts set out in the statement, including the elements of the offense;

(b) The character of the witness reporting the statement and the number of witnesses to the statement;

(c) Whether a record of the statement was made and the timing of the making of the record in relation to the making of the statement; and/or

(d) The relationship between the witness and the defendant.

(3) Where the court finds that the confession, admission, or other statement of the defendant is sufficiently trustworthy to be admitted, the court shall issue a written order setting forth the rationale for admission.

(4) Nothing in this section may be construed to prevent the defendant from arguing to the jury or judge in a bench trial that the statement is not trustworthy or that the evidence is otherwise insufficient to convict.

