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5 **IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
6 **DIVISION TWO**

7 KEONI EDWARD APO
8 fka JEREMY EDWARD GAINES,
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Petitioner,

NO.

PERSONAL RESTRAINT PETITION

vs

STATE OF WASHINGTON,
Respondent.

FILED
COURT OF APPEALS
DIVISION TWO
2019 FEB -5 PM 5:02
STATE OF WASHINGTON
DEPUTY

1. STATUS OF PETITIONER.

KEONI EDWARD APO, convicted under his former name of JEREMY EDWARD GAINES, is restrained pursuant to judgment and sentence entered in Pierce County Superior Court cause 13-1-02515-1 subsequent to convictions for Count II – Unlawful Possession of a Firearm, Count III - unlawful solicitation to deliver a controlled substance with a firearm sentencing enhancement, and Count V - conspiracy to deliver a controlled substance with a firearm sentencing enhancement. Appendices A, B. On Count II, the court sentenced the defendant to 116 months and on counts III and V, which the court found to be most serious offenses under the persistent offender statute, the court sentenced the defendant to life without parole.

The defendant filed a direct appeal which was denied. Appendix C. The mandate was filed on February 3, 2017. Appendix D.

This personal restraint petition is timely filed.

APO PERSONAL RESTRAINT
PETITION

BARBARA COREY, ATTORNEY, PLLC
902 South 10th Street
Tacoma, WA 98405
253.779.0844

1
2 2. GROUND FOR RELIEF.

3 To prevail on a collateral attack on a judgment and sentence by way of a personal
4 restraint petition, a petitioner generally must first establish that a constitutional error has
5 occurred and it has resulted in actual and substantial prejudice or that a nonconstitutional error
6 has caused a complete miscarriage of justice. *In re Pers. Restraint of Grantham*, 168 Wn.2d 204,
7 212, 227 P.3d 285 (2010) (quoting *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d
8 390 (2004)).

9 I. TRIAL COUNSEL FAILED TO PROVIDE EFFECTIVE ASSISTANCE OF
10 COUNSEL.

11 To prevail on an ineffective assistance of counsel claim, a criminal defendant must
12 demonstrate (1) deficient performance by counsel and (2) resulting prejudice. *Strickland v.*
13 *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

14 Courts presume counsel's representation was effective. *Strickland*, 466 U.S. at 689; *State*
15 *v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The presumption is rebutted if there
16 is no possible tactical explanation for counsel's action. *State v. Reichenbach*, 153 Wn.2d 126,
17 130, 101 P.3d 80 (2004). Legitimate trial tactics or strategy cannot form the basis for an
18 ineffective assistance of counsel claim. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185
19 (1994). *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

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1 a. Trial counsel was ineffective for failing to prepare and knowing that police in fact had
2 petitioner never allegedly delivered methamphetamine in any controlled buy and that
3 the police had poorly documented such “controlled buy.”

4 Maureena Dudschus of the Washington State Patrol Crime Laboratory tested the
5 substance taken by the police during the controlled buy. RP 140, 143. She determined that the
6 substance contained methylsulfonylmethane, or MSM, a dietary supplement, that is not
7 methamphetamine. RP 143. She testified that by “eyeballing” the substance, she could have
8 thought it was methamphetamine because it also is a white crystalline type material. RP 145-146.
9 She testified that MSM sometimes is used as cutting agent with methamphetamine. RP 146.

10 TPD Officer Schultz testified that Exhibit 1, the substance recovered in the controlled
11 buy on June 3, 2013 was field tested and field tested positive for methamphetamine. RP 33, 35,
12 37.

13 Petitioner insisted to trial counsel from the on-set of the case that he not possessed or
14 delivered methamphetamine to anyone. Appendix E -Declaration of Petitioner. He urged counsel
15 to have the substance the tested by a defense expert. *Id.* Had this been done, the State would have
16 had to dismiss Count I – unlawful delivery of a controlled substance – methamphetamine and
17 also likely would have dismissed the Counts III – V [unlawful solicitation to deliver a controlled
18 substance; conspiracy to deliver a controlled substance; and conspiracy to deliver a controlled
19 substance].

20 This case began after police erroneously contended that they had performed a field test on
21 the substance in question and the field test yielded a positive result. However, close examination
22 of the testimony affirms that no field test was done. Officer Schultz carefully testified that “he”
23 did not perform the field testing. RP 35. In his testimony, he carefully distinguished between
24 acts that he personally performed with the use of the pronoun “I” and acts that the police team
25

1 assigned to the controlled buy performed with the pronoun “we”. *E.g.*, RP 31-35. He testified
2 [after identifying the item as the substance purchased by the CI from Handlen who had
3 purchased it from Gaines], “. . .so when I took it from the C.I., we field tested it. it states here it
4 field tested positive, the weight, which was 6.4 grams, so it was weighed, field-tested, placed
5 immediately in the sealed bag, again with case number, *my initials because I was the case agent,*
6 and then the same bar code and evidence, *but it’s my name because I was the one who initially*
7 *placed it into property here.*” RP 35.

8
9 Schultz testified that he was not certain that he had very specific information about where
10 the gun was found on the driver’s side floorboard, except that it was found by the driver’s feet.
11 RP 47. When asked if he was certain of that, he said, “Not really.” RP 47. He refreshed his
12 memory by reading from his report which clearly contained information from other officers
13 because Schultz also acknowledged that at time of the warrant stop on June 20, 2013, he was in
14 the rear of the van, staying out of sight until the other units were ready for the take down and
15 moving into position. RP 94.

16 Based on information from other officers that he had put in his report, Schultz testified
17 that there was a gun down by the driver’s floorboard and there was some movement there,
18 meaning that he was making a motion down there. RP 47. Schultz wrote in his report that what
19 directed their attention down there is that petitioner placed the firearm down there with his hands
20 “*because, like I said, I was watching his hands.*” RP 47, 48.

21
22 Schultz acknowledged that he included in his report observations made by others without
23 so identifying them as not his own. RP 87-88. For example, he described in detail the transaction
24 at which Handlen obtained the “bunk” although he did not observe it. RP 87. He also
25 acknowledged that he had not seen petitioner at that time. RP 88.

1 Schultz recalled that Gaines was the registered owner of the car but that the bank was the
2 legal owner. RP 89.

3
4 b. Had trial counsel known that police had not done a controlled buy where petitioner
5 delivered methamphetamine, trial counsel could have and should have moved to
6 exclude all evidence that a sale of fake drugs was corroborative evidence of any
7 propensity to deliver drugs and further moved to exclude all testimony regarding any
8 such sale.

9 Jessica Handlen, the civilian who participated in the “controlled buy”, recalled that it
10 probably occurred in May. RP 207. She was “pretty certain” about this. *Id.* although she had
11 been charged with dealing methamphetamine to a police informant on June 3, 2013, a day when
12 police saw her with petitioner, she did not remember that event. RP 209. During this time,
13 Handlen was using probably half an ounce of meth a day as well as heroin, working as a
14 prostitute and a police informant. RP 210, 213. Police wanted her to turn in petitioner but she
15 would not. RP 214.

16 She had pleaded guilty to delivering methamphetamine to police on June 3, 2013, but she
17 did not know that the substance she delivered in fact was not even methamphetamine. RP 214.

18 However, when the prosecutor showed her Exhibit 1, the substance admitted into evidence
19 as that from the controlled buy, she described it as appearing like “bunk” or “garbage.” RP 217.

20 She previously had told defense counsel that she had no testimony to give against
21 petitioner however she testified that she was testifying at trial against him because the deputy
22 prosecutor and her own attorney told her she would go to jail if she did not. RP 215.

23 Officer Schultz had not observed the dealings between Handlen and petitioner. RP 31-35, 87-
24 88.

1 Thus there is no reliable evidence in the record regarding what, if anything transpired
2 between the two of them, and trial counsel should have heeded petitioner's insistent and wise
3 advice to prepare for the suppression hearing and the trial. In this case, petitioner's knowledge
4 of the substance was critical. He urged counsel to prepare and counsel did not. As a result,
5 damning, irrelevant and unfairly prejudicial evidence was admitted.
6

7 c. Had trial counsel known that police had not done a controlled buy where petitioner
8 never delivered methamphetamine, trial counsel could have and should have moved
9 to exclude all evidence that petitioner had cash on his person where that cash could
10 not be shown to be related to any drug transactions.

11 Petitioner had \$657.00 on his person when he was arrested. RP 121. The denominations of
12 the cash were four \$100 bills, eleven \$20 bills, two \$10 bills, and 17 \$1 bills. RP 122. At most,
13 police might have been able to connect it to the sale of a legal dietary supplement.

14 Instead, the court allowed the State to adduce testimony that this money could be the
15 proceeds from selling methamphetamine which petitioner would have purchased from Mexicans
16 on a "payment plan." Police maintained that petitioner stated that he was "a runner" for the
17 Mexicans and that he was enroute to pick up "two pounds." RP 61, 62. Petitioner never said
18 whether he was picking up two pounds of enchiladas, clean laundry, or what. *Id.* However,
19 police jumped to the conclusion that he was picking up methamphetamine, although even with
20 the money order Brandon Ryan had just sent [\$900], he would not have paid sufficient funds for
21 one kilo of meth. Police did not consider Ryan culpable in any drug transaction despite his
22 sending of money to Mexico on the date of the offense.
23
24
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1 Given the dearth of evidence that petitioner was involved in any drug dealing, trial counsel
2 should have had the alleged controlled substance tested as petitioner insisted and discovered the
3 great weaknesses in the State's case. Defense counsel should move to exclude the State's
4 speculation that defendant's cash came from drug proceeds where there was no evidence to
5 support that and that baseless speculation was damning, irrelevant and unfairly prejudicial.
6

7 d. Trial counsel was ineffective for failing to adduce evidence that petitioner is legally
8 disabled under the Americans with Disabilities Act cannot work, and therefore for
9 failing to adduce evidence to establish that petitioner in fact received money from
10 lawful sources during the charged period , was not dependent on criminal acts as a
11 source of funds, especially where the deputy prosecutor repeatedly and erroneously
12 referred to petitioner as unemployed.

13 Petitioner is a disabled person and has been recognized as such by the State of
14 Washington since October 24, 1996. [Appendix F]. As the result of his disability, he receives
15 monthly payments from the State of Washington.

16 These vary in amount. [Obviously he does not receive any payments when incarcerated.]
17 However he has at times had custody of my son and he also has tried to work to make extra some
18 money to support himself and his family. He did temp work in 2008 and 2009 doing light
19 janitorial work, and has attached pay stubs to prove this. Appendix G. He has saved small
20 amounts of money when possible and also received money as gifts from family over the years. I
21 made a down payment on the Dodge Charger with these funds and financed it with monthly
22 payments. He traded in an older car when he purchased that car as well.

23 ///

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1 He told his attorney about his permanent disability and his sources of income. Petitioner
2 told him about these matters long before the trial started because he wanted to prepare for every
3 possible issue that might come up and make certain that he had all of the papers and documents
4 needed for the defense. The attorney told him not to worry. He was well aware of petitioner's
5 permanent disability and limited financial ability. He knew that petitioner's family was pulling
6 together to pay his fee as petitioner could not afford to pay him by myself.

7
8 Defense counsel suggested only late in the trial that it might be good to have some
9 records relating to petitioner's disability. At that point, there was insufficient time to get them.

10 Throughout the trial, the deputy prosecutor referred to what he assumed to be petitioner's
11 lack of legal income/funds. For example, he initially sought to offer a receipt for jewelry, "You
12 know, I suppose someone who is unemployed and is buying extravagant purchases it might be
13 indicative that he has an illegitimate source of income, but I am not offering that receipt." RP 70.
14 The State offered and the trial court admitted wire transfers: Document One, from the
15 codefendant Brandon Ryan to Jesus Enrique Palomera in Mexico in the amount of \$1,000.00 on
16 June 20, 2013; Document Two, the receipt and actual transfer paper for Document One;
17 Document Three, a very faded wire transfer from petitioner in the amount of \$900 to an
18 unknown individual in an unknown location in Mexico as well as the receipt dated May 29, 2013
19 which shows the recipient's name to be Ana Ramos Cuevas in Jalisco, Mexico. RP 76-78.

20
21 The lead case officer, Albert Schultz of the Tacoma Police Department, had spent several
22 years working drugs cases as part of the department's narcotics and vice unit and also assigned to
23 TNET, the Tacoma Enforcement Team, that works with the Drug Enforcement Administration
24 [DEA]. RP 12-13.

1 Schultz had not previously heard the name Gaines as one that the Task Force was
2 targeting prior to the arrest, which he did not personally witness. RP 86-88. Schultz knows that it
3 is common for suspects to tell wild stories to try to get immunity to deal off potential charges.
4 RP 90.

5 Schultz knew that \$900.00 was not sufficient to purchase a kilo of meth or other drugs
6 from the Mexicans but he suggested that "it's just like a car, you can be making payments." TRP
7 90.66

8 Police did not find any drugs in petitioner's possession or in his car that night. RP 90. No
9 fingerprints were found on any firearms. RP 110. The State did not request examination for
10 possible DNA recovery and testing. RP 112. Thus the State relied on innuendo and smear to
11 prove its case.
12

13 The deputy prosecutor called Robert Page, the records officer for the Washington State
14 Department of Employment Security [DES] to determine whether or not petitioner was
15 employed by any employer that was paying into Workers Compensation. RP 172-173, 184-185.
16 DES records would show a wages report if petitioner was employed by anyone who was
17 contributing to workers' compensation or receiving unemployment benefits. RP 174. DES
18 records showed no wages reported or unemployment paid for petitioner for the period from
19 January 2012 through the end of December 2013. RP 184.
20

21 Page conceded that DES records would not show if a person was on Social Security
22 disability unless that person applied for unemployment. RP 185. DES would only attempt to
23 access those records only if the person applied for unemployment. RP 186.
24
25

1 In closing argument, the deputy prosecutor continued to focus on defendant's lack of
2 access to cash:

3 The evidence in this case, quite simply, in the spring and summer of 2013, Mr.
4 Gaines chose the easy way out, without a way to support himself, he chose to deal
5 drugs. He got caught, or he came to law enforcement's attention, on their radar if you
6 will, when he happened to get caught in a controlled buy on June 3rd of 2013, and he
7 really got caught when they arrested him on June 29th, and he chose to come clean
8 with the, to open up in the hopes of helping himself out in the process, calculated
9 gamble to telling them everything that he was involved in, hoping he could interest
10 them. He's here because he was involved in dealing drugs, he's here because
11 he was caught with a gun and so was Mr. Ryan, and that what this evidence has
12 shown.
13 RP 277-278.

14 The deputy prosecutor emphasized,

15 You know he's involved in large amounts of cash with no legitimate source.
16 Unemployed, no worker's compensation, no anything, no way of supporting himself,
17 but he's got thousands of dollars to send to Mexico. He's got \$638 in his pocket. He's
18 driving around in a new Dodge Charger. All of this, again, is consistent with what he
19 tells Officer Schultz. That is how he supports himself. This is what he's doing." RP
20 286.

21 The deputy prosecutor also argued, based on no evidence whatsoever,

22 The informant and Ms. Handlen don't have a relationship. Ms. Handlen
23 doesn't know the informant. She told you that she was in prison racking her brain
24 trying to figure out who it was. She doesn't know this informant, so she and Mr.
25 Gaines decide this person we don't know, we don't care about, just give him
bunk, just give him something that looks like methamphetamine. Easy money.
Mr. Gaines wasn't expecting to be dealing drugs. This was a last-minute thing., he
gets called to come drop off something, he drops off something, and sure enough,
he gives it to Ms. Handlen, who gives it to the informant . . . RP 291.

26 The deputy prosecutor's argument about Ms. Handlen and petitioner's making a plan to
27 sell "bunk" to the unknown informant is not based on any testimony whatsoever. RP 201-217. It
28 was not a reasonable or fair inference from the evidence.

1 Rather it was fabricated by the deputy prosecutor to sell his case to the jury. This is
2 impermissible, intentional, flagrant prosecutorial misconduct.

3 The police did not seize the Dodge Charger because it was owned by the bank, not by
4 petitioner. RP 307-308. The evidence was clear that petitioner did not own the car.

5 In rebuttal, the deputy prosecutor impermissibly argued that petitioner had a lengthy
6 history of drug dealing and setting up buys with the Mexicans.

7 This argument in part was intended to position him in the drug hierarchy but also to
8 explain his wealth:
9

10 Mr. Cross tells you, look at the dates, June 3rd, and June 20th. That's all we
11 care about. No, certain events happened on June 3rd. Certain events happened on June
12 20th. *Facts that occurred before June 3rd become relevant, like wiring money to*
13 *Mexico. Is this his first dance? Is this his first rodeo, June 3rd? No. Does he know*
14 *what he's doing? Is this something – is he a novice? No, because you look at the wire*
15 *receipt from May 29th. He has experience here. He knows what he's doing. It kind of*
16 *adds to this idea that he would sell bunk to kind of dupe the drug addict. It adds to the*
17 *idea that it's an ongoing enterprise for him. We just happen to know about a couple*
18 *of dates in particular.* RP 318.

19 In this case, trial counsel had no strategy for trial. Trial counsel had not read the
20 discovery or understood the Washington State Patrol Crime Laboratory report. In a case where
21 the defendant is charged with possession of a controlled substance, it is essential that defense
22 counsel understand whether or not the State has even charged the defendant with a crime. Here
23 the State had not done so. Defense counsel should have known this within weeks of getting this
24 case and should have sought appropriate relief. Defense counsel should have sought a material
25 witness warrant for Richard Thompson who had stated that the gun on the driver's side
floorboard was his gun.

1 Because he was seated directly behind petitioner, his testimony would have been
2 exculpatory because it would have been very easy for a firearm to move under the seat as the car
3 moved, turned, or stopped. Further, trial counsel, knowing that petitioner was legally disabled
4 and receiving support from the State, should have adduced evidence of this at trial to counter the
5 State's outrageous arguments that petitioner is a parasite who supports himself only by drug-
6 dealing. In addition, trial counsel violated his duty to his client when he made repeated motions
7 to withdraw, at least for inability to communicate with petitioner, and yet, after being ordered to
8 stay on the case, continued to fail to communicate with petitioner throughout the trial.
9

10 At petitioner's motion for new counsel, while trial counsel was still petitioner's attorney,
11 trial counsel should have acted to ensure that petitioner's arguments were heard by the court.

12 B. PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO ARGUE
13 HIS MOTION FOR REPRESENTATION BY THE ATTORNEY OF HIS CHOICE IN
14 THE SUPERIOR COURT.

15 In *State v. Gaines*, No. 46852-2-II 9 [conviction underlying this appeal], petitioner filed
16 multiple motions for discharge of Mr. Cross. Appendix H . Mr. Cross Filed motions as well.
17 Appendix I.

18 Although the court heard from Mr. Cross and later Ms. Corey, the trial court never
19 allowed petitioner to address the court. Petitioner would have addressed his concerns that he
20 required new counsel to prepare for trial regarding the forensic tests, preparing a case strategy,
21 subpoenaing witness Richard Thompson, subpoenaing records regarding his disabilities and
22 finances – all of which he believed were critical to his defense and none of which were done.
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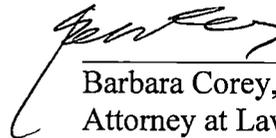
1 Petitioner believed and continues to believe that he was denied his constitutional right to
2 counsel of his choice. Petitioner believes and continues to believe that different counsel would
3 have resulted in a different outcome at trial. See appendix E.

4 3. CONCLUSION.

5
6 For the foregoing reasons, petitioner respectfully asks this court to grant the relief requested
7 herein.

8
9
10 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
11 WASHIGTON THAT I AM THE ATTORNEY FOR PETITIONER KEONI EDWARD APO,
12 CONVICTED UNDER HIS FORMER LEGAL NAME OF JEREMY EDWARD GAINES,
13 THAT I HAVE READ THE PETITION, KNOW ITS CONTENTS, AND I BELIEVE THE
14 PETITION IS TRUE.

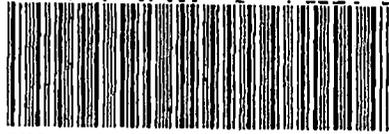
15 *Signed in Tacoma, Washington on February 5, 2018*

16 

17 _____
18 Barbara Corey, WSB#11778
19 Attorney at Law

APPENDIX A

CERTIFIED COPY



FILED
IN COUNTY CLERK'S OFFICE

SEP 15 2017

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY [Signature] DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

DEPT. 5
IN OPEN COURT

SEP 15 2017

Pierce County Clerk

In re the Name Change of:) NO. 17-2-10432-4 /
JEREMY EDWARD GAINES,) ORDER CHANGING NAME
Petitioner,)

THIS MATTER coming on regularly for a hearing, petitioner being represented by Geoffrey Cross, the petitioner being in prison. Good cause appearing, now therefore, it is hereby

ORDERED, ADJUDGED and DECREED that the name of petitioner is changed to Keoni Edward Apo, and upon payment of the appropriate fees the Clerk of the Court shall file this Order with the County Auditor.

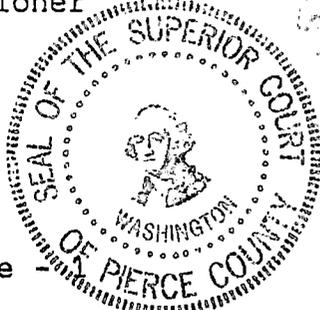
DATE: September 15, 2017

[Signature]
JUDGE

Presented by:

[Signature]
GEOFFREY C. CROSS, WSB #3089
Attorney for Petitioner

Seal of the County of Pierce
Washington
SEP 29 2017



Order Changing Name

LAW OFFICES OF
GEOFFREY C. CROSS, P.S., INC.

901 80.1 STREET #202
TACOMA, WASHINGTON 98405
TELEPHONE: (253) 872-8988
FAX: (253) 872-8948
G.CROSS1840@YAHOO.COM

0280

9/19/2017 2171

ORIGINAL

August 28 2017 2:06 PM

KEVIN STOCK
COUNTY CLERK
NO: 17-2-10432-4

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8 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
9 IN AND FOR PIERCE COUNTY

10 In re the Name Change of:) NO. 17-2-10432-4
11 JEREMY EDWARD GAINES,)
12) DECLARATION OF
13) GEOFFREY CROSS
14)

15 Geoffrey Cross, under penalty of perjury, deposes and states
16 that attached are relevant records from the district court. The
17 Department of Corrections and the State of Washington Attorney
18 General were put on notice of this hearing. Mr. Gaines was
19 incarcerated in the Pierce County Jail at the time he started
20 this case. He wished to change my name for two reasons. The
21 last name Apo is the name of his biological father who is
22 deceased. Two, the prosecutor stated to the press that he had
23 been offering to inform on other defendants. This put his life
24 in danger.

25 He has lost a three strike case and a subsequent felony and
26 is probably going to be in prison for the rest of his life unless
27 he wins his appeal which was lost in the first round at the Court

28 Declaration of
Geoffrey Cross - 1

LAW OFFICES OF
GEOFFREY G. CROSS, P.S., INC.

901 SO. I STREET #202
TACOMA, WASHINGTON 98405
TELEPHONE: (253) 272-8998
FAX: (253) 572-8548
G.CROSS1840@YAHOO.COM

1
2 of Appeals, Division II. I have been his attorney for forty
3 years and was present at the hearing. The Court Commissioner
4 came up with all sorts of rationalizations of why he should not
5 change his name and finally denied it based on jurisdiction only.

6 Clearly this case was started when he was a resident of
7 Pierce County. He is involuntarily a resident of another county
8 and the court should allow him to change his name. There was no
9 opposition. Attached are the relevant documents for this case.

10 DATED at Tacoma, WA this 20 day of August 2017.

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13 _____
14 Geoffrey C. Cross, WSB #3089
15 Attorney for Petitioner

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28 Declaration of
Geoffrey Cross

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APPENDIX B



FILED
DEPT. 15
IN OPEN COURT
OCT 31 2014
By *[Signature]*
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 13-1-02515-1

vs.

JEREMY EDWARD GAINES,

Defendant.

WARRANT OF COMMITMENT

- 1) County Jail
- 2) Dept. of Corrections
- 3) Other Custody

OCT 31 2014

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

- [] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).
- 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

11/3/2014 3:91:21 0010

1
2 [] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for
3 classification, confinement and placement as ordered in the Judgment and Sentence.
4 (Sentence of confinement or placement not covered by Sections 1 and 2 above).

5 Dated: 10.31.14

By direction of the Honorable

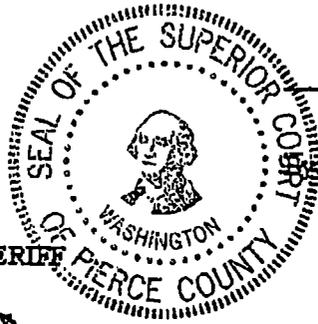
[Signature]

JUDGE
KEVIN STOCK Thomas J. Feinagle

CLERK

[Signature]

DEPUTY CLERK



CERTIFIED COPY DELIVERED TO SHERIFF

10 OCT 31 2014 by *[Signature]*

11 STATE OF WASHINGTON

ss:

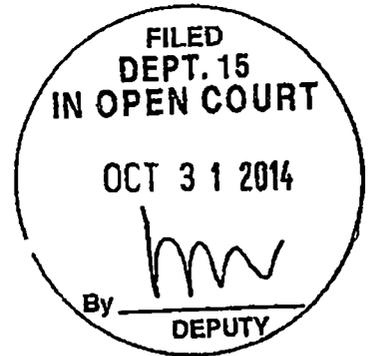
12 County of Pierce

13 I, Kevin Stock, Clerk of the above entitled
14 Court, do hereby certify that this foregoing
15 instrument is a true and correct copy of the
16 original now on file in my office.
17 IN WITNESS WHEREOF, I hereunto set my
18 hand and the Seal of Said Court this
19 _____ day of _____

20 KEVIN STOCK, Clerk

21 By: _____ Deputy

22 ajm



11/3/2014 3:12 PM

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

FILED
DEPT. 15
IN OPEN COURT
OCT 31 2014
BY *[Signature]*
DEPUTY

STATE OF WASHINGTON,

Plaintiff, CAUSE NO. 13-1-02515-1

vs.

JEREMY EDWARD GAINES

Defendant.

JUDGMENT AND SENTENCE (JIS)

- Prison
- RCW 9.94A.712-9.94A.507 Prison Confinement
- Jail One Year or Less
- First-Time Offender
- Special Sexual Offender Sentencing Alternative
- Special Drug Offender Sentencing Alternative
- Alternative to Confinement (ATC)
- Clerk's Action Required, para 4.5 (SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8
- Juvenile Decline Mandatory Discretionary

OCT 31 2014

SID: WA15619093
DOB: 07/29/1978

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 10/29/14 by [] plea [X] jury-verdict [] bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
II	UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE (GGG66)	9A.1.040(1)(a)	NONE	06/03/13	TACOMA PD 131540708
III	UNLAWFUL SOLICITATION TO DELIVER A CONTROLLED SUBSTANCE (J80-S)	69.50.401(1)(2)(a) - D 9A.28.030	FASE	06/20/13	TACOMA PD

141-9-10753-7

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
V	CONSPIRACY TO DELIVER A CONTROLLED SUBSTANCE (J80-C)	69.50.401(1)(2)(a) - D 69.50.407	FASE	06/03/13	131540708

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VE) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW 9.94A.533(8). (If the crime is a drug offense, include the type of drug in the second column.)

as charged in the Jury Verdict Information

- A special verdict/finding for use of firearm was returned on Count(s) III and V RCW 9.94A.602, 9.94A.533.
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

COUNT NO	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADLT JUV	TYPE OF CRIME
1	PSP 2	03/16/92	Pierce Co., WA	10/14/91	J	NV
2	BURG 1	09/24/92	Pierce Co., WA	08/09/92	J	V
3	UPFA	04/22/93	Pierce Co., WA	05/10/93	J	NV
4	RES BURG	04/22/93	Pierce Co., WA	05/10/93	J	NV
5	UPFA BY A MINOR	07/10/95	Pierce Co., WA	05/22/95	J	NV
6	ASLT 2 W/FASE	02/05/98	Pierce Co., WA	10/23/96	A	V
7	ASLT 2	02/05/98	Pierce Co., WA	10/23/96	A	V
8	ASLT 3	12/06/02	Pierce Co., WA	01/03/02	A	NV
9	UPFA 1	12/06/02	Pierce Co., WA	01/03/02	A	NV
10	ASLT 2 W/DWSE	12/06/02	Pierce Co., WA	09/05/02	A	V
11	UPFA 1	12/06/02	Pierce Co., WA	09/05/02	A	NV

- The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

SENTENCING DATA:

SCORE	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
II	9	VI	87-116 MOS	NONE	87-116 MOS	10 YEARS
III	9	VIII	75+90 MOS	FASE	111-126 MOS	5 YEARS
IV	9	III	100+120 MOS	FASE	172-192 MOS	10 YEARS

Life w/o possible of early release if persistent offender

[] EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence.

[] above the standard range for Count(s) _____

[] The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence further and is consistent with the interests of justice and the purposes of the sentencing reform act.

[] Aggravating factors were [] stipulated by the defendant, [] found by the court after the defendant waived jury trial, [] found by jury by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4. [] Jury's special interrogatory is attached. The Prosecuting Attorney [] did [] did not recommend a similar sentence.

ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

[] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

[] The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

[] **FELONY FIREARM OFFENDER REGISTRATION.** The defendant committed a felony firearm offense as defined in RCW 9A.1.010.

[] The court considered the following factors:

[] the defendant's criminal history;

[] whether the defendant has previously been found not guilty by reason of insanity of any offense in this state or elsewhere.

[] evidence of the defendant's propensity for violence that would likely endanger persons.

[] other: _____

[] The court decided the defendant [] should [] should not register as a felony firearm offender.

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1

[] The court DISMISSES Counts _____

Possess Methamphetamine w/Intent to Deliver w/FASE, on double jeopardy grounds given

JUDGMENT AND SENTENCE (JS) the conviction in Count III for Solicitation to Deliver Methamphetamine w/FASE. Page 3 of 9

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

- RTNRJN \$ _____ Restitution to: _____
- \$ _____ Restitution to: _____
(Name and Address--address may be withheld and provided confidentially to Clerk's Office).
- PCV \$ 500.00 Crime Victim assessment
- DNA \$ 100.00 DNA Database Fee
- PUB \$ _____ Court-Appointed Attorney Fees and Defense Costs
- FRC \$ 200.00 Criminal Filing Fee
- FCM \$ _____ Fine

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

- \$ _____ Other Costs for: _____
- \$ _____ Other Costs for: _____
- \$ 800.00 TOTAL

- The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:
 - shall be set by the prosecutor.
 - is scheduled for _____
- RESTITUTION. Order Attached

- The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).
- All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ Per DOC per month commencing. Per DOC. RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b)

- COSTS OF INCARCERATION. In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

COSTS ON APPEAL. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.160.

FILED
11/13/2014
FILED

1
2 4.1b **ELECTRONIC MONITORING REIMBURSEMENT.** The defendant is ordered to reimburse
_____ (name of electronic monitoring agency) at _____
3 for the cost of pretrial electronic monitoring in the amount of \$_____.

4 4.2 **DNA TESTING.** The defendant shall have a blood/biological sample drawn for purposes of DNA
5 identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the
6 county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from
7 confinement. RCW 43.43.754.

8 **HIV TESTING.** The Health Department or designee shall test and counsel the defendant for HIV as
9 soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

10 4.3 **NO CONTACT**

11 The defendant shall not have contact with _____ (name, DOB) including, but not
12 limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to
13 exceed the maximum statutory sentence).

14 Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection
15 Order is filed with this Judgment and Sentence.

16 4.4 **OTHER:** Property may have been taken into custody in conjunction with this case. Property may be
17 returned to the rightful owner. Any claim for return of such property must be made within 90 days. After
18 90 days, if you do not make a claim, property may be disposed of according to law.

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29 4.4a All property is hereby forfeited

30 Property may have been taken into custody in conjunction with this case. Property may be returned to
31 the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if
32 you do not make a claim, property may be disposed of according to law.

33 4.4b **BOND IS HEREBY EXONERATED**

4.5 **CONFINEMENT OVER ONE YEAR: PERSISTENT OFFENDER.** The defendant was found to be a Persistent Offender.

The court finds Counts III and V is a most serious offense and that the defendant has been convicted on at least two separate occasions of most serious offense felonies, at least one of which occurred before the commission of the other most serious offense for which the defendant was previously convicted.

The court finds Count _____ is a crime listed in RCW 9.94A.030(31)(b)(i) (e.g., rape in the first degree, rape of a child in the first degree (when the offender was sixteen years of age or older when the offender committed the offense), child molestation in the first degree, rape in the second degree, rape of a child in the second degree (when the offender was eighteen years of age or older when the offender committed the offense) or indecent liberties by forcible compulsion; or any of the following offenses with a finding of sexual motivation: murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree or burglary in the first degree; or an attempt to commit any crime listed in RCW 9.94A.030(31)(b)(i)), and that the defendant has been convicted on at least one separate occasion, whether in this state or elsewhere, of a crime listed in RCW 9.94A.030(31)(b)(i) or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in RCW 9.94A.030(31)(b)(i).

Those prior convictions are included in the offender score as listed in Section 2.2 of this Judgment and Sentence. RCW 9.94A.030, RCW 9.94A.

(a) **CONFINEMENT.** RCW 9.94A.570 and RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections:

Life without the possibility of early release on Count III and V
116 months on Count II
____ months on Count _____
____ months on Count _____

Actual number of months of total confinement ordered is: Life without the possibility of early release.

(b) **CONSECUTIVE/CONCURRENT SENTENCES.** RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively:

The sentence herein shall run consecutively to all felony sentences in other cause numbers that were imposed prior to the commission of the crime(s) being sentenced.

The sentence herein shall run concurrently with felony sentences in other cause numbers that were imposed subsequent to the commission of the crime(s) being sentenced unless otherwise set forth here.

The sentence herein shall run consecutively to the felony sentence in cause number(s) _____

The sentence herein shall run consecutively to all previously imposed misdemeanor sentences unless otherwise set forth here: _____

Confinement shall commence immediately unless otherwise set forth here: _____

4.6 **OTHER:** _____

V. NOTICES AND SIGNATURES

5.1 COLLATERAL ATTACK ON JUDGMENT. Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 LENGTH OF SUPERVISION. For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505. The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 NOTICE OF INCOME-WITHHOLDING ACTION. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 RESTITUTION HEARING.

[] Defendant waives any right to be present at any restitution hearing (sign initials): _____

5.5 CRIMINAL ENFORCEMENT AND CIVIL COLLECTION. Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

5.6 FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.7 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200.
N/A

5.8 [] The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

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5.10 OTHER: _____

DONE in Open Court and in the presence of the defendant this date: 10.31.14

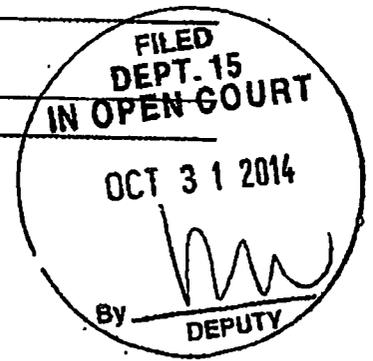
JUDGE
Print name

[Signature]
Thomas J. Feinagle

[Signature]
Deputy Prosecuting Attorney
Print name: Jesse Williams
WSB # 35543

Attorney for Defendant
Print name: _____
WSB # _____

[Signature]
Defendant
Print name: _____



VOTING RIGHT'S STATEMENT: RCW 10.64.140. I acknowledge that my right to vote has been lost due to felony convictions. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: [Signature]

CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 13-1-02515-1

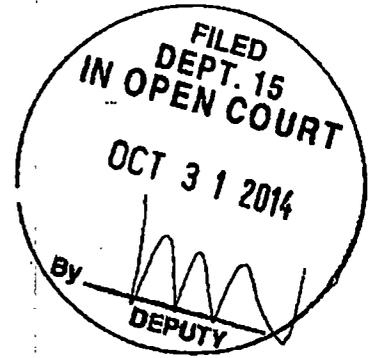
I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF COURT REPORTER

Sheri Schelbert
Court Reporter



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IDENTIFICATION OF DEFENDANT

SID No. WA15619093
(If no SID take fingerprint card for State Patrol)

Date of Birth 07/29/1978

FBI No. 521592EB3

Local ID No. CHRI#863280001

PCN No. 541005978

Other

Alias name, SSN, DOB:

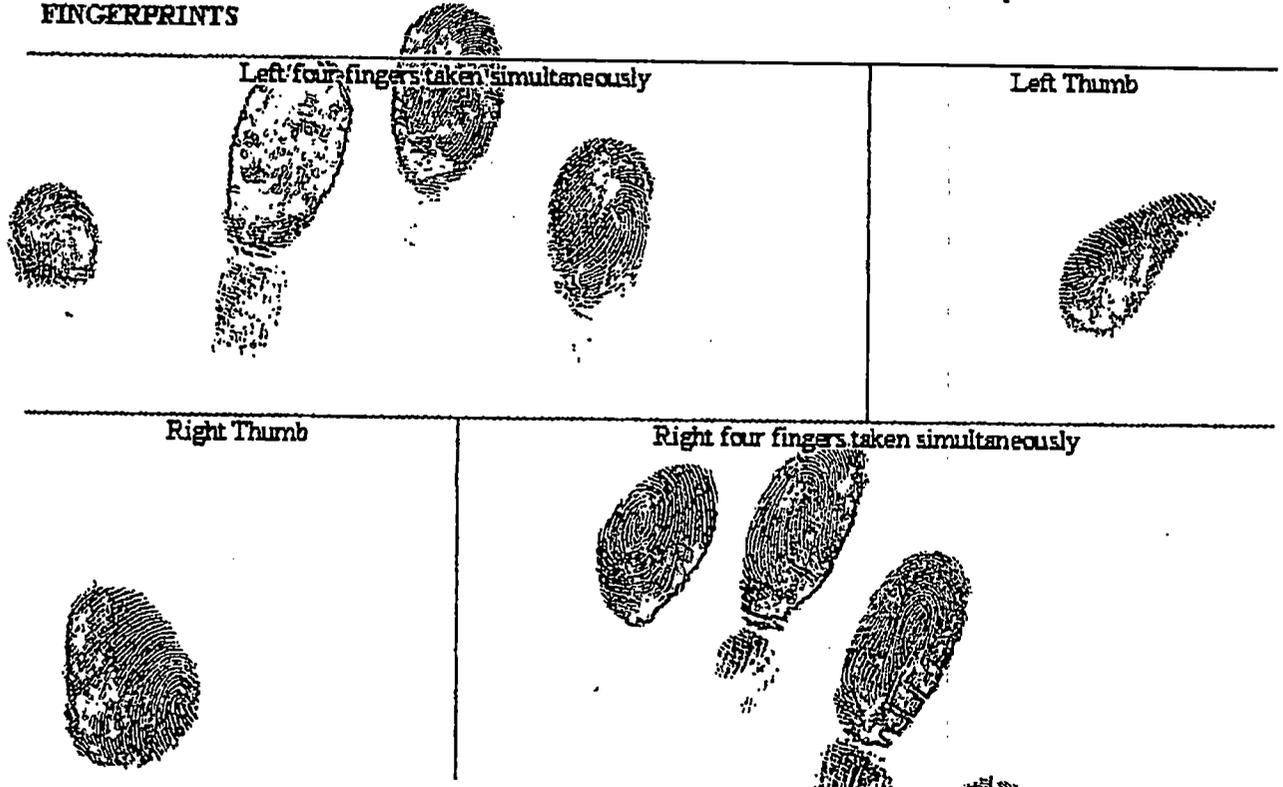


Race: Asian/Pacific Islander Black/African-American Caucasian Native American Other: :

Ethnicity: Hispanic Non-Hispanic

Sex: Male Female

FINGERPRINTS



I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, [Signature] Dated: 31. Oct. 14

DEFENDANT'S SIGNATURE: [Signature]

DEFENDANT'S ADDRESS: [Signature]

JUDGMENT AND SENTENCE (JS)
(Felony) (7/2007) Page ____ of ____

0021
11/13/2014
391211

APPENDIX C

State v. Gaines

Court of Appeals of Washington, Division Two
February 25, 2016, Oral Argument; May 3, 2016, Filed
No. 46852-2-II

Reporter
2016 Wash. App. LEXIS 955 *

THE STATE OF WASHINGTON, *Respondent*, v. JEREMY
EDWARD GAINES, *Appellant*.

Notice: RULES OF THE WASHINGTON COURT OF
APPEALS MAY LIMIT CITATION TO
UNPUBLISHED OPINIONS. PLEASE REFER TO
THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at *State v. Gaines, 2016*
Wash. App. LEXIS 1108 (Wash. Ct. App., May 3, 2016)

Prior History: [*1] Appeal from Pierce County
Superior Court. Docket No: 13-1-02515-1. Judge
signing: Honorable Bryan Chushcoff. Judgment or order
under review. Date filed: 10/31/2014.

Core Terms

controlled substance, deliver, continuance, solicitation,
conspiracy, firearm, methamphetamine, argues, convict,
trial court, search warrant, motions, front, assigned
error, wire transfer, criminalizes, insufficient evidence,
unlawful possession, first degree, reasonable inference,
sufficient evidence, private counsel, competency,
delivery, requires, replace, wire, gun, motion for
continuance, substantial step

Counsel: For Appellant: Barbara L. Corey, Tacoma,
WA.

For Respondent: Jason Ruyf, Pierce County Prosecutor's
Office, Tacoma, WA.

Judges: Authored by Thomas R Bjorgen. Concurring:
Bradley A. Maxa, Lisa Sutton.

Opinion by: Thomas R Bjorgen

Opinion

¶1 BJORGEN, C.J. — Jeremy Edward Gaines appeals his convictions for solicitation to deliver a controlled substance, conspiracy to deliver a controlled substance, first degree unlawful possession of a firearm, and the firearm enhancements attached to the first two convictions.

¶2 Gaines argues that (1) insufficient probable cause supported the warrant to search his vehicle, (2) the trial court abused its discretion in denying his motion for continuance, effectively depriving him of his right to choose private counsel, (3) solicitation to deliver a controlled substance is not criminalized, and (4) the State presented insufficient evidence to allow a jury to return guilty verdicts on his convictions.

¶3 We decline to address the merits of Gaines's search warrant argument, because it was not adequately addressed in his briefing. As to [*2] his other arguments, we hold that the trial court did not abuse its discretion in declining his motion for continuance, that *chapter 9A.28 RCW* criminalizes solicitation to deliver a controlled substance, and that there is sufficient evidence to uphold all of his convictions.

¶4 Accordingly, we affirm.

FACTS

¶5 On June 3, 2013, police used a confidential informant (CI) to conduct a controlled buy¹ from Jessica Handlen.

¹ According to the record, a "controlled buy" is where police officers arrange [*3] and observe a drug transaction to acquire information about potential illegal drug activity. Verbatim Report of Proceedings

Police observed the CI and Handlen meet and watched Handlen explain to the CI that she was waiting for her "source." Verbatim Report of Proceedings (VRP) at 28-29. Shortly thereafter, a white Dodge Charger pulled up near Handlen and the CI. The vehicle was registered to Gaines and officers identified the driver in the vehicle as Gaines. Police observed Handlen go up to the driver's side window for a brief moment and then return to the CI. The CI returned to the police and gave them a package received from Handlen, which field tested at the time as 6.4 grams of methamphetamine. However, it was later discovered that this substance was in fact methylsulfonylmethane, a legal substance that is often mixed with methamphetamine.²

¶6 On June 20, police stopped Gaines's Dodge Charger in order to execute a search warrant. As police surrounded the vehicle, three occupants were identified, including Gaines in the driver's seat and Brandon Ryan in the front passenger seat. Police observed Gaines's hands make a downward motion in front of himself and later found a gun placed on the front floorboard on the driver's side in front of Gaines. Police also later found a second gun on the front floorboard of the front passenger's side in front of Ryan.

¶7 Upon arrest, Gaines made several statements to the police. He acknowledged that he dealt narcotics but that "he was a small fish ... [as] a runner³ for [*4] the Mexicans." VRP at 60-61. He stated that he was "[w]iring the money to Mexico for the dope man" and was "supposed to be picking up two pounds." *Id.* at 62, 65.

¶8 The police found wire transfer receipts during their search of Gaines's vehicle. The first receipt was dated May 29, 2013, four days before Gaines was observed

(VRP) at 19-20.

²The State expected an expert to testify that the drugs from the June 3 transaction were methamphetamine. However, at trial, a state patrol laboratory forensic scientist testified that it was a purely legal substance, often used to "cut" methamphetamine. VRP at 140, 143, 145-46. Thus, Gaines was subsequently charged with delivery of an imitation controlled substance. The jury later acquitted Gaines of this charge.

³According to the record, a "runner" is someone who gets paid to broker deals for a higher level person or entity in a drug operation. VRP (Oct. 21, 2014) at 61. They often transport drugs from one person to another and then give money back to the higher level person or entity in exchange for the drugs.

contacting Handlen on June 3. The May 29 receipt indicated that Gaines sent \$900 to an Ana Ramos Cuevas in Mexico. The second wire transfer receipt was dated June 20, 2013, the same day Gaines and Ryan were arrested. The June 20 receipt indicated that Ryan had sent \$1,000 to a Jesus Enrique Palomera in Mexico.

¶9 After the State charged Gaines for his involvement in these crimes, he requested that Gary Clower, a privately retained attorney, replace his assigned public defender. The judge granted the request on July 2, 2013. After the prosecutor and Clower jointly requested and received two continuances, Gaines [*5] replaced Clower with a new private attorney, Geoffrey Cross. With Cross as Gaines's counsel, the case was continued six times. Two of the continuances were requested solely by the prosecutor to accommodate his trial schedule,⁴ but most were requested by both parties.⁵

¶10 Gaines voluntarily retained Cross for approximately seven months, but on May 7 and 8, 2014, Gaines and Cross respectively moved to have Cross replaced. At the time, Cross had also [*6] filed a motion for a competency evaluation of Gaines. On May 15, the trial court heard arguments and granted the competency evaluation. However, the court denied the motion for substitution of counsel, reasoning that the trial date was too close and that "if there are questions about his competence, this certainly isn't the time for him to be making a decision about withdrawing counsel." VRP (May 15, 2014) at 30-31. Gaines later spent some time at Western State Hospital until his competency was deemed restored a few months later.

¶11 Shortly after Gaines's competency was restored, Cross moved to withdraw as counsel twice, stating that Gaines maintained he did not want Cross's

⁴On Jan 15, 2014, Gaines's case was continued to accommodate the prosecutor's trial schedule. On May 1, the case was continued at the State's request due to the prosecutor being in another trial.

⁵On Jan 27, 2014 both parties requested a continuance to complete discovery and to accommodate the prosecutor's trial schedule. On March 11, the case was continued because Gaines's co-defendant's attorney was sick. On March 17, the case was continued because of "[defense] attorney & [plaintiff] atty conflicts." Reply Br. of Appellant, App'x F. On April 7, the case was continued because new charges had been brought against Gaines while he had been out on bail, the attorneys needed more time to prepare for trial, and the primary police witness was unavailable.

representation.⁶ Cross's affidavits to these motions stated that he had a "fairly good relationship" with Gaines until May when Gaines requested him to be discharged. Clerk's Papers (CP) at 330. Cross expressed that when he had the prosecutor meet with Gaines and himself, Gaines took "excessive exception to the fact that [he] even exposed him to the prosecutor." CP at 330. Cross also stated that when he tried to go to the jail to prepare for trial, Gaines refused to allow him access to the jail. To Cross, "[a]ll communication between [him]self and [] Gaines ha[d] broken [*7] down." *Id.* Meanwhile, the trial court granted two more jointly sought continuances,⁷ and trial was ultimately set for October 16, 2014. At this point, Gaines's case had been continued for over a year from the original trial date of August 13, 2013.

¶12 On the day set for trial, October 16, 2014, the court heard Gaines's and Cross's renewed motion for a continuance and counsel substitution in conjunction with Barbara Corey, who was a private attorney with whom Gaines wanted to replace Cross. The court ultimately denied the motions. When the court asked Corey if she could try the case before the end of the year, she replied, "I think not." VRP (Oct. 16, 2014) at 12. Although Corey stated that she could try the case [*8] in February 2015, the court disagreed based on Corey's caseload, which contained many cases that were all nearing a year old or more and would soon require resolution. The court stated that even "if half of them settled ... [i]t would still take a year to try this one." *Id.* at 9. It further noted that the Gaines case itself was already "very old" and that if it had only been "a 30-day-old, 60-day-old, 90-day-old case, that's something else." *Id.* at 19. The court also had concerns about the right of Ryan, Gaines's co-defendant, to a speedy trial, even though Ryan himself was not worried about a few more months' delay. The trial court also noted that Cross's motions to substitute had been denied at least "twice"⁸ previously, *id.* at 18, and that if Gaines

⁶Cross moved to withdraw another time as well, before Gaines's competency was restored.

⁷On September 17, 2014, the case was continued again because "additional time [was] needed to consider resolution options" and Gaines had just provided a supplemental witness list and evidence. CP at 353. On September 30, the case was again continued because Gaines was "trying to track down material witness," a "[w]itness for [the] State [was] not available" and "[s]tatus of [Gaines's] representation [was] up in the air." CP at 354.

was going to throw what "amounts to kind of a tantrum" because he did not get his way, the court was not compelled to grant his motion for new counsel.⁹ *Id.* at 18.

¶13 After trial with attorney Cross representing Gaines, the jury returned guilty verdicts on charges for first degree unlawful possession of a firearm, unlawful solicitation to deliver a controlled substance, and conspiracy to deliver a controlled substance. The jury also entered verdicts for firearm enhancements on the latter two convictions.¹⁰

¶14 Gaines appeals.

ANALYSIS

I. SEARCH WARRANT

¶15 In his assignments of error, Gaines claims that the court erred in its determination that probable cause supported the warrant to search his vehicle. The State contends that we should not reach Gaines's challenge to the search warrant, because even though he assigned error to the warrant, [*10] he "abandoned the claim by failing to address it in the body of the opening brief." Br. of Resp't at 25. We agree.

¶16 "Passing treatment of an issue or lack of reasoned argument is insufficient to allow for our meaningful review." *State v. Stubbs*, 144 Wn. App. 644, 652, 184 P.3d 660 (2008), *rev'd by* 170 Wn.2d 117, 240 P.3d 143 (2010). Here, Gaines makes argumentative statements in the "Statement of Facts" section of his brief regarding the sufficiency of the search warrant, but fails to elaborate on it in the "Analysis" section or cite authority

⁸It is not clear from the record when the other time Cross's motion to substitute was denied other than the court's oral ruling on May 15, 2014. However, because Cross agreed that his motions to substitute had been denied twice in the past, we accept this as a verity.

⁹Cross also stated in his affidavit to the motions [*9] to substitute that there was a possible conflict of interest due to Cross having taken a witness statement on Gaines' behalf from a former client of Cross's. Whether this conflict continued to be a problem at the time of the hearing is unclear from the record and is not argued in the parties' briefs.

¹⁰Gaines was also found guilty of unlawful solicitation to possess a controlled substance with intent to deliver. However, this charge was later dismissed on double jeopardy grounds at sentencing and is not at issue in this appeal.

in accordance with the Rules of Appellate Procedure (RAP). RAP 10.3(a)(6). Additionally, after the State argued in its brief that Gaines had abandoned the claim, he implicitly affirmed the State's assertion by failing to respond or even mention the search warrant issue in his reply brief. Instead, his reply brief focuses entirely on his argument regarding the right to choose private counsel.

¶17 Gaines's disjointed assignments of error further buttress our decision not to address the merits of the search warrant issue. He assigned error to conclusions of law two through four and six through eight on the "Assignment of Error" portion of the brief, but on the "Issues Pertaining to Assignments of Error" portion, conclusions of law two through seven are all [*11] challenged.¹¹ Despite Gaines having an opportunity to amend his opening brief, we cannot reasonably decipher what assignments of error he wants us to review, particularly without adequate accompanying analysis.

¶18 Because Gaines failed to follow the RAP, coupled with the difficulty in construing from his brief what he wants us to review, we decline to review this issue.

II. RIGHT TO CHOOSE PRIVATE COUNSEL

¶19 Gaines argues that the trial court abused its discretion when it denied his motion for a continuance, effectively depriving him of his right to retain private counsel. We disagree.

¶20 When a defendant requests a continuance for the purpose of replacing his current attorney with new private counsel, we review the court's decision to deny the continuance for an abuse of discretion. State v. Hampton, 184 Wn.2d 656, 670, 361 P.3d 734 (2015), petition for cert. filed, No. 15-8300 (Feb. 24, 2016). "A trial court abuses its discretion when its decision 'is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.'" *Id.* (quoting State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)) [*12]. "A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." Hampton, 184 Wn.2d at 670

(quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). "A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take, and arrives at a decision outside the range of acceptable choices." Hampton, 184 Wn.2d at 670-71 (quoting Rohrich, 149 Wn.2d at 654).

¶21 The *Sixth Amendment to the United States Constitution* grants a criminal defendant, if he or she can afford it, the right to a private counsel of his or her choice.¹² Hampton, 184 Wn.2d at 662-63. However, this right is not absolute. *Id.* at 663. A defendant's right to counsel of his or her choice is limited, in part, in that a trial court considering a continuance for this purpose must balance that right against the demands of its calendar and the public's interest in the prompt and efficient administration of justice. *Id.* A court has wide latitude in weighing these interests. *Id.* The court is not required to apply any mechanical test and can consider any relevant information necessary to make its decision. *Id.* at 669. However, a court may be guided by the 11 Hampton factors in determining whether to grant a continuance to allow substitution of counsel:

- "(1) whether the request came at a point sufficiently in advance of trial to permit the trial court to readily adjust its calendar;
- (2) the length of the continuance requested;
- (3) whether the continuance would carry the trial date beyond the period specified [*13] in the state speedy trial act;
- (4) whether the court had granted previous continuances at the defendant's request;
- (5) whether the continuance would seriously inconvenience the witnesses;
- (6) whether the continuance request was made promptly after the defendant first became aware of the grounds advanced for discharging his or her counsel;
- (7) whether the defendant's own negligence placed him or her in a situation where he or she needed a continuance to obtain new counsel;
- (8) whether the defendant had some legitimate

¹¹ Conclusion five should not have been assigned error because the trial court accepted the State's concession that there was *not* a sufficient nexus for the warrant to be executed on Gaines's residence.

¹²In contrast, an indigent defendant, who is guaranteed appointment of counsel, can only substitute an appointed attorney if he or she [*14] demonstrates an "irreconcilable conflict." Hampton, 184 Wn.2d at 663.

cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation;

(9) whether there was a 'rational basis' for believing that the defendant was seeking to change counsel 'primarily for the purpose of delay';

(10) whether the current counsel was prepared to go to trial;

(11) whether denial of the motion was likely to result in identifiable prejudice to the defendant's case of a material or substantial nature."

Id. at 669-70 (quoting 3 WAYNE R. LAFAYE, WASHINGTON PRACTICE: CRIMINAL PROCEDURE 11.4(c), at 718-20 (3d ed.2007)).

¶22 Here, the court denied the continuance because of (1) Corey's inability to try the case within a couple of months, (2) Corey's caseload, which had many old cases, creating the possibility of prolonging the trial up to another year, (3) its concern with Gaines's co-defendant's right to a speedy trial, (4) the age of the case generally, which had received numerous continuances in the past, and (5) the prior denials of the motion for substitution. These are reasonable bases for exercising discretion to deny the continuance.

¶23 It was also brought before the trial court, however, that Cross and Gaines had had potential communication problems since May 2014. Cross maintained that Gaines refused to be represented by him, citing Gaines's disapproval of Cross's attempt to negotiate plea deals with the prosecutor in this case, as well as Gaines's refusal to come out of his jail cell when Cross tried to prepare for trial. We also note our concern that the trial court did not specifically address Gaines's allegation, which was specifically brought up at the hearing, that Cross had allegedly arranged an improper meeting with the prosecutor. Our concern is [*15] heightened by the trial court's characterization of Gaines's behavior as amounting "to kind of a tantrum." VRP (Oct. 16, 2014) at 18.

¶24 However, in examining the trial court's ruling overall, Gaines's primary issue with Cross was argued to the court, and *Hampton* does not require that the court make specific findings. *Hampton* requires instead that the record indicate that the court made a reasoned

decision.¹³ Even though there was evidence of problems between Gaines and Cross, the court reasonably believed that Corey, who was to be Cross's replacement, could not try the case in an acceptable amount of time. Indeed, the court indicated that it would have permitted Corey a shorter continuance to prepare for Gaines's trial. Although there was disagreement whether Corey could have tried the case by February, we cannot say the court abused its discretion after considering Corey's calendar in some detail in making its assessment that she could not.

¶25 Gaines also argues that because he "made no motions for continuance" and only "joined in and/or did not oppose motions made by the deputy prosecutor or codefendant's attorney," the court was unreasonable in not granting his request for a continuance. Br. of Appellant at 32-35; Reply Br. of Appellant at 4-5. However, while the case was occasionally continued solely at the request and need of the prosecutor, the record also demonstrates that at least some of the continuances were due to Gaines's actions. For example, the April 7, 2014 continuance was granted, in part, because new charges had been brought against him while he was out on bail. In addition, the joint continuance motions are to be taken for what they were: a request by *both* Gaines and the prosecutor for the court to delay trial. Therefore, Gaines's characterization that the continuances were predominantly only requested by the prosecutor is incorrect. In any event, the continuances, along with Gaines's stay in Western State Hospital, resulted in the case becoming sufficiently old so that it was reasonable for the court to base its denial, in part, on the case's age.¹⁴

¶26 We hold that, taking all the facts into consideration, the trial court did not abuse its discretion in denying

¹³Gaines also argues that the court misapplied the law, but as *Hampton*, 184 Wn.2d at 669-72 clarified, the trial court is not required to apply any mechanical test so long as we can reasonably discern that it weighed the defendant's choice of counsel against the other relevant circumstances. [*16]

¹⁴Gaines also argues that that the State incorrectly presented [*17] evidence that it would suffer prejudice because a delay would cause possible difficulty in presenting witnesses at trial. However, it is not clear that the court based its decision on this argument, and therefore, we do not examine it as a reason for finding the decision reasonable.

Gaines's motion for a continuance.¹⁵

III. CRIMINALIZATION OF SOLICITATION TO DELIVER A CONTROLLED SUBSTANCE

¶27 Gaines argues that his conviction for solicitation to deliver a controlled substance must be dismissed due to the absence of statutory law criminalizing his conduct. We disagree.

¶28 In *In re Personal Restraint of Hopkins*, 137 Wn.2d 897, 900, 904, 976 P.2d 616 (1999), our Supreme Court held that solicitation to deliver a controlled substance is not an offense under chapter 69.50 RCW, the Uniform Controlled Substances Act, and therefore that conviction was not subject to the Act's sentence-doubling provisions. However, the *Hopkins* [*18] court also recognized that the defendant was still subject to punishment for solicitation to deliver a controlled substance under chapter 9A.28 RCW, which criminalizes anticipatory offenses including solicitation. *Id.* at 899-900; see also *In re Pers. Restraint of Bowman*, 109 Wn. App. 869, 871, 38 P.3d 1017 (2001). Specifically, RCW 9A.28.010 criminalizes a solicitation of any crime outside of title 9A, which would include chapter 69.50 RCW, since it makes delivery of a controlled substance unlawful. Accordingly, we hold that solicitation to deliver a controlled substance is criminalized under chapter 9A.28 RCW.

IV. SUFFICIENCY OF THE EVIDENCE

¶29 Gaines argues that the State presented insufficient evidence to convict him of conspiracy to deliver a controlled substance, solicitation to deliver a controlled substance, and first degree unlawful possession of a firearm. We disagree.

1. Legal Principles

¶30 Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits a reasonable juror to find the essential elements of the crime beyond a reasonable doubt. *State v. McPherson*, 186 Wn. App. 114, 117, 344 P.3d 1283, review denied, 183 Wn.2d 1012 (2015). A claim of

insufficiency admits the truth of the State's evidence and all reasonable inferences that a juror can draw from that evidence. *Id.* at 117-18. All reasonable inferences from the evidence must be drawn in favor of the State and interpreted [*19] strongly against the defendant. *State v. Miller*, 179 Wn. App. 91, 104, 316 P.3d 1143 (2014). Circumstantial evidence is no less reliable than direct evidence. *Id.* at 105. We “defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

2. Conspiracy To Deliver a Controlled Substance

¶31 Gaines argues that there was insufficient evidence to convict him of conspiracy to deliver a controlled substance. We disagree.

¶32 A person is guilty of criminal conspiracy “when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.” RCW 9A.28.040(1). A formal agreement is not necessary for the formation of a conspiracy; rather, “[a]n agreement can be shown by a ‘concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose.’” *State v. Smith*, 65 Wn. App. 468, 471, 828 P.2d 654 (1992) (quoting *State v. Casarez-Gastelum*, 48 Wn. App. 112, 116, 738 P.2d 303 (1987)). While the threshold to show a “substantial step” in a conspiracy context is lower than for attempt,¹⁶ it still requires a manifestation “‘that the conspiracy is at work, and is neither a project still resting solely in the minds of the conspirators [*20] nor a fully completed operation no longer in existence.’” *State v. Dent*, 123 Wn.2d 467, 475, 477, 869 P.2d 392 (1994) (internal quotation marks omitted) (quoting *Yates v. United States*, 354 U.S. 298, 334, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957)). Preparatory conduct which furthers the ability of the conspirators to carry out the agreement can be “a substantial step in pursuance of [the] agreement”. *Id.* at 477. Conspiracy to deliver a controlled substance specifically requires the

¹⁵Gaines also discusses possible prejudice to him from Cross's actions at trial. However, this allegation fits more squarely under an ineffective assistance of counsel claim and not as a means to impeach the reasonableness of the court's denial of a continuance before trial.

¹⁶“A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.” RCW 9A.28.020(1).

involvement of at least three people, because the delivery itself involves two people and a conspiracy must involve a third person other than those involved in the delivery. *State v. McCarty*, 140 Wn.2d 420, 426, 998 P.2d 296 (2000).

¶33 Here, Gaines admitted that he was a drug runner for individuals located in Mexico and that he was on his way to pick up two pounds. Testimony at trial established that about two pounds of methamphetamine is usually a quantity that comes from a major source such as the Mexican cartel members. Gaines was also observed on June 3 delivering a substance often mixed with methamphetamine to Handlen. Taking this evidence in the light most favorable to the State, one can reasonably infer that Gaines was admitting [*21] to being on his way to pick up two pounds of methamphetamine.

¶34 Additionally, Gaines was found in a vehicle with Ryan, whose name was listed on the June 20 wire transfer receipt that listed a \$1,000 payment sent to a person located in Mexico, which corroborated Gaines's statements. The May 29 wire transfer receipt, which bore Gaines's name, coupled with police observing Gaines deliver drugs to Handlen on June 3, supplies circumstantial evidence that Gaines, Ryan, and individuals located in Mexico had an agreement to deliver methamphetamine to a low level supplier such as Handlen. Even though Gaines was arrested and was found with no methamphetamine, testimony at trial established that wire transfers are often used to pay money to recipients in Mexico in exchange for methamphetamine smuggled into the United States. Therefore, a jury could have reasonably found that the payment indicated on the June 20 wire receipt constituted a substantial step toward affecting that conspiracy.

¶35 Gaines argues that because the May 29 wire transfer receipt was dated outside the State's charging period for conspiracy, there was no evidence he participated in the wiring of money to Mexico. While we agree that [*22] the May 29 receipt does not establish a conspiracy on its own, that wire transfer, as previously noted, is circumstantial evidence of Gaines's intent and corroborates his statements regarding the June 20 incident.

¶36 Gaines also argues that there is insufficient evidence

under the corpus delicti doctrine to show that the purposes underlying the wire transfers were to send money to Mexico in exchange for methamphetamine. Generally, corpus delicti requires independent evidence that would corroborate a defendant's incriminating statement. *State v. Brockob*, 159 Wn.2d 311, 327-28, 150 P.3d 59 (2006). Police officers' observations of Gaines's prior delivery on June 3, coupled with the May 29 wire receipt bearing Gaines's signature, supply sufficient, independent corroborative evidence of Gaines's incriminating statements.

¶37 Accordingly, we hold the State presented sufficient evidence to convict Gaines of conspiracy to deliver a controlled substance.

3. Solicitation To Deliver a Controlled Substance

¶38 Gaines next argues that there was insufficient evidence to convict him of solicitation to deliver a controlled substance. We disagree.

¶39 Solicitation to deliver a controlled substance requires proof of a person's "intent to promote or facilitate" the crime. *State v. Constance*, 154 Wn. App. 861, 883, 226 P.3d 231 (2010) (quoting [*23] *State v. Varnell*, 162 Wn.2d 165, 169, 170 P.3d 24 (2007)); *RCW 9A.28.030(1)*; former *RCW 69.50.401* (2013). A person is guilty of the offense whether or not the criminal act is completed. *Constance*, 154 Wn. App. at 884. Under *RCW 9A.28.030(1)* solicitation occurs when "a person offers money or something of value to another person to commit a crime." *Id.*; *RCW 9A.28.030*.

¶40 Our analysis of this challenge is largely similar to the discussion above of conspiracy to deliver a controlled substance. Gaines's statements to police officers, the wire receipts, and his participation in the June 3 transaction are sufficient evidence that he solicited delivery of methamphetamine on June 20. Specifically, the jury could have reasonably inferred that the June 20 wire receipt was evidence of an offer of money to individuals located in Mexico for methamphetamine. Although Gaines argues that \$900 would not be enough money to buy a "kilo," or 2.2 pounds, of methamphetamine, Brief of Appellant at 41, testimony at trial established that it is common for drug dealers to make incremental "payments" in order to purchase this amount. VRP at 90, 96-97.

¶41 Gaines also argues that Handlen's lack of

knowledge at trial that he sold to her specifically on June 3 makes the evidence insufficient. In addition, he argues that because the purpose of the wire receipts can only be proved [*24] by Gaines's statements, the evidence is insufficient under the corpus delicti doctrine. However, similar to conspiracy to deliver a controlled substance, the May 29 receipt and the police's surveillance of the June 3 incident is sufficient circumstantial evidence to demonstrate Gaines's intent to solicit individuals from Mexico with money and to arrange a purchase of methamphetamine on June 20.¹⁷

¶42 Accordingly, we hold the State presented sufficient evidence to convict him of solicitation to deliver a controlled substance.

4. First Degree Unlawful Possession of a Firearm

¶43 Finally, Gaines argues that there was insufficient evidence to convict him of first degree unlawful possession of a firearm. We disagree.

¶44 First degree unlawful possession of a firearm requires proof that a defendant “owns, has in his or her possession, [*25] or ... control any firearm after having previously been convicted ... of any serious offense as defined in this chapter.”¹⁸ Former RCW 9A.040(1)(a) (2011). Possession can be actual or constructive. Because Gaines was not directly observed with a firearm, we examine whether he constructively possessed a firearm.

¶45 To determine constructive possession we analyze “whether, under the totality of the circumstances, the defendant exercised dominion and control over the item in question.” State v. Davis, 182 Wn.2d 222, 234, 340 P.3d 820 (2014) (Stephens, J., dissenting).¹⁹ While the ability to immediately take actual possession of an item can establish dominion and control, mere proximity to

the item cannot. *Id.* Factors supporting dominion and control include ownership of the item and ownership of the property where the item is located. *Id.*

¶46 In Davis, 182 Wn.2d at 235, the Supreme Court reversed the defendants' firearm convictions when the evidence only established that they had “briefly handled the item” for the true possessor of the gun. In contrast to this case, Gaines was pulled over and found making hand motions [*26] toward the space in front of the driver's seat where he was sitting. Immediately thereafter, officers found a gun in the location toward which he had been making the hand motions. The vehicle in which the firearm was located was registered to Gaines. A jury could have reasonably inferred from Gaines's motion toward the space where the gun was found that he placed the gun there. Testimony at trial also established that firearms are often used to protect drug runners when dealing with a larger amount of drugs, which, coupled with the firearm found on the passenger side near Ryan, could have buttressed a jury's belief that Gaines possessed the firearm in front of him to protect his drug operation. Unlike *Davis*, a jury could have reasonably inferred from the totality of this evidence that Gaines had dominion and control over the firearm.

¶47 Gaines argues that the officer's testimony during trial recounting his observations about Gaines's hand motions was inconsistent and contradictory. Even if we were to agree, we “must defer to the trier of fact on issues of conflicting testimony [and] credibility of witnesses” on a sufficiency challenge. Thomas, 150 Wn.2d at 874-75.

¶48 Accordingly, we hold the State presented sufficient [*27] evidence to convict Gaines of first degree unlawful possession of a firearm.

CONCLUSION

¶49 We decline to address the merits of the search warrant argument. We hold that the court did not in abuse its discretion in denying the continuance, that chapter 9A.28 RCW criminalizes solicitation to deliver a controlled substance, and that there is sufficient evidence to uphold all of his convictions. For these reasons, we affirm.

¶50 A majority of the panel having determined that this

¹⁷ Gaines also contends that the evidence is insufficient because the State presented evidence only that he had been associated with methylsulfonylmethane, a legal substance. Inchoate crimes, such as solicitation and conspiracy, by their very nature, do not require completion of the actual, underlying crime. Therefore, there is no requirement that methamphetamine was ever actually found.

¹⁸ Gaines stipulated to the prior serious offense conviction, which made the possession unlawful.

¹⁹ This portion of the *Davis* dissent received five votes, so it has precedential value.

opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA and SUTTON, JJ., concur.

End of Document

APPENDIX D

February 03 2017 9:42 AM

KEVIN STOCK
COUNTY CLERK
NO: 13-1-02515-1

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

STATE OF WASHINGTON,

Respondent,

v.

JEREMY EDWARD GAINES,

Appellant.

No. 46852-2-II

MANDATE

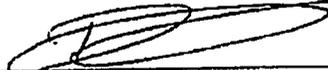
Pierce County Cause No.
13-1-02515-1

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on May 3, 2016 became the decision terminating review of this court of the above entitled case on November 2, 2016. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Tacoma, this 3RD day of February, 2017.




Derek M. Byrne
Clerk of the Court of Appeals,
State of Washington, Div. II

APPENDIX F

Medical Verification of Total and Permanent Disability

Instructions

Use this form to authorize information release and obtain medical verification statement of a **total and permanent disability** by a physician or medical provider.

The noncustodial parent must complete the Authorization to Release Information section before taking the form to the physician or medical provider.

If the physician or medical provider agrees that the noncustodial parent is totally and permanently disabled as defined in the definition below, the physician or medical provider completes the remainder of this form and returns it to the noncustodial parent.

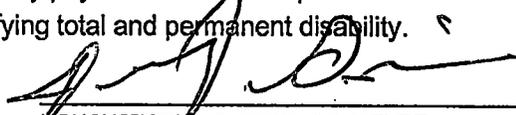
The noncustodial parent must send this completed form and the completed **Request for Proof of Your Disability Status** to DCS at the address or fax number listed below.

Definition of Disability: The law defines disability as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment(s) which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

Authorization to Release Information (completed by the noncustodial parent)

I, JEREMY EDWARD GAINES, authorize my physician or medical provider to release the information below to the Division of Child Support for the purpose of verifying total and permanent disability.

5-14-12
DATE


NONCUSTODIAL PARENT SIGNATURE

Physician or Medical Provider Statement: Medical Verification of Total and Permanent Disability

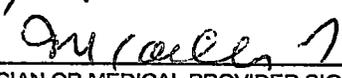
I am a licensed medical provider. Based on the legal definition of disability provided by DCS, I verify that the noncustodial identified below is totally disabled and the disability is permanent without the potential for gainful employment in the future.

1. Noncustodial Parent's Name: JEREMY EDWARD GAINES

2. Division of Child Support Case Number: 1774456

3. Date Disability Determined as Permanent: Oct 27, 1996

5-14-12
DATE


PHYSICIAN OR MEDICAL PROVIDER SIGNATURE

John C. Diller MD
PHYSICIAN OR MEDICAL PROVIDER PRINTED NAME

M.D.
PHYSICIAN OR MEDICAL PROVIDER TITLE

610 S. Meridian
Puyallup, Wash. 99371
PHYSICIAN OR MEDICAL PROVIDER BUSINESS ADDRESS

253 1845-2629
PHYSICIAN OR MEDICAL PROVIDER TELEPHONE NUMBER
(INCLUDE AREA CODE)

Family Practice
PHYSICIAN OR MEDICAL PROVIDER MEDICAL SPECIALTY

DIVISION OF CHILD SUPPORT
PO BOX 11520
TACOMA WA 98411-5520
FAX: (866) 668-9518
E-mail:



No person because of race, color, national origin, creed, religion, sex, age, or disability, shall be discriminated against in employment, services, or any aspect of the program's activities. This form is available in alternative formats upon request.

APPENDIX G

JAN PRO CLEANING SYSTEMS
 3901 TRIBUTE AVE E
 TACOMA WA 98403

Pay Period 7/16/09 7/31/09
 Pay Date 08/05/2009
 Check 3511

Employee Number 46
 Department Number
 Social Security Number xxx-xx-0611
 Marital Status SINGLE
 Number Of Allowances 01
 Rate 22.0000

Jeremy E Gaines
 10114 Canyon Rd E
 Puyallup, WA 98373

Hours and Earnings				Taxes and Deductions		
Description	Hours	This Period	Year-To-Date	Description	This Period	Year-To-Date
REGULAR	79.5	1749	23210	FICA	196.88	2476.28
O/TIME				MEDICL	25.36	336.64
HOLIDAY				SS	108.44	1439.02
OTHER						
BONUS						
		22.00				

Gross Pay Year To Date	Gross Pay This Period	Total Deductions This Period	Net Pay This Period
23210	1749	330.68	1418.32

VAC HOUR BAL: .00 SICK HOUR BAL: .00

15.0000

RJ Industrials

31-6079000

Gaines, Jeremy E

XXX-XX-0611

09/11/08

0093170

Overtime	4.25	95.63	170.97	Soc Sec	-54.53	1662.94
Regular Pay	56.43	846.45	21558.56	FICA	-103.35	2585.88
Incentive	6.25	187.50	76.50	Medicare	-10.44	355.04

RJ INDUSTRIALS
12623 99th Ave Ct. E.
Puyallup, WA 98373-3463

GROSS PAY	1129.58
NET PAY	961.26

168.32

APPENDIX H

May 07 2014 2:01 PM

KEVIN STOCK
COUNTY CLERK
NO: 13-1-02515-1

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8 SUPERIOR COURT OF WASHINGTON
9 COUNTY OF PIERCE

10 STATE OF WASHINGTON,)

NO. 13-1-02515-1

11) Plaintiff,)
12 and)

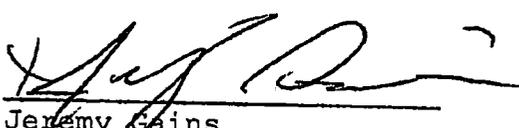
DISCHARGE OF ATTORNEY

13 JEREMY EDWARD GAINES,)

14) Defendant.)

15 COMES NOW, Jeremy Gaines, and discharges Geoffrey Cross as
16 his attorney and requests that he withdraw and that he apply to
17 the court to have a court appointed attorney take over the case.
18

19 DATE: 5/7/14

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Jeremy Gaines

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28 DISCHARGE OF ATTORNEY - 1

LAW OFFICES OF
GEOFFREY C. CROSS, P.S., INC.

1902 64TH AVENUE WEST, SUITE B,
TACOMA, WASHINGTON 98486
TELEPHONE: (253) 272-8888
FAX: (253) 572-8946
GCROSS.EVAUGHAN@YAHOO.COM

May 07 2014 2:01 PM

KEVIN STOCK
COUNTY CLERK
NO: 13-1-02515-1

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8 SUPERIOR COURT OF WASHINGTON
9 COUNTY OF PIERCE

10 STATE OF WASHINGTON,)

11 Plaintiff,)

12 and)

13 JEREMY EDWARD GAINES,)

14 Defendant.)

NO. 13-1-02515-1

DISCHARGE OF ATTORNEY

15 COMES NOW, Jeremy Gaines, and discharges Geoffrey Cross as
16 his attorney and requests that he withdraw and that he apply to
17 the court to have a court appointed attorney take over the case.
18

19 DATE: 5/7/14

20 
Jeremy Gaines

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28 DISCHARGE OF ATTORNEY - 1

LAW OFFICES OF
GEOFFREY C. CROSS, P.S., INC.

1902 64TH AVENUE WEST, SUITE B,
TACOMA, WASHINGTON 98466
TELEPHONE: (253) 272-8998
FAX: (253) 572-8946
GCROSS.EMAUGHAN@YAHOO.COM

May 08 2014 9:53 AM

KEVIN STOCK
COUNTY CLERK
NO: 13-1-02515-1

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SUPERIOR COURT OF WASHINGTON
COUNTY OF PIERCE

STATE OF WASHINGTON,)	NO. 13-1-02515-1
)	
Plaintiff,)	MOTION FOR WITHDRAWAL
and)	OF COUNSEL
)	
JEREMY EDWARD GAINES,)	
)	
Defendant.)	

COMES NOW, Geoffrey C. Cross, attorney for defendant, and at the request of Jeremy Gaines, moves to withdraw from representing Mr. Gaines in the above entitled cause.

DATED this 8 day of May 2014.



GEOFFREY C. CROSS, WSB #3089
Attorney for Defendant

Motion for Withdrawal
of Counsel - 1

LAW OFFICES OF
GEOFFREY C. CROSS, P.S., INC.
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GCROSS.EMAUGHAN@YAHOO.COM

APPENDIX I

July 31 2014 2:32 PM

KEVIN STOCK
COUNTY CLERK
NO: 13-1-02515-1

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SUPERIOR COURT OF WASHINGTON
COUNTY OF PIERCE

STATE OF WASHINGTON,)	NO. 13-1-02515-1
)	
Plaintiff,)	MOTION FOR WITHDRAWAL
and)	OF COUNSEL
)	
JEREMY EDWARD GAINES,)	
)	
Defendant.)	

COMES NOW, Geoffrey Cross, and moves that he be allowed to withdraw. This is the 2nd request from Mr. Gaines that I not be his attorney.

DATED this 31 day of July 2014.



GEOFFREY C. CROSS, WSB #3089
Attorney for Defendant

ORIGINAL

Motion for Withdrawal
of Counsel - 1

LAW OFFICES OF
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5/16/2014



13-1-02515-1 42543535 CME 05-16-14



IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

Cause Number: 13-1-02515-1

MEMORANDUM OF JOURNAL ENTRY

vs.

Page 1 of 2

GAINES, JEREMY EDWARD

Judge: CRIMINAL DIVISION- PRESIDING JUDGE

Court Reporter: ANGELA MCDUGALL

Judicial Assistant/Clerk: Rasheedah McGoodwin

JESSE WILLIAMS

Prosecutor

GEOFFREY COLBURN CROSS

Defense Attorney

Proceeding Set: MOTION-WITHDRAWAL/SUBSTITUTION

Proceeding Date: 05/15/14 13:30

Proceeding Outcome: HELD

Resolution:

Clerk's Code:
 Proceeding Outcome code: MTHRG
 Resolution Outcome code:
 Amended Resolution code:

0050
1076
5/16/2014

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

Cause Number: 13-1-02515-1

**MEMORANDUM OF
JOURNAL ENTRY**

vs.

GAINES, JEREMY EDWARD

Page: 2 of 2

Judge:

CRIMINAL DIVISION- PRESIDING JUDGE

MINUTES OF PROCEEDING

Judicial Assistant/Clerk: Rasheedah McGoodwin

Court Reporter: ANGELA MCDUGALL

Start Date/Time: 05/15/14 1:49 PM

May 15, 2014 01:48 PM DPA, Jesse Williams present. Defense Attorney Geoffrey Cross present w/defendant. Case comes on before the court on defense counsel motion to withdraw as counsel of record, denied.

End Date/Time: 05/15/14 1:50 PM

May 06 2014 1:12 PM

KEVIN STOCK
COUNTY CLERK
NO: 13-1-02515-1

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SUPERIOR COURT OF WASHINGTON
COUNTY OF PIERCE

STATE OF WASHINGTON,)
)
) Plaintiff,)
)
) and)
)
) JEREMY EDWARD GAINES,)
)
) Defendant.)

NO. 13-1-02515-1

DECLARATION OF
GEOFFREY C. CROSS

Geoffrey C. Cross, under penalty of perjury, deposes and states that Mr. Gaines has a long history of mental illness and physical illness. He is having judgmental issues and physical issues and that they should clinically investigated.

DATED at Tacoma, Washington this 6 day of May 2014.



GEOFFREY C. CROSS

Declaration of
Geoffrey C. Cross - 1

LAW OFFICES OF
GEOFFREY C. CROSS, P.S., INC.

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September 26 2014 2:40 PM

KEVIN STOCK
COUNTY CLERK
NO: 13-1-02515-1

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8 SUPERIOR COURT OF WASHINGTON
COUNTY OF PIERCE

9 STATE OF WASHINGTON,
10 Plaintiff,
11 and
12 JEREMY EDWARD GAINES,
13 Defendant.

) NO. 13-1-02515-1
)
) DECLARATION OF
) GEOFFREY C. CROSS

14 Geoffrey C. Cross, under penalty of perjury, deposes and
15 states that I represent Mr. Gaines, substituting for Mr. Cloud
16 who was his former attorney. I had a fairly good relationship
17 with Mr. Gaines until he discharged me in May. I felt they
18 needed a 5551 examination and rehabilitation at Western State
19 which he completed. On his scheduled return from Western State,
20 the court elected to set his trial for October 1, 2014, over
21 Affiant's objection.

22 In an effort to settle the case your Affiant met with Mr.
23 Gaines and the prosecutor. The defendant took excessive
24 exception to the fact that I even exposed him to the prosecutor,
25 even though I was in attendance and the conversation was rather
26 appropriate. He decided that I was not on his side. I went to
27 the jail thereafter to prepare for trial and he refused to allow

28 Declaration of
Geoffrey C. Cross - 1

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ORIGINAL

1
2 access to me in the jail in Pierce County. He says he does not
3 want me as his lawyer. All communication between myself and Mr.
4 Gaines has broken down.

5 Third parties have told me indirectly that there was
6 criticism of my ethical conduct in having the prosecutor talk to
7 Mr. Gaines in my presence, outlining his risks and exposures. I
8 felt it was very appropriate as it is a three strike case.

9 This case was set with the understanding that Mr. Thompson
10 would be available. Mr. Thompson gave a statement prior to my
11 representation on Mr. Gaines, that he owned the firearm that was
12 in the car. In preparation for trial I learned that I
13 represented Mr. Thompson in 2002. As far as I know he was going
14 to cooperate and the trial date was set for October 1, 2014,
15 because Mr. Thompson would be going to court before then and I
16 would have access to serve my subpoena.

17 In fact, Mr. Thompson jumped bail. I had a process server
18 go to his reported residence and he was not found there.

19 Mr. Gaines is quite dissatisfied with my services and there
20 is no meaningful communication between us. I was prepared to
21 present this on September 26th at the status conference, but the
22 prosecutor was unavailable. I advised the Department of Assigned
23 Counsel of my situation and they are ready to step in.

24 DATED at Tacoma, Washington this 26 day of September 2014.

25
26 
27 _____
GEOFFREY C. CROSS

28 Declaration of
Geoffrey C. Cross - 2

LAW OFFICES OF
GEOFFREY C. CROSS, P.S., INC.

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