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A. ASSIGNMENTS OF ERROR

1. In violation of appellant Adele Ewing’s Sixth Amendment right to counsel and Fourteenth Amendment right to a fair trial, the prosecutor committed misconduct by vouching for the testimony of the State’s star witness.

2. Defense counsel denied Ms. Ewing her Sixth Amendment right to the effective assistance of counsel by failing to object to the misconduct in closing argument by the prosecutor.

3. The sentencing court failed to meaningfully consider Ms. Ewing’s request to be sentenced pursuant to the Drug Offender Sentencing Alternative (DOSA) as mandated by RCW 9.94A.660.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In closing argument the prosecutor vouched for the State’s star witness. Does this flagrant and ill-intentioned misconduct require reversal? Assignment of Error 1.

2. Did defense counsel fail to render the effective assistance to which Ms. Ewing was entitled by the Sixth Amendment by not objecting to the improper argument? Assignment of Error 2.

3. The sentencing court must consider a request for a DOSA

sentence and may not deny such a request by failing to consider mandatory statutory criteria. Where the sentencing court denied Ms. Ewing's request for DOSA, did the court commit reversible error for failure to meaningfully consider her request for DOSA? Assignment of Error 3.

C. STATEMENT OF THE CASE

1. Procedural facts:

Adele Ewing was charged by information filed in Lewis County Superior Court with one count of delivery of a controlled substance, (methamphetamine), in violation of RCW 69.50.401(1), (2)(b). Clerk's Papers [CP] 1-2. The State subsequently filed amended information adding the special allegation of RCW 69.50.435, that the offense was committed within 1000 feet of a school bus route stop. CP 4-6.

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. 1Report of Proceedings [RP] at 13.¹ The matter was tried to a jury on June 13 and 14, 2007, the Honorable Nelson Hunt presiding.

Defense counsel objected to the State's proposed instructions for accomplice liability (Instruction No. 7) and an instruction on the definition of "school bus route stop." (Instruction No. 12). 1RP at 197; CP 23, 28.

During closing argument, the deputy prosecutor stated:

¹ The record of proceedings is designated as follows: March 2, 2007, hearing; 1RP -- Jury trial, June 13, 2007; 2RP -- Jury trial, June 14, 2007; 3RP--June 21, 2007; 4RP-- July 25, 2007; 5RP--April 30, June 24, 2010; 6RP--June 28, July 1, 2010.

That's why you folks as a collective jury of 12 individuals will decide this case because you determine credibility, and I submit to you the testimony of the witnesses is going to come down to who you believe. Credibility is determined based on your common experiences, what people say and how they say it vis-à-vis what they said.

You know, the funny thing about lying too well is that you never really know what you're lying about. I think Mr. Bonagofsky got on the stand and he was gonna fall on his sword for Ms. Ewing. He's already been convicted of his part in this thing, and if he gets up there and says yeah, I delivered that, I'm taking sole responsibility for this, that she'd get off the hook. The problem is he screwed it up. Remember what he said? He was very pointed in this. Mr. Greer handed the money to Ms. Ewing. Mr. Greer said he handed the money to Ms. Ewing.

Now, why is that important? It was probably lost on Mr. Bonagofsky, but by testifying that the money went to Ms. Ewing he implicated her as an accomplice to this crime, and that is Instruction Number 7[.]

2RP at 222, 223.

After reading Instruction No. 7, the prosecutor continued:

I would ask you to read that instruction very carefully and think about the testimony you heard. Personally I believe Mr. Greer. I believe Mr. Greer went in, made a deal with Ms. Ewing, and she handed it to Mr. Bonagofsky, who handed it to Mr. Greer.

2RP at 223.

During rebuttal, the prosecutor argued:

You've got Mr. Greer who was controlled by the officers. If he doesn't testify truthfully here today he doesn't get the benefit of his bargain. That's a hammer hanging over his head.

Now Mr. Bonagofsky, the only thing I can say there is I think he just screwed up in his lie because the accomplice instruction does talk about aiding a person, okay?

2RP at 245, 246.

The jury returned a verdict of guilty to the offense as charged and also found that it was committed within 1000 feet of a school bus route stop. CP 33, 34.

A hearing was scheduled for June 21, 2007, to set a sentencing date. On that date Ms. Ewing was present but her attorney did not appear. 3RP at 2. The hearing was continued to July 5, 2007, in order to set a sentencing date. 3RP at 2. On July 5, 2007, sentencing was set for July 25, 2007. Neither Ms. Ewing nor her attorney were present in court on July 25, 2007, and a warrant was subsequently issued for Ms. Ewing's arrest. 4RP at 3.

Several years later Ms. Ewing was arrested in Colorado and appeared in custody in Lewis County on April 30, 2010, and new counsel was appointed. 5RP at 4, 5. Sentencing took place on June 28, 2010. Ms. Ewing entered a guilty plea to one count of bail jumping in cause number 07-1-503-4. 6RP at 3, 4. After accepting her plea, Judge Hunt addressed sentencing on the original matter. 6RP at 7.

Ms. Ewing had been evaluated for prison-based DOSA, and was determined to be eligible for the sentencing alternative. CP 42. The prosecution and defense both requested imposition of prison-based DOSA. 6RP at 13; CP 53.

Defense counsel argued that Ms. Ewing had done well in turning her life around while in Colorado. 6RP at 10. The court initially questioned whether DOSA was possible since the evaluation stated that she did not have a chemical dependency and she reported that she had been clean and sober for the past three years. 6RP at 12. The defense argued that she has an untreated chemical dependency. 6RP at 12. The court denied the joint request for DOSA and imposed a sentence of 114 months, which apparently included a 24 month school bus route stop enhancement, although the actual length of the standard range sentence is not designated in the Judgment and Sentence or the court's oral ruling. 6RP at 13-14, CP 60, 61.

In denying the DOSA request, the court stated:

Well, I don't see any reason at all here to give a DOSA. I am shocked that the state has gone along with this. Sentence will be hundred and 14 months in Department of Corrections credit for hundred five days. The bail jumpers 29 month concurrent. Ms. Ewing did everything she could to thumb her nose at the system here. It did give her a sentence that would result in 27 months in prison after she goes to trial, turned down a similar bargain, goes to trial, gets convicted, then runs, and then the state comes in and says, oh, she's good for a

prison DOSA, is shocking to me, absolutely shocking. It is essentially is a reward for jerking the system around and I'm not going to put up with it. So that's the sentence.

6RP at 13, 14.

On June 29, 2010, defense counsel filed a sentencing memorandum describing changes in Ms. Ewing's life since her trial in 2007. CP 49-57.

The memorandum stated in part:

A review of her record makes it clear that Ms. Ewing has a long history of substance abuse and has not had a prior DOSA sentence. However, on the other hand, Ms. Ewing has made fairly substantial gains in her private life since her conviction. She moved from the State of Washington and has led a clean and sober life for over three years and has not used any controlled substances during that time period. Ironically, in some ways, the move has been good for her and her family as it has allowed her long-term sobriety.

...

During Ms. Ewing's absence from the state of Washington she was a hard worker who maintained constant employment to support herself and her children.

CP 50-51.

The court entered a Judgment and Sentence on July 1, 2010. CP 58-66. Timely notice of appeal was filed on July 1, 2010. CP 67. This appeal follows.

2. Testimony at trial:

Ryan Greer testified that he participated in a "controlled buy" of

methamphetamine for the Lewis County Sheriff's Office in June, 2006. 1RP at 127. Mr. Greer had been arrested previously and he agreed to make four controlled buys from four separate people for the police. 1RP at 135. Mr. Greer stated that on June 3, 2006, he met with then-Centralia Police Officer Steven Dawes and Centralia Police Officer Neil Hoium at a wastewater treatment plant in Centralia, Lewis County, Washington. 1RP at 128. He stated that he and his vehicle were searched by the officers and that he was given \$350 to use to buy drugs. 1RP at 128. After being searched he drove to Adele Ewing's house at 210 South King Street in Centralia. 1RP at 24. When he arrived at the house there were several people there, including Shane Bonagofsky, with whom he had recently been in jail. 1RP at 129. He talked with Mr. Bonagofsky for a minute, and then they both went into a bedroom in the house. 1RP at 129. Mr. Greer stated that Ms. Ewing asked him how much money he had. 1RP at 129. He told her that he had \$350 and gave the money to her. 1RP 129. He stated that she then left the room leaving him with Mr. Bonagofsky. 1RP 129. She came back into the room and asked both of them to step outside, and so they both went onto the back porch of the house for two to three minutes and had a cigarette. 1RP at 129, 130. He stated that Ms. Ewing then went outside and asked him to come back into the bedroom. 1RP at 129, 130. Mr. Greer testified that she asked him

whether this was a controlled by police, which he denied. 1RP at 130. Mr. Greer testified that Ms. Ewing then handed Mr. Bonagofsky a bag to give to him. 1RP at 130. Mr. Greer then left the house and gave the bag to law enforcement. 1RP at 26, 83, 131. An employee of the Washington State Patrol Laboratory identified the substance given to police as methamphetamine. 1RP at 89; Exhibit 5.

Ms. Ewing was subsequently arrested. Police did not recover any of the “buy money” that was provided to Mr. Greer. 1RP at 51, 52.

Shane Bonagofsky testified that there was a barbeque taking place at Ms. Ewing’s house on June 3, 2006, and that there were approximately ten people present. 1RP at 182. He stated that Ryan Greer showed up at the house, and asked if he could get him some drugs. 1RP at 183. He testified that they went into Ms. Ewing’s bedroom, then Ms. Ewing entered the room and then both went outside to smoke. 1RP at 185. They returned to the house and he stated that Mr. Greer gave money to Ms. Ewing and that he gave methamphetamine to Mr. Greer, and that he had had the methamphetamine in his possession all the time. 1RP at 185.

Ms. Ewing testified that on June 3, 2006 she was having a barbecue at her house and that Mr. Greer came to her house and that he and Mr. Bonagofsky went out the back porch to smoke. 2RP at 204, 205. She stated

that they both came back inside and went to her bedroom and that she went in there to see what was going on. 2RP at 206. She stated that Mr. Bonagofsky asked Mr. Greer if he had money and that Mr. Bonagofsky gave methamphetamine to Mr. Greer. 2RP at 207. She stated that she did not hand the methamphetamine to Mr. Greer and that she did not touch it. 2RP at 207.

Dale Dunham, an employee of the Centralia-Chehalis Transportation Co-Op responsible for designating school bus route stops in the Centralia School District, testified that there is a bus stop located at the southwest corner of Washington and Locust Streets in Centralia. 1RP at 67, 68. He stated that Locust Street was subsequently renamed Centralia College Blvd. 1RP at 105.

Steve Spurgeon, an employee of the City of Centralia Engineering Department, testified that the distance from the bus stop located at the intersection of Centralia College Blvd. and Washington to 210 S. King St. is approximately 362 feet. 1RP at 110.

D. ARGUMENT

- 1. THE PROSECUTOR ENGAGED IN FLAGRANT AND ILL-INTENTIONED MISCONDUCT BY VOUCHING FOR THE STATE'S STAR WITNESS, WHICH DENIED MS. EWING A FAIR TRIAL AND WHICH REQUIRES REVERSAL OF MS. EWING'S CONVICTION.**

The deputy prosecutor improperly vouched for its primary witness, Ryan Greer, by arguing:

Personally I believe Mr. Greer. I believe Mr. Greer went in, made a deal with Ms. Ewing, and she handed it to Mr. Bonagofsky, who handed it to Mr. Greer.

2RP at 223.

The prosecutor, as an officer of the court, has a duty to see an accused receives a fair trial. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). In the interests of justice, a prosecutor must act impartially, seeking a verdict free of prejudice and based upon reason. *Id.* at 664. A defendant's due process right to a fair trial and the right to be tried by an impartial jury is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict. *Charlton*, 90 Wn.2d at 664-65; *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); U.S. Const. amends. 5, 6 and 14; Wash. Const. art. 1, § 22. A prosecutor's comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). To determine whether misconduct warrants reversal, the court considers its prejudicial nature and its cumulative effect on the jury. *State v. Jerrels*, 83 Wn. App. 503, 508, 925 P.2d 209 (1996); *State v. Suarez-*

Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

The cumulative effect of errors may be so flagrant that no instruction can erase their combined prejudicial effect. *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956); *State v. Henderson*, 100 Wn. App. 794, 804, 998 P.2d 907 (2000).

A claim of prosecutorial misconduct in closing argument is waived if defense counsel did not object and curative instructions would have obviated the prejudice from the remarks. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 154 (1988). However, “[a]ppellate review is not precluded if the prosecutorial misconduct is so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.” *Id.* The State's duty to ensure a fair trial precludes the prosecutor from personally vouching for the government or endorsing the credibility of prosecution witnesses. *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985).

Moreover, "it is improper for a prosecutor to express his personal opinion about the credibility of a witness and the guilt or innocence of the accused. . . ." *Reed*, 102 Wn.2d at 140. Under RPC 3.4(f) the prosecutor may not “state a personal opinion as to the justness of a cause, the credibility of a witness. . . the guilt or innocence of an accused.” To argue in this manner

constitutes prosecutorial misconduct. *Id.*

Here, the deputy prosecutor clearly violated this clear cut rule. The deputy argued in his closing argument that:

I would ask you to read that instruction very carefully and think about the testimony you heard. Personally I believe Mr. Greer. I believe Mr. Greer went in, made a deal with Ms. Ewing, and she handed it to Mr. Bonagofsky, who handed it to Mr. Greer.

2RP at 223.

The deputy prosecutor's vouching continued during rebuttal argument:

You've got Mr. Greer who was controlled by the officers. If he doesn't testify truthfully here today he doesn't get the benefit of his bargain. That's a hammer hanging over his head.

2RP at 245, 246.

The jury alone determines issues of witness credibility. *State v. Jungers*, 125 Wn. App. 895, 901, 106 P.3d 827 (2005). It is improper for a prosecutor to personally vouch for the credibility of a witness. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). The theme of the prosecutor's closing argument was that Mr. Greer was telling the truth, that he *had* to tell the truth because of his "bargain" with the police, and that Mr. Bonagofsky was lying. 2RP at 222, 223, 245. The theme of defense counsel's closing

argument was that Mr. Bonagofsky was telling the truth when he testified that he supplied the drugs to Mr. Greer, and that Mr. Greer was lying. 2RP at 233, 234. The prosecutor exhorted the jury to believe the State's chief witness. The deputy prosecutor also argued that Mr. Bonagofsky was lying when he testified that Mr. Greer gave the money to Ms. Ewing, and that it was Mr. Bonagofsky who gave methamphetamine to Mr. Greer, not Ms. Ewing. 1RP at 185, 2RP at 222.

The prosecutor in this manner improperly bolstered Mr. Greer's credibility in a case that turned on whose story the jury believed. The prosecutor's comments were an unmistakable expression of personal opinion about how he viewed their testimony. *See Brett*, 126 Wn.2d at 175 (prejudicial error will be found when counsel expresses a "clear and unmistakable" opinion about the credibility of a witness).

The deputy prosecutor announced that Mr. Greer was telling the truth in everything he said. The deputy's argument that he believed Mr. Greer, that he was "controlled by the officers," and that if he "doesn't testify truthfully," he would not be able to obtain his bargain with the State was improper vouching. 2RP at 223, 245. *See, Reed*, 102 Wn.2d at 145. The State's case against Ms. Ewing was based entirely upon witness credibility. The jury's verdict turned on whether they believed Mr. Greer was being truthful

in testifying that he received the drugs from Ms. Ewing after she first handed the bag to Mr. Bonagofsky. The jury sided with the State's argument. Under these circumstances, there is a substantial likelihood that the prosecutor's improper arguments regarding witness credibility influenced the verdict.

Defense counsel did not object to the prosecutor's improper argument but the cumulative effect of errors may be so flagrant that no instruction can erase, their combined prejudicial effect. *Henderson*, 100 Wn. App. at 804. The prejudicial influence of the prosecutor's improper vouching resulted in enduring prejudice.

An error of constitutional magnitude is harmless only if the appellate court is convinced beyond a reasonable doubt that the jury would not have convicted absent the error. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The State cannot meet this heavy burden here. The “buy” money was never recovered; the case was merely Mr. Greer’s credibility weighed against Ms. Ewing’s. In light of the facts, there was significant room for doubt regarding whether the State met its burden. This Court should find the State cannot prove the error from the prosecutor’s improper arguments harmless beyond a reasonable doubt.

2. **DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE REPEATED**

**INSTANCES OF FLAGRANT AND ILL-
INTENTIONED MISCONDUCT.**

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, § 22 of the Washington State Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. *Thomas*, 109 Wn.2d at 226. To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Reversal is required where defense counsel incompetently fails to object to prosecutorial misconduct and there is a reasonable probability the failure to object affected the outcome. *State v. Horton*, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (reversing where defense counsel failed to object to prosecutor's improperly expressed personal opinion about defendant's credibility during closing argument). This makes sense because

the purpose behind both the prohibition against prosecutorial misconduct and the right to effective assistance is to protect the defendant's right to a fair and impartial trial. *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984); *Reed*, 102 Wn.2d at 145; *Charlton*, 90 Wn.2d at 664-65. Only legitimate trial strategy or tactics constitute reasonable performance. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

Here, there was no legitimate reason not to object given the prejudicial nature of the prosecutor's improper arguments. Ms. Ewing derived no conceivable benefit from letting the jury consider those arguments as it deliberated on her fate. Further, if this Court rules curative instructions could have erased the prejudice resulting from the prosecutor's misconduct, then counsel was deficient in failing to request such instruction. No legitimate strategy justified allowing the prosecutor's prejudicial comments to fester in the juror's minds without instruction from the court that these improper arguments should be disregarded and play no role in their deliberations. There is a reasonable probability counsel's failure affected the verdict for the reasons set forth above in § 1, *supra*.

3. **THE SENTENCING COURT ERRED WHEN IT FAILED TO MEANINGFULLY CONSIDER MS. EWING'S REQUEST FOR DOSA.**

At sentencing, Ms. Ewing asked the court to impose a drug treatment

sentence under the Drug Offender Sentencing Alternative (DOSA). 6RP at 9, 10, 11. The court denied Ms. Ewing's request for a prison-based DOSA. 6RP at 13. Because the court did not properly evaluate Ms. Ewing's eligibility for a DOSA, a new sentencing proceeding is required.

A DOSA is a form of standard range sentence consisting of total confinement for one-half of the mid-standard range followed by community supervision. DOSA authorizes trial judges to give eligible nonviolent drug offenders a reduced sentence, treatment, and increased supervision in an attempt to help them recover from their addictions. See generally RCW 9.94A.660.

The decision whether to impose a DOSA sentence is within the sentencing court's discretion, but a court's refusal to exercise its discretion or its choice to sentence on an improper basis is appealable. *State v. Garcia-Martinez*, 88 Wn.App.322, 328, 944 P.2d 1104 (1997). The process by which the sentence was imposed may be challenged. *State v. Grayson*, 154 Wn.2d 333,335,338, 111 P.3d 1183 (2005).

The statute provides the court with mandatory criteria to evaluate in determining eligibility. RCW 9.94A.660. In considering a prison-based DOSA, if the court determines a DOSA is appropriate, the court shall waive a standard range sentence and impose a sentence which is one-half the

midpoint of the standard range sentence in prison or twelve months, whichever is greater. RCW 9.94A.662. Once the defendant has completed the custodial part of the sentence, he or she is released into closely monitored community custody and appropriate substance abuse treatment in a program that has been approved by the Department of Social and Health Services for the balance of the sentence. RCW 9.94A.662(1). The defendant has a significant incentive to comply with the conditions of a DOSA, since failure may result in serving the remainder of the sentence in prison. RCW 9.94A.662(3); *Grayson*, 154 Wn.2d at 338.

Generally, a trial court's decision to deny a DOSA is not reviewable. *Grayson*, 154 Wn.2d at 338. Every defendant, however, is entitled to ask the trial court for meaningful consideration of a DOSA request. *Id.* at 342. A defendant is entitled to appellate review of the denial of a request for a (DOSA) in order to correct a legal error or an abuse of discretion. *State v. White*, 123 Wn.App. 106,114, 97 P.3d 34 (2004) (quoting *State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003)).

In an evaluation for DOSA, the sentencing court must determine whether the offender has met the statutory requirements for DOSA eligibility, and if so, whether DOSA is appropriate or merited in the case. RCW 9.94A.660 (1),(3). Here, Ms. Ewing was determined to be eligible for DOSA

in her Department of Corrections Risk Assessment. CP 42.

At sentencing, the court initially asked both counsel for the defense and the State why Ms. Ewing was eligible “if the DOSA evaluation says, no chemical dependency.” 6RP at 12.

Counsel told the court that Ms. Ewing has an untreated dependency and that she had maintained sobriety. 6RP at 12, 13.

In determining appropriateness of DOSA, the sentencing court simply stated:

Well, I don't see any reason at all here to give a DOSA. I am shocked that the state has gone along with this. Sentence will be 114 months in Department of Corrections, credit for 105 days. The Bail Jump is 29 months concurrent.

Ms. Ewing did everything she could to thumb her nose at the system here. And to give her a sentence that would result in 57 months in prison after she goes to trial, turned down a similar bargain, goes to trial, gets convicted, then runs, and then the state comes in and says, oh, she's good for a prison DOSA, is shocking to me, absolutely shocking. This essentially is a reward for jerking the system around and I'm not going to put up with it. So that's the sentence.

6RP at 13, 14.

The court made its ruling with announced its decision without any articulated reasons for denying the DOSA request and stated that she turned

down a plea offer similar of 57 months, and then was convicted and ran, “jerk[ed] the system around” and “thumb[ed] her nose at the system.”

Ms. Ewing met all the statutory requirements for eligibility for a DOSA. The court failed to meaningfully consider whether Ms. Ewing’s statutory eligibility and instead focused on her failure to take a plea bargain and her failure to appear for sentencing on July 25, 2007. Based on the failure of the court to meaningfully consider whether DOSA was an appropriate sentencing alternative for Ms. Ewing, this Court should reverse Ms. Ewing’s sentence on procedural grounds and abuse of the court’s discretion and remand the matter for resentencing with a statutorily proper consideration of DOSA.

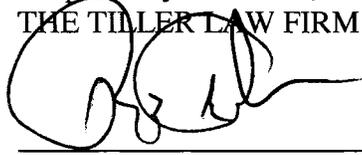
E. CONCLUSION

Ms. Ewing respectfully requests that this Court hold that the prosecutor’s flagrant and ill-intentioned misconduct denied her a fair trial, that defense counsel rendered ineffective assistance of counsel, and requests this Court to reverse and dismiss her conviction.

In the alternative, Ms. Ewing respectfully requests this Court to remand for resentencing, including a statutorily proper consideration of DOSA, consistent with the arguments presented herein.

DATED: January 6, 2011.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. B. Tiller', written over the text 'THE TILLER LAW FIRM'.

PETER B. TILLER-WSBA 20835
Of Attorneys for Adele Ewing

EXHIBIT A

STATUTES

RCW 9.94A.660

Drug offender sentencing alternative — Prison-based or residential alternative.

(1) An offender is eligible for the special drug offender sentencing alternative if:

(a) The offender is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.533 (3) or (4);

(b) The offender is convicted of a felony that is not a felony driving while under the influence of intoxicating liquor or any drug under RCW 46.61.502(6) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug under RCW 46.61.504(6);

(c) The offender has no current or prior convictions for a sex offense at any time or violent offense within ten years before conviction of the current offense, in this state, another state, or the United States;

(d) For a violation of the Uniform Controlled Substances Act under chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter 9A.28 RCW, the offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as the weight, purity, packaging, sale price, and street value of the controlled substance;

(e) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence;

(f) The end of the standard sentence range for the current offense is greater than one year; and

(g) The offender has not received a drug offender sentencing alternative more than once in the prior ten years before the current offense.

(2) A motion for a special drug offender sentencing alternative may be made by the court, the offender, or the state.

(3) If the sentencing court determines that the offender is eligible for an alternative sentence under this section and that the alternative sentence is appropriate, the court shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of either a prison-based alternative under RCW 9.94A.662 or a residential chemical dependency treatment-based alternative under RCW 9.94A.664. The residential chemical dependency treatment-based alternative is only available if the midpoint of the standard range is twenty-four months or less.

(4) To assist the court in making its determination, the court may order the department to complete either or both a risk assessment report and a chemical dependency screening report as provided in RCW 9.94A.500.

(5)(a) If the court is considering imposing a sentence under the residential chemical dependency treatment-based alternative, the court may order an examination of the offender by the department. The examination shall, at a minimum, address the following issues:

(i) Whether the offender suffers from drug addiction;

(ii) Whether the addiction is such that there is a probability that criminal behavior will occur in the future;

(iii) Whether effective treatment for the offender's addiction is available from a provider that has been licensed or certified by the division of alcohol and substance abuse of the department of social and health services; and

(iv) Whether the offender and the community will benefit from the use of the alternative.

(b) The examination report must contain:

(i) A proposed monitoring plan, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others; and

(ii) Recommended crime-related prohibitions and affirmative conditions.

(6) When a court imposes a sentence of community custody under this section:

(a) The court may impose conditions as provided in RCW 9.94A.703 and may impose other affirmative conditions as the court considers appropriate. In addition, an offender may be required to pay thirty dollars per month while on community custody to offset the cost of monitoring for alcohol or controlled substances.

(b) The department may impose conditions and sanctions as authorized in RCW 9.94A.704 and RCW 9.94A.737.

(7)(a) The court may bring any offender sentenced under this section back into court at any time on its own initiative to evaluate the offender's progress in treatment or to determine if any violations of the conditions of the sentence have occurred.

(b) If the offender is brought back to court, the court may modify the conditions of the community custody or impose sanctions under (c) of this subsection.

(c) The court may order the offender to serve a term of total confinement within the standard range of the offender's current offense at any time during the period of community custody if the offender violates the conditions or requirements of the sentence or if the offender is failing to make satisfactory progress in treatment.

(d) An offender ordered to serve a term of total confinement under (c) of this subsection shall receive credit for any time previously served under this section.

(8) In serving a term of community custody imposed upon failure to

complete, or administrative termination from, the special drug offender sentencing alternative program, the offender shall receive no credit for time served in community custody prior to termination of the offender's participation in the program.

(9) An offender sentenced under this section shall be subject to all rules relating to earned release time with respect to any period served in total confinement.

(10) Costs of examinations and preparing treatment plans under a special drug offender sentencing alternative may be paid, at the option of the county, from funds provided to the county from the criminal justice treatment account under RCW 70.96A.350.

RCW 9.94A.662

Prison-based drug offender sentencing alternative.

(1) A sentence for a prison-based special drug offender sentencing alternative shall include:

(a) A period of total confinement in a state facility for one-half the midpoint of the standard sentence range or twelve months, whichever is greater;

(b) One-half the midpoint of the standard sentence range as a term of community custody, which must include appropriate substance abuse treatment in a program that has been approved by the division of alcohol and substance abuse of the department of social and health services;

(c) Crime-related prohibitions, including a condition not to use illegal controlled substances;

(d) A requirement to submit to urinalysis or other testing to monitor that status; and

(e) A term of community custody pursuant to RCW 9.94A.701 to be imposed upon the failure to complete or administrative termination from the special drug offender sentencing alternative program.

(2) During incarceration in the state facility, offenders sentenced under this section shall undergo a comprehensive substance abuse assessment and receive, within available resources, treatment services appropriate for the offender. The treatment services shall be designed by the division of alcohol and substance abuse of the department of social and health services, in cooperation with the department of corrections.

(3) If the department finds that conditions of community custody have been willfully violated, the offender may be reclassified to serve the remaining balance of the original sentence. An offender who fails to complete the program or who is administratively terminated from the program shall be reclassified to serve the unexpired term of his or her sentence as ordered by the sentencing court.

(4) If an offender sentenced to the prison-based alternative under this section is found by the United States attorney general to be subject to a deportation order, a hearing shall be held by the department unless waived by the offender, and, if the department finds that the offender is subject to a valid deportation order, the department may administratively terminate the offender from the program and reclassify the offender to serve the remaining balance of the original sentence.

RCW 69.50.401

Prohibited acts: A — Penalties.

(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.

(2) Any person who violates this section with respect to:

(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 69.50.435

Violations committed in or on certain public places or facilities —
Additional penalty — Defenses — Construction — Definitions.

(1) Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and

flowering tops of marihuana to a person:

- (a) In a school;
- (b) On a school bus;
- (c) Within one thousand feet of a school bus route stop designated by the school district;
- (d) Within one thousand feet of the perimeter of the school grounds;
- (e) In a public park;
- (f) In a public housing project designated by a local governing authority as a drug-free zone;
- (g) On a public transit vehicle;
- (h) In a public transit stop shelter;
- (i) At a civic center designated as a drug-free zone by the local governing authority; or
- (j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand foot perimeter

may be punished by a fine of up to twice the fine otherwise authorized by this chapter, but not including twice the fine authorized by RCW 69.50.406, or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter, but not including twice the imprisonment authorized by RCW 69.50.406, or by both such fine and imprisonment. The provisions of this section shall not operate to more than double the fine or imprisonment otherwise authorized by this chapter for an offense.

(2) It is not a defense to a prosecution for a violation of this section that the person was unaware that the prohibited conduct took place while in a school or school bus or within one thousand feet of the school or school bus route stop, in a public park, in a public housing project designated by a local governing authority as a drug-free zone, on a public transit vehicle,

in a public transit stop shelter, at a civic center designated as a drug-free zone by the local governing authority, or within one thousand feet of the perimeter of a facility designated under subsection (1)(i) of this section, if the local governing authority specifically designates the one thousand foot perimeter.

(3) It is not a defense to a prosecution for a violation of this section or any other prosecution under this chapter that persons under the age of eighteen were not present in the school, the school bus, the public park, the public housing project designated by a local governing authority as a drug-free zone, or the public transit vehicle, or at the school bus route stop, the public transit vehicle stop shelter, at a civic center designated as a drug-free zone by the local governing authority, or within one thousand feet of the perimeter of a facility designated under subsection (1)(i) of this section, if the local governing authority specifically designates the one thousand foot perimeter at the time of the offense or that school was not in session.

(4) It is an affirmative defense to a prosecution for a violation of this section that the prohibited conduct took place entirely within a private residence, that no person under eighteen years of age or younger was present in such private residence at any time during the commission of the offense, and that the prohibited conduct did not involve delivering, manufacturing, selling, or possessing with the intent to manufacture, sell, or deliver any controlled substance in RCW 69.50.401 for profit. The affirmative defense established in this section shall be proved by the defendant by a preponderance of the evidence. This section shall not be construed to establish an affirmative defense with respect to a prosecution for an offense defined in any other section of this chapter.

(5) In a prosecution under this section, a map produced or reproduced by any municipality, school district, county, transit authority engineer, or public housing authority for the purpose of depicting the location and boundaries of the area on or within one thousand feet of any property used for a school, school bus route stop, public park, public housing project designated by a local governing authority as a drug-free zone, public transit vehicle stop shelter, or a civic center designated as a drug-free zone by a local governing authority, or a true copy of such a map, shall under proper authentication, be admissible and shall constitute prima facie evidence of the location and boundaries of those areas if the governing

body of the municipality, school district, county, or transit authority has adopted a resolution or ordinance approving the map as the official location and record of the location and boundaries of the area on or within one thousand feet of the school, school bus route stop, public park, public housing project designated by a local governing authority as a drug-free zone, public transit vehicle stop shelter, or civic center designated as a drug-free zone by a local governing authority. Any map approved under this section or a true copy of the map shall be filed with the clerk of the municipality or county, and shall be maintained as an official record of the municipality or county. This section shall not be construed as precluding the prosecution from introducing or relying upon any other evidence or testimony to establish any element of the offense. This section shall not be construed as precluding the use or admissibility of any map or diagram other than the one which has been approved by the governing body of a municipality, school district, county, transit authority, or public housing authority if the map or diagram is otherwise admissible under court rule.

(6) As used in this section the following terms have the meanings indicated unless the context clearly requires otherwise:

(a) "School" has the meaning under RCW 28A.150.010 or 28A.150.020. The term "school" also includes a private school approved under RCW 28A.195.010;

(b) "School bus" means a school bus as defined by the superintendent of public instruction by rule which is owned and operated by any school district and all school buses which are privately owned and operated under contract or otherwise with any school district in the state for the transportation of students. The term does not include buses operated by common carriers in the urban transportation of students such as transportation of students through a municipal transportation system;

(c) "School bus route stop" means a school bus stop as designated by a school district;

(d) "Public park" means land, including any facilities or improvements on the land, that is operated as a park by the state or a local government;

(e) "Public transit vehicle" means any motor vehicle, streetcar, train, trolley vehicle, or any other device, vessel, or vehicle which is owned or

operated by a transit authority and which is used for the purpose of carrying passengers on a regular schedule;

(f) "Transit authority" means a city, county, or state transportation system, transportation authority, public transportation benefit area, public transit authority, or metropolitan municipal corporation within the state that operates public transit vehicles;

(g) "Stop shelter" means a passenger shelter designated by a transit authority;

(h) "Civic center" means a publicly owned or publicly operated place or facility used for recreational, educational, or cultural activities;

(i) "Public housing project" means the same as "housing project" as defined in RCW 35.82.020.

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ADELE E. EWING,

Appellant.

COURT OF APPEALS NO.
40968-2-II

SUPERIOR COURT NO.
06-1-00432-3

CERTIFICATE OF HAND
DELIVERY AND MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Opening Brief of Appellant was mailed by first class mail to the Court of Appeals, Division 2, and a copy was hand delivered to Sara Beigh, Deputy Prosecuting Attorney, and a copy was mailed to Adele Ewing, Appellant, by first class mail, postage pre-paid on January 6, 2011, at the Centralia, Washington post office addressed as follows:

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CERTIFICATE OF HAND
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Dated: January 6, 2011.

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', is written over the firm name. The signature is fluid and cursive, with a large loop for the 'P' and a long horizontal stroke extending to the right.

PETER B. TILLER – WSBA #20835
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