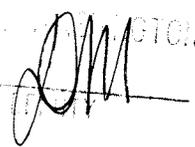


FILED
COURT OF APPEALS

10 JUL 20 PM 12:03

STATE OF WASHINGTON

BY 

NO. 40482-6-II

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

STATE OF WASHINGTON,

Respondent,

vs.

VICTOR A. L. WHALEN,

Appellant.

BRIEF OF APPELLANT

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

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

ORIGINAL

TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iii
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	
I. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT DENIED THE DEFENDANT’S MOTION FOR A CONTINUANCE IN ORDER TO SECURE THE PRESENCE OF A WITNESS ESSENTIAL TO THE DEFENSE	8
II. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT REFUSE TO ALLOW HIM TO PRESENT EXCULPATORY PHYSICAL EVIDENCE	12
E. CONCLUSION	17
F. APPENDIX	
1. Washington Constitution, Article 1, § 3	18
2. United States Constitution, Fourteenth Amendment	18

TABLE OF AUTHORITIES

Page

Federal Cases

Boykin v. Alabama,
395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) 8

Chambers v. Mississippi,
410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) 12

State Cases

Molsness v. Walla Walla, 84 Wn.App. 393, 928 P.2d 1108 (1996) 9

State v. Allery, 101 Wn.2d 495, 850 P.2d 495 (1993) 11

State v. Bonisio, 92 Wn.App. 783, 964 P.2d 1222(1998) 9, 10

State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) 16

State v. Edmon, 28 Wn.App. 98, 621 P.2d 1310 (1981) 12, 13

State v. Ellis, 136 Wn.2d 498, 963 P.2d 843 (1998) 12

State v. Garrison, 71 Wn.2d 312, 427 P.2d 1012 (1967) 8

State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983) 12

State v. Majors, 94 Wash.2d 354, 616 P.2d 1237 (1980) 8

State v. Perez, 137 Wn.App. 97, 151 P.3d 249 (2007) 9

State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995) 16

State v. Sain, 34 Wn.App. 553, 663 P.2d 493 (1983) 10

State v. Williams, 104 Wn.App. 516, 17 P.3d 648 (2001) 8, 9

State v. Wilson, 38 Wn.2d 593, 231 P.2d 288 (1951) 14

Constitutional Provisions

Washington Constitution, Article 1, § 3 8, 12, 13, 15
Washington Constitution, Article 1, § 22 11
United States Constitution, Fourteenth Amendment 8, 12, 13, 15

Statutes and Court Rules

ER 401 13
ER 402 13

Other Authorities

The Merck Online Medical Dictionary, Psychiatric Disorders;
Subject: Drug Use and Dependence; Topic: Injection Drug
Use - Diagnosis at <http://www.merck.com>. 14

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3, And United States Constitution, Fourteenth Amendment, when it denied the defendant's motion for a continuance in order to secure the presence of a witness essential to the defense.

2. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3, And United States Constitution, Fourteenth Amendment, when it refuse to allow him to present exculpatory physical evidence.

Issues Pertaining to Assignment of Error

1. In a trial in which the defendant claims unwitting possession of heroin residue in a baggie found in his wallet, does a trial court deny the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it denies a motion for a continuance in order to secure the presence of a witness who would testify that she gave the defendant a coin in the baggie, and that the defendant did not know that she had left heroin residue in it?

2. In a trial for possession of heroin, does a court deny the defendant a fair trial under Washington Constitution, Article 1, § 3, And United States Constitution, Fourteenth Amendment, if it refuses to allow him to show the jury that his arms do not have scars on them referred to a “track marks” indicative of intravenous drug use as was claimed by a state’s witness?

STATEMENT OF THE CASE

Factual History

At about 12:30 am on August 23, 2009, Washington State Trooper Sherrie Murphy was on routine patrol in Lewis County when she heard a radio report of three males fleeing a Safeway store in Chehalis following a robbery at knife point. RP 34-36.¹ Being near to the location, she drove slowly along some adjacent side streets looking for the suspects. *Id.* As she approached the intersection of Washington and 3rd Avenue, she saw the defendant sitting in the driver's seat of a Ford truck that was legally parked on the road. *Id.* As she drove past, the defendant, who had been looking at her, got out of his truck and ran towards her "waiving his arms and hollering." RP 36-37. Upon seeing this, she immediately stopped and got out of her patrol vehicle. *Id.* As the defendant approached, he asked if she was looking for three males, who he said were just down the street hiding in some bushes. *Id.*

Trooper Murphy asked the defendant who he was, and he responded "Rusty." RP 37. Recognizing him as Victor Whalen and believing that there were outstanding warrants for his arrest, she placed the defendant in

¹The record in this case includes one volume of continuously numbered verbatim reports of the trial and the sentencing in this case, referred to herein as "RP [page #]."

handcuffs and had him sit on the “push bars” of her front bumper while she verified the existence of the warrants. RP 38. Within a few minutes, dispatch confirmed the existence of the warrants. RP 39-40. Upon hearing this, she told the defendant he was under arrest, searched his person, and then put him in the back of her patrol car. *Id.* During the search incident to arrest, Trooper Murphy found a small baggie with suspected heroin residue in it in the defendant’s wallet. *Id.* She then walked over to the defendant’s truck. RP 42-44. Looking inside the open driver’s door window, she saw a belt sitting on the seat, as well as a syringe, both of which she associated with intravenous drug usage. *Id.* She then returned to her patrol vehicle, where she inspected the defendant’s arms. *Id.* According to Trooper Murphy, the defendant had “track marks” on his arms as well as fresh injection sites, all indicative of drug use. RP 44.

Procedural History

By information filed August 24, 2009, the state charged the defendant with one count of possession of heroin. CP 1-3. Within a week of the filing of the information, the defendant’s competency was called into question and the court signed an order for a competency evaluation and staying speedy trial. CP 4-10. Dr. Carl Redick of Western State Hospital in Tacoma later performed this evaluation and filed it with the court. CP 11-20. Finally, on October 15, 2009, the court entered an order of competency and set a trial

date. CP 25. Two weeks later, the state named two witnesses for trial: Trooper Murphy, and Jason Dunn, a forensic scientist with the Washington State Patrol. CP 26.

On January 8, 2010, this case came on for trial before a jury with the defendant endorsing the affirmative defense of unwitting possession. RP 5-6. Prior to voir dire, the defense moved for a short continuance in order to serve a subpoena upon Helen Maro, the defendant's "aunt." RP 5-8. According to the defendant's attorney, the night before trial the defendant told him that on the evening of his arrest his aunt Helen Maro, a heroin addict, had given him a small plastic baggie with a dollar coin in it since he collected silver coins. He later took the coin out and placed the baggie in his wallet, not knowing that there was heroin residue on it. *Id.* The court refused to grant the continuance. *Id.*

During a short recess, the defendant's attorney went to Helen Maro's apartment, but he was unable to find her. RP 8-12. He then renewed his motion for a continuance, arguing that (1) there would be no prejudice to the state since its two witnesses were law enforcement officers, (2) that the defendant understood that the court might well impose sanctions such as a jury fee based upon the lateness of the motion, and (3) that without calling Helen Maro as a witness, he could not provide adequate representation for the defendant. *Id.* The trial court again denied the motion. RP 12. The court

then called the jury panel into the court and held *voir dire*. RP 28-30.

During the trial, the state called Jason Dunn as its first witness. He testified that he had tested the residue in the baggie the Trooper found in the defendant's wallet, and that the test revealed the presence of heroin. RP 24-30. The state then called Trooper Murphy, who testified to the facts contained in the preceding Factual History. *See* Factual History. In addition, Trooper Murphy also testified to the following: (1) that after handcuffing the defendant, she walked over to his truck, looked through the open driver's side window, and saw a syringe and a belt laying on the front seat, (2) that both of these items were used in the process of intravenous drug use, (3) that upon finding these items she went back and looked at the defendant's arms, and (4) that the defendant's arms had "track marks" on them indicative of prior drug use, as well as recent injection sites. RP 42-44.

Following the close of the state's case, the defendant took the stand on his own behalf. RP 49. He testified that (1) his nickname was "Rusty," (2) he collected silver coins, (3) that on the day he was arrested, his aunt Helen Maro had given him a silver dollar in a small baggie, (4) that he took the silver dollar out and put the baggie in his wallet, (5) that his aunt was a heroin user, and (6) that he had no idea that the baggie his aunt gave him had heroin residue in it. RP 53-54. In addition, he testified that he did not use intravenous drugs, and that he had no "track marks" on his arms as Trooper

Murphy claimed. RP 52. At this point, the defense asked for permission to show the jury the defendant's arms to demonstrate the absence of track marks. *Id.* However, without articulating why, the trial court refused the defense request. *Id.*

After the defendant's testimony, the defense rested and the court instructed the jury. RP 56-64, CP 68-81. Following argument by counsel, the jury retired for deliberation and later returned a verdict of guilty. RP 64-72, 73-76, CP 82. The court later sentenced the defendant within the standard range, and the defendant filed timely notice of appeal. CP 92-101, 103-114.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT DENIED THE DEFENDANT'S MOTION FOR A CONTINUANCE IN ORDER TO SECURE THE PRESENCE OF A WITNESS ESSENTIAL TO THE DEFENSE.

Under Washington Constitution, Article 1, § 3, and under United States Constitution, Fourteenth Amendment, every criminal defendant has the right to a fair trial, although not a perfect trial. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). This includes the right to call exculpatory witnesses and to compel their presence. *State v. Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980); *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

In the case at bar, the defendant argues that the trial court's refusal to grant him a short continuance in order to give him time to compel the presence of his aunt Helen Maro denied him a fair trial because she would have been able to confirm his claim that she had given him the baggie that had the heroin residue in it and she would have been able to verify his claim that he did not know that there was any residue in the bag. Normally, a trial court's denial of a motion to continue is reviewed on appeal under an abuse of discretion standard. *State v. Williams*, 104 Wn.App. 516, 17 P.3d 648 (2001). However, a court "necessarily abuses its discretion by denying a

criminal defendant's constitutional rights." *State v. Perez*, 137 Wn.App. 97, 105, 151 P.3d 249 (2007).

In order to prevail on a claim that the trial court erred when it denied a motion for a continuance, the defendant has the burden of showing that in making its decision, the trial court abused its discretion. *State v. Williams, supra*. The trial court does not abuse its discretion in denying a motion for a continuance if (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence additional discovery might establish; or (3) the desired evidence will not raise a genuine issue of material fact. *Molsness v. City of Walla Walla*, 84 Wn.App. 393, 400-01, 928 P.2d 1108 (1996).

For example, in *State v. Bonisio*, 92 Wn.App. 783, 964 P.2d 1222(1998), the defendant was charged with burglary. During plea negotiations, the state indicated that if the defendant would plead guilty, it would refrain from filing a number of other charges outlined in the discovery already provided. When the defendant refused, the court allowed the state to amend the information to include these charges. The defense then moved for a continuance in order to interview one of the state's witnesses on one of the new charges. The court denied the motion upon the state's assurance that it would immediately arrange for the defense to interview this additional witness. The defendant was later convicted and appealed, arguing that the

trial court abused its discretion when it denied the motion to continue. The court of appeals rejected this argument, stating as follows:

Here, although Bonisisio did not receive the amended information until approximately one week before trial, he did not claim that the charging document was untimely or otherwise prejudicial. Nor did he seek to sever any of the charges or explain what information he sought to obtain through the additional discovery. Further, he had been aware of the possibility of the State filing those charges for a considerable time.

In an effort to minimize prejudice to Bonisisio, the trial court required the State to produce the desired witness and, as defense counsel conceded in oral argument, counsel did in fact interview the witness before trial. The trial court found that a further delay would prejudice the State, causing it to lose another of its witnesses. In light of these considerations, the trial court acted with reasonable discretion in denying the continuance.

State v. Bonisisio, 92 Wn.App. at 793

By contrast, in *State v. Sain*, 34 Wn.App. 553, 663 P.2d 493 (1983), two defendants convicted of first degree robbery appealed their convictions arguing that the trial court's denial of their motion to continue on the day of trial denied them their right to a fair trial. In this case, trial counsel had been appointed the day previous. On the day of trial, counsel moved to continue, stating that all he had been able to do in preparation was speak to his two clients: he had not interviewed the state's witnesses, he had not prepared instructions, and had not reviewed the state's discovery. The trial court none the less denied the motion, noting that the facts and law in the case were not complicated. Following conviction, the defendant's appealed, arguing that

the trial court's refusal to grant a continuance denied them fair trials and necessarily constituted an abuse of discretion.

In analyzing the defendant's claims, the court first noted that under Washington Constitution, Article 1, § 22, the defendants were entitled to effective assistance of counsel, and that this right presumed that counsel would have the time necessary to prepare a defense. Finding that one day was insufficient time to prepare a defense, the court found that the refusal to grant a continuance necessarily constituted an abuse of discretion because it had the effect of denying the defendants effective assistance of counsel. Thus, the court of appeals reversed the convictions and remanded for a new trial.

As was noted above, due process does not guarantee every defendant a perfect trial. However, it does guarantee each defendant a fair trial, and fundamental to a fair trial, is the right to effectively present and argue any defense available at law. *State v. Allery*, 101 Wn.2d 495, 595, 850 P.2d 495 (1993). In a case in which a defendant claims unwitting possession of heroin residue in a small baggie he claims his aunt gave him, the right to effectively present and argue the unwitting possession defense necessarily requires calling the defendant's aunt as a witness. As trial counsel stated at the beginning of the trial, he did not have the information about the aunt until the day before trial. In addition, a short continuance would have caused

absolutely no prejudice to the state. Both of the state's witnesses were law enforcement officers who would be available on future dates. Thus, in the case at bar, the trial court denied the defendant his due process right to call and compel an exculpatory witness, thus necessarily abusing its discretion. As a result, the defendant is entitled to a new trial.

II. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL UNDER AND WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT REFUSED TO ALLOW HIM TO PRESENT EXCULPATORY PHYSICAL EVIDENCE.

The due process right to a fair trial also guarantees that a defendant charged with a crime will be allowed to present relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). For example, in *State v. Ellis*, 136 Wn.2d 498, 963 P.2d 843 (1998), a defendant charged with aggravated first degree murder sought and obtained discretionary review of a trial court order granting a state's motion to exclude his three experts on diminished capacity. In granting the motion to exclude, the trial court noted that the defense had failed to meet all of the criteria for the admissibility of diminished capacity evidence set in the Court of Appeals decision in *State v. Edmon*, 28 Wn.App. 98, 621 P.2d 1310 (1981).

On review, the state argued that the trial court had not erred because

the defense experts had failed to meet the *Edmon* criteria. In its decision on the issue, the Supreme Court initially agreed with the state's analysis. However, the court nonetheless reversed the trial court, finding that regardless of the factors set out in *Edmon*, to maintain a diminished capacity defense, a defendant need only produce expert testimony demonstrating that the defendant suffers from a mental disorder, not amounting to insanity, and that the mental disorder impaired the defendant's ability to form the specific intent to commit the crime charged. The court then found that the state had failed to prove that the defendant's experts did not meet this standard. Thus, by granting the state's motion to exclude the defendant's experts on diminished capacity, the trial court had denied the defendant his right under Washington Constitution, Article 1, § 3, and United States Constitution, Sixth and Fourteenth Amendments to present relevant evidence supporting his defense.

Under ER 401, "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under ER 402, "all relevant evidence is admissible" with certain limitations. By contrast, under this same rule "[e]vidence which is not relevant is not admissible." Thus, before testimony or exhibit can be received into evidence, it must be shown to be relevant and material to the

case. *State v. Wilson*, 38 Wn.2d 593, 231 P.2d 288 (1951).

In the case at bar, the state charged the defendant with possession of heroin residue in a small baggie a police officer found in the defendant's wallet. The defendant claimed unwitting possession, arguing that his aunt had given him the baggie with a silver coin in it, and that he did not know there was heroin residue was present. By far, the state's best evidence to rebut the defendant's claim of unwitting possession was Trooper Murphy's testimony that she saw a syringe in his truck and fresh "track marks" on his arm consistent with intravenous heroin injection. Although not explained in any detail at trial, the Merck Online medical dictionary provides the following definition for "track marks" associated with illegal drug usage:

Practitioners may suspect problems with drug use when they notice changes in mood or behavior in a person. They may then do a thorough physical examination. Signs of drug abuse may be apparent. For example, repeatedly injecting drugs intravenously produces track marks. Track marks are lines of tiny, dark dots (needle punctures) surrounded by an area of darkened or discolored skin. Injecting drugs under the skin (skin popping) produces circular scars or ulcers. Addicts may claim other reasons for the marks, such as frequent blood donations, bug bites, or other injuries.

The Merck Online Medical Dictionary, Psychiatric Disorders; Subject: Drug Use and Dependence; Topic: Injection Drug Use - Diagnosis² at

²Merck medical manuals, both printed and online, have previously been accepted by the appellate courts of this state as learned treatises in the areas covered by the particular manual cited. *See State v. Cisne*, 72 Wn.App. 677, 680, 865 P.2d 564 (1994) (citing the definition for the term "gaze

<http://www.merck.com>.

The defendant's best method for rebutting Trooper Murphy's claims that he had track marks on his arms was to show them to the jury for inspection. It is true that he testified that he did not have any such scarring on his arms. However, the best evidence and certainly the irrefutable evidence was for the defendant to prove his claim by showing his bare arms to the jury. He offered to do so and the court, without any explanation at all, refused his request. In so doing, the court prevented the defendant from presenting the best evidence he had to rebut the state's evidence that he had been using heroin. This left the court in the curious position of allowing the state to present the testimony from Trooper Murphy as to what she saw on the defendant's arms but preventing the jury from seeing the defendant's arms and making the assessment themselves.

By refusing the defendant's request to show his bare arms to the jury, the court denied the defendant his right under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, to

nystagmus" in the Merck Manual of Diagnosis and Therapy, 1980 (14th ed. 1982)); *see also Bartusch v. Oregon State Board of Higher Education*, 131 Wn.App. 298, 126 P.3d 840 (2006) (citing the definition for the term "impaction of the cecum or large colon" in the Merck Veterinary Manual – 8th Edition – Online at <http://www.merckvetmanual.com>).

present relevant, exculpatory evidence. As an error of constitutional magnitude, the defendant is entitled to a new trial unless the state can prove the error harmless beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002). Under this standard, an error is not “harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. . . . A reasonable probability exists when confidence in the outcome of the trial is undermined.” *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted).

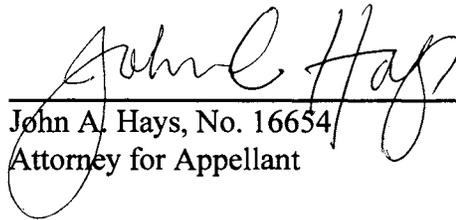
In the case at bar, the defendant claimed unwitting possession of just a trace amount of heroin and presented a reasonable story as to how the substance came into his possession. Had he been allowed to show his bare arms to the jury and demonstrate the absence of track marks, there is a substantial likelihood that the jury would have acquitted. Thus, the state cannot bear its heavy burden of proving the error harmless beyond a reasonable doubt. The defendant is entitled to a new trial.

CONCLUSION

The trial court's refusal to grant the defendant a continuance and to allow him to present relevant, exculpatory evidence denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. As a result, the defendant is entitled to a new trial.

DATED this 21st day of June, 2009.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

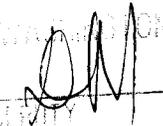
No person shall be deprived of life, liberty, or property, without due process of law.

**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.

FILED
COURT OF APPEALS

10 JUN 23 PM 12:03

STATE OF WASHINGTON
BY 

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

**STATE OF WASHINGTON,
Respondent,**

APPEAL NO: 40482-6-II

vs.

AFFIRMATION OF SERVICE

**Victor Albert Lyle Whalen,
Appellant.**

**STATE OF WASHINGTON)
) vs.
COUNTY OF LEWIS)**

DONNA BAKER, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On **June 21, 2010**, I personally placed in the mail the following documents

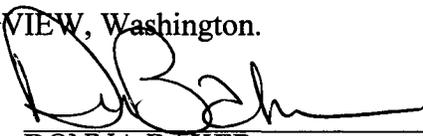
- 1. BRIEF OF APPELLANT
- 2.. AFFIRMATION OF SERVICE

to the following:

**MICHAEL GOLDEN
LEWIS COUNTY PROS. ATTY
345 W. MAIN ST.
CHEHALIS, WA 98532**

**VICTOR ALBERT LYLE WHALEN
DOC # 907512
AIRWAY HEIGHTS CORR CENTER
P.O. BOX 1809
AIRWAY HEIGHTS, WA. 99001**

Dated this 21st day of June, 2010 at **LONGVIEW**, Washington.



**DONNA BAKER
LEGAL ASSISTANT TO JOHN A. HAYS**