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

IN RE THE PERSONAL RESTRAINT
PETITION OF:

JEREMY EDWARD GAINES, who now
goes by KEONI EDWARD APO.¹

Petitioner.

NO. 51871-6

STATE'S RESPONSE TO PERSONAL
RESTRAINT PETITION

A. ISSUES PERTAINING TO PETITIONER'S PERSONAL RESTRAINT
PETITION:

1. Should this court summarily dismiss petitioner's claim that he was denied his Sixth Amendment right to counsel of his choice when this claim was rejected on direct appeal?
2. Should this Court dismiss the petition because petitioner failed to show that he was actually prejudiced by any constitutional error or that a fundamental defect in his trial resulted in a complete miscarriage of justice?

¹ As the petitioner was prosecuted and sentenced under the name of Jeremy Edward Gaines, the respondent will use that name as the primary identifier for petitioner.

- 1 3. Should this court summarily dismiss claims of ineffective assistance of
- 2 trial counsel when petitioner failed to provide any supporting evidence to
- 3 support his allegations of deficient performance?
- 4 4. Has petitioner failed to show that his trial counsel was deficient?
- 5 5. Has petitioner failed to show both prongs necessary to succeed on his
- 6 claim of ineffective assistance of counsel?
- 7

8 B. STATUS OF PETITIONER:

9 Petitioner, Jeremy Edward Gaines, is restrained pursuant to a judgment entered in
10 Pierce County Cause No. 13-1-02515-1, after a jury found him guilty of unlawful
11 possession of a firearm in the first degree (Count II), unlawful solicitation to deliver a
12 controlled substance (Count III), and conspiracy to deliver a controlled substance (Count
13 V). Appendix A. On Counts III and V, the jury also returned a finding that petitioner was
14 armed with a firearm at the time of the crime. *Id.* When trial began, Count I alleged
15 petitioner had committed the crime of unlawful delivery of a controlled substance, but this
16 was amended mid trial to unlawful delivery of an imitation controlled substance after the
17 State's expert testified that the substance obtained during a controlled buy, looked like
18 methamphetamine but did not contain any of that controlled substance. IRP 140-144. The
19 jury found petitioner not guilty of Count I. Appendix B. The jury also convicted
20 petitioner of Count IV, solicitation to possess a controlled substance with intent to deliver
21 (firearm enhanced), but the court dismissed this count, finding that sentencing on both this
22 count and Count II violated double jeopardy. Appendix A. Petitioner was sentenced on
23 October 31, 2014, as a persistent offender. *Id.* He appealed his convictions and they were
24 affirmed in an unpublished opinion that was filed on May 3, 2016. Appendix C; *State v.*
25

1 **Gaines**, 193 Wn. App. 1044 (2016). The mandate issued on February 3, 2017. Appendix
2 D. February 3, 2018 fell on a Saturday; petitioner filed his personal restraint petition on
3 February 5, 2018, which is considered timely.

4 Petitioner raises two claims in his petition: 1) he claims that he received ineffective
5 assistance of trial counsel; and 2) that the court erred in not hearing from him directly
6 when deciding the motion for continuance which led to the denial of his constitutional
7 right to have trial counsel of his choice.

8 It does not appear that petitioner is claiming to be indigent.

9
10 C. ARGUMENT:

- 11 1. PETITIONER'S CLAIM THAT HE WAS DENIED HIS SIXTH
12 AMENDMENT RIGHT TO COUNSEL OF HIS CHOICE
13 SHOULD BE DISMISSED AS IT IS A REFORMULATION OF A
CLAIM REJECTED ON DIRECT REVIEW.

14 Collateral attack by personal restraint petition "should not simply be a reiteration of
15 issues finally resolved at trial and direct review, but rather should raise new points of fact
16 and law that were not or could not have been raised in the principal action, to the prejudice
17 of the defendant." *In re PRP of Gentry*, 137 Wn.2d 378, 388-89, 972 P.2d 1250 (1999); *In*
18 *re PRP of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). A petitioner is prohibited
19 from renewing an issue that was raised and rejected on direct appeal unless the interests of
20 justice require re-litigation of that issue. *In re PRP of Davis*, 152 Wn.2d 647, 670-671,
21 101 P.3d 1 (2004); *see also Gentry*, 137 Wn.2d at 388. An issue is considered raised and
22 rejected on direct appeal if the same ground presented in the petition was determined
23 adversely to the petitioner on appeal, and the prior determination was on the merits. *In re*
24 *PRP of Taylor*, 105 Wn.2d 683, 687, 717 P.2d 755 (1986). A petitioner can show the
25

1 interests of justice are served by reexamining an issue by showing there has been an
2 intervening change in the law or some other justification for having failed to raise a crucial
3 point or argument in the prior application. *In re PRP of Stenson*, 142 Wn.2d 710, 720, 16
4 P.3d 1 (2001). The change in the law must be material to petitioner's case. *In re Jeffries*,
5 114 Wn.2d 485, 488, 789 P.2d 731 (1990).

6 "Simply 'revising' a previously rejected legal argument . . . neither creates a 'new'
7 claim nor constitutes good cause to reconsider the original claim." *Jeffries*, 114 Wn.2d at
8 488.

9 [I]dentical grounds may often be proved by different factual allegations.
10 So also, identical grounds may be supported by different legal arguments,
11 . . . or be couched in different language, . . . or vary in immaterial respects.
12 Thus, for example, "a claim of involuntary confession predicated on
13 alleged psychological coercion does not raise a different 'ground' than
14 does one predicated on physical coercion."

15 *Id.* (citations omitted). A petitioner may not create a different ground for relief merely by
16 alleging different facts, asserting different legal theories, or couching his argument in
17 different language. *Lord*, 123 Wn.2d at 329.

18 In his direct appeal, petitioner alleged that the trial court abused its discretion in
19 denying a continuance which would have permitted the counsel of his choosing to
20 represent him at trial. *See*, Appendix C, Opinion at p. 8-11. The appellate court
21 considered the matter on the merits, weighing the petitioner's Sixth Amendment right
22 against the public's right to prompt and efficient administration of justice, and upheld the
23 ruling of trial court. *Id.*

24 Petitioner now re-raises this claim, this time arguing that the trial court should
25 have heard from him directly when the motion for continuance was being argued.
Petitioner cites no authority that a trial court is required to hear directly from a criminal
defendant when that defendant's interests and position are being put forth by the argument

1 of his counsel. Nor does petitioner provide any argument as to how the interests of justice
2 requires re-litigation of this issue that was rejected on direct review. Consequently, the
3 court should summarily dismiss this claim.

4 2. THE PETITION MUST BE DISMISSED BECAUSE PETITIONER
5 FAILS TO MEET HIS HEAVY BURDEN OF SHOWING
6 PREJUDICIAL CONSTITUTIONAL ERROR OR A COMPLETE
MISCARRIAGE OF JUSTICE NECESSARY TO OBTAIN
7 COLLATERAL RELIEF.

8 Personal restraint procedure has its origins in the State's habeas corpus remedy,
9 guaranteed by article 4, section 4, of the State Constitution. Fundamental to the nature of
10 habeas corpus relief is the principle that the writ will not serve as a substitute for appeal. A
11 personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for
12 an appeal. *In re Hagler*, 97 Wn.2d 818, 823 24, 650 P.2d 1103 (1982). Collateral relief
13 undermines the principles of finality of litigation, degrades the prominence of the trial, and
14 sometimes costs society the right to punish admitted offenders. These are significant costs,
and they require that collateral relief be limited in state as well as federal courts. *Id.*

15 In this collateral action, the petitioner has the duty of showing constitutional error
16 and that such error was actually prejudicial. The rule that constitutional errors must be
17 shown to be harmless beyond a reasonable doubt has no application in the context of
18 personal restraint petitions. *In re Mercer*, 108 Wn.2d 714, 718 21, 741 P.2d 559 (1987);
19 *Hagler*, 97 Wn.2d at 825. Mere assertions are insufficient in a collateral action to
20 demonstrate actual prejudice. Inferences, if any, must be drawn in favor of the validity of
21 the judgment and sentence and not against it. *Hagler*, 97 Wn.2d at 825-26. To obtain
22 collateral relief from an alleged nonconstitutional error, a petitioner must show "a
23 fundamental defect which inherently results in a complete miscarriage of justice." *In re*
24 *Cook*, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). This is a higher standard than the
25 constitutional standard of actual prejudice. *Id.* at 810. "Relief by way of a collateral

1 challenge to a conviction is extraordinary, and the petitioner must meet a high standard
2 before this court will disturb an otherwise settled judgment.” *In re PRP of Coats*, 173
3 Wn.2d 123, 132–33, 267 P.3d 324 (2011).

4 Reviewing courts have three options in evaluating personal restraint petitions:

- 5 1. If a petitioner fails to meet the threshold burden of showing actual
6 prejudice arising from constitutional error or a fundamental defect
7 resulting in a miscarriage of justice, the petition must be dismissed;
- 8 2. If a petitioner makes at least a prima facie showing of actual
9 prejudice, but the merits of the contentions cannot be determined
10 solely on the record, the court should remand the petition for a full
11 hearing on the merits or for a reference hearing pursuant to RAP
12 16.11(a) and RAP 16.12;
- 13 3. If the court is convinced a petitioner has proven actual prejudicial
14 error, the court should grant the personal restraint petition without
15 remanding the cause for further hearing.

16 *In re Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

- 17 a. Claims that are not supported by competent evidence should be
18 dismissed.

19 In a personal restraint petition, “naked castings into the constitutional sea are not
20 sufficient to command judicial consideration and discussion.” *In re Williams*, 111 Wn.2d
21 353, 365, 759 P.2d 436 (1988) (citing *In re Rozier*, 105 Wn.2d 606, 616, 717 P.2d 1353
22 (1986), which quoted *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)).

23 That phrase means “more is required than that the petitioner merely claim in broad general
24 terms that the prior convictions were unconstitutional.” *Williams*, 111 Wn.2d at 364. The
25 petition must also include the facts and “the evidence reasonably available to support the
26 factual allegations.” *Id.*

27 The petition must include a statement of the facts upon which the claim of unlawful
28 restraint is based and the evidence available to support the factual allegations. RAP
29 16.7(a)(2); *Williams*, 111 Wn.2d at 365 The evidence that is presented to an appellate

1 court to support a claim in a personal restraint petition must also be in proper form. On
2 this subject, the Washington Supreme Court has stated:

3 It is beyond question that all parties appearing before the courts of this
4 State are required to follow the statutes and rules relating to authentication
5 of documents. This court will, in future cases, accept no less.

6 *In re Personal Restraint of Connick*, 144 Wn.2d 442, 458, 28 P.3d 729 (2001). Personal
7 restraint petition claims must be supported by testimonial affidavits stating particular facts,
8 certified documents, certified transcripts, and the like. *Williams*, 111 Wn.2d at 364. If the
9 petitioner fails to provide sufficient evidence to support his challenge, the petition must be
10 dismissed. *Williams* at 364. A reference hearing is not a substitute for the petitioner's
11 failure to provide evidence to support his claims. As the Supreme Court stated, "the
12 purpose of a reference hearing is to resolve genuine factual disputes, not to determine
13 whether the petitioner actually has evidence to support his allegations." *In re Rice*, 118
14 Wn.2d 876, 886, 828 P.2d 1086 (1992). "Bald assertions and conclusory allegations will
15 not support the holding of a hearing," but the dismissal of the petition. *Rice*, at 886,
16 *Williams*, at 364-365.

17 Petitioner argues that his trial attorney was deficient for failing to get an
18 independent analysis of the suspected methamphetamine, as petitioner had told him to do
19 since he had not possessed nor delivered methamphetamine to anyone. He further contends
20 that his attorney was deficient for not presenting evidence that defendant had legitimate
21 sources of income, as petitioner had informed his attorney, to rebut negative inferences
22 about the source of money found on his person at the time of arrest. *See*, Petition at p. 3, 6,
23 8. To support the claim that defendant had these discussions with his attorney, petitioner
24 references "Appendix E – Declaration of Petitioner." *See*, Petition at p. 3. No "Appendix
25 E" or any declaration from the petitioner is attached to the petition. The only pleading in
this case that contains petitioner's signature is a "Verification of Personal Restraint

1 Petition” that was filed with the court of appeals on March 20, 2018. In short, petitioner
2 has not presented any evidence to support his claims about the conversations he had with
3 his attorney that are outside the record on review in the direct appeal. Moreover, the
4 record in the trial court provides affirmative evidence that petitioner was not
5 communicating with his attorney for several months before the trial. *See*, RP (10/16/14
6 JTF) 2-7; Appendix E.

7 Petitioner also argues that his attorney was deficient for not introducing evidence
8 that he had legitimate sources of income to rebut the State’s evidence² that petitioner did
9 not have a legitimate source of income. Petition at p.7-11. The evidence adduced by the
10 State permitted the State to argue that the money found on his person when arrested on
11 June 20th, 2013, the money petitioner sent to Mexico by wire transfer, and the new Dodge
12 Charger he was driving came from money earned through drug dealing. Petitioner asserts
13 that he was getting money from the State of Washington for being disabled, *see*, Petition at
14 p. 7, but presents no evidence that shows his receipt of such funds. Petitioner supplied a
15 copy of a form that was submitted to DSHS in a child support action. Appendix F attached
16 to Petition. It shows a doctor has indicated that petitioner was permanently disabled since
17 1996 and provides a release signed by petitioner allowing the doctor to release information
18 to DSHS regarding his disability. The wording on the form indicates that completion of
19 this form is the first step in trying to prove a disability, but that DSHS will take further
20 steps to obtain proof of the disability. *Id.* While the document provides some evidence
21 that petitioner might be disabled, it provides *no* evidence that the State of Washington was
22 paying money to petitioner for his disability. As such it does not provide any evidence to
23 support his claim that he had legitimate sources of income in June of 2013.

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² According to state databases, defendant did not have any reported wage or unemployment
payments from January, 2012, to the end of December, 2013. IRP 24, 121-22, 2RP183-84.

1 Secondly, petitioner provided two pay stubs showing that he earned \$1418.32 in
2 August, 2009, from Jan Pro Cleaning Services in Tacoma and \$961.26 from RJ Industrials
3 in Puyallup in September, 2008. *See*, Appendix G to the Petition. While these pay stubs
4 arguably undermine his claim that he has been totally disabled since 1996, neither provides
5 any evidence that he had a legitimate source of income in June 2013.

6 Finally, while petitioner alludes to conversations he had with his trial counsel in the
7 course of the trial, there is no evidence provided to support these claims. *See* Petition at p.
8 8. As petitioner has provided no evidence that he told his attorney that he had a legitimate
9 source of income in June 2013, nor shown that any evidence exists to show he was
10 receiving funds from a legitimate source in June 2013, petitioner's claim that his attorney
11 was deficient for failing to introduce such evidence must fail.

12 Any claim that is unsupported by competent evidence should be summarily
13 dismissed.

14 As argued more fully below, petitioner fails to show that he is entitled to relief on
15 his claim of ineffective assistance of counsel.

16 2. PETITIONER FAILS TO MEET HIS BURDEN OF SHOWING
17 BOTH PRONGS OF **STRICKLAND** NECESSARY TO SUCCEED
18 ON HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

19 To establish ineffective assistance of counsel, a petitioner must establish that (1)
20 counsel's performance was deficient and (2) the deficient performance actually prejudiced
21 the defendant. *State v. Grier*, 171 Wn.2d 17, 32–33, 246 P.3d 1260 (2011); *State v.*
22 *McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995) (*citing Strickland v.*
23 *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); *In re Orange*,
24 152 Wn.2d at 814, 100 P.3d 291(2004). There is a strong presumption of effective
25 representation. *McFarland*, 127 Wn.2d at 334–35. The Washington Supreme Court has

1 held fast to the standard of *Strickland* in assessing ineffective assistance of counsel claims,
2 and that in order to show deficient performance, the defendant must show that counsel
3 made errors so serious that counsel was not functioning as the “counsel” guaranteed the
4 defendant by the Sixth Amendment. *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011).

5 Representation is deficient if, after considering *all the circumstances*, it falls below
6 an objective standard of reasonableness. *Grier*, 171 Wn.2d at 34. Prejudice exists if there
7 is a reasonable probability that except for counsel's errors, the result of the proceeding
8 would have differed. *Grier*, 171 Wn.2d at 34. Reasonable probability in this context
9 means a probability sufficient to undermine confidence of the outcome. *In re Crace*, 174
10 Wn.2d 835, 840, 280 P.3d 1102 (2012).

11 Showing that counsel made an error, however, is not the same thing as establishing
12 deficient performance. *State v. Carpenter*, 52 Wn. App. 680, 684-85, 763 P.2d 455
13 (1988)(even assuming that counsel had proposed erroneous instructions, the court would
14 not find deficient performance based on that single error considering counsel’s overall
15 performance). The United States Supreme Court has reiterated just how strong a
16 presumption of competence exists under *Strickland*: “The question is whether an
17 attorney’s representation amounted to incompetence under ‘prevailing professional norms,’
18 not whether it deviated from best practices or most common custom.” *Harrington v.*
19 *Richter*, 562 U.S. 86, 131 S. Ct. 770, 778, 178 L. Ed. 2d 624 (2011) (citing *Strickland*,
20 466 U.S. at 690). The Sixth Amendment guarantees reasonable competence, not
21 perfection, and counsel can make demonstrable mistakes without being constitutionally
22 ineffective. *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003). A
23 petitioner carries the burden of demonstrating that there was no legitimate strategic or
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1 tactical rationale for the challenged attorney conduct. *State v. McFarland*, 127 Wn.2d
2 322, 336, 899 P.2d 1251 (1995). The standard of review for effective assistance of counsel
3 is whether, after examining the whole record, the court can conclude that defendant
4 received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d
5 1165 (1988).

6 Matters that go to trial strategy or tactics do not show deficient performance, and
7 petitioner bears the burden of establishing there were no legitimate strategic or tactical
8 reasons behind his attorney's choices. *State v. Rainey*, 107 Wn. App. 129, 135–36, 28 P.3d
9 10 (2001).

11 If a petitioner meets the *Strickland* standard for ineffective assistance of counsel,
12 he has necessarily made a showing of prejudice sufficient to grant a PRP. *In re Crace*, 174
13 Wn.2d at 846–47.

- 14 a. Petitioner fails to show deficient performance or resulting prejudice
15 from the failure to get an independent analysis of the suspected
16 amphetamine.

17 Petitioner argues that if his attorney had hired a defense expert to analyze the
18 suspected methamphetamine, he would have been able to get Count I dismissed when the
19 analysis showed there was no methamphetamine present; he asserts the failure of his
20 attorney to retain the expert was deficient performance. This argument is faulty for several
21 reasons.

22 First, as the prosecution bears the burden of proving that a criminal defendant
23 delivered a controlled substance, it is a reasonable trial strategy to wait until the State's
24 expert identifies the presence of a controlled substance in the suspected methamphetamine
25 before expending funds for a defense expert. Here, the State's expert did not find the

1 presence of methamphetamine in the suspected controlled substance, *see*, IRP 140-147, so
2 nothing could have been gained by hiring an independent expert. Second, petitioner's
3 assumption that the charge would be dismissed if no controlled substance were found is
4 erroneous, as can be seen in the record below. When it was determined that there was no
5 controlled substance found in the material that was the subject of the controlled buy, the
6 charge was amended to unlawful delivery of an imitation controlled substance rather than
7 the count being dismissed. IRP 143-144; Appendix F. Finally, it is difficult to see how
8 defendant was prejudiced by his attorney's failure to retain a defense expert when he was
9 acquitted of Count I. Appendix B. This is the best possible result he could achieve, which
10 would indicate that his attorney had an effective trial strategy on this count.
11

12 b. The testimony regarding the controlled buy was relevant to the charge
13 of unlawful delivery of an imitation controlled substance, thus
14 defendant cannot show that the court would have excluded the
15 evidence had an objection been made.

16 Petitioner's erroneous assumption that failure to find a controlled substance in the
17 material that was obtained in the controlled buy would result in the dismissal of Count I,
18 also affects petitioner's next claim of deficient performance. Petitioner argues his attorney
19 was deficient for failing to move to exclude evidence of the controlled buy. *See*, Petition at
20 5-6.

21 To prevail on a claim that counsel's performance was deficient by failing to file a
22 motion or make an objection, it must be shown that the motion would have been granted or
23 the objection would have succeeded. *See, State v. Brown*, 159 Wn. App. 366, 371, 245
24 P.3d 776; *State v. Gerds*, 136 Wn. App. 720, 727, 150 P.3d 627 (2007).

1 In this case, petitioner faced a charge of unlawful delivery of an imitation
2 controlled substance stemming from the controlled buy that occurred on June 3, 2013.
3 Appendix F. Consequently, the evidence regarding the controlled buy was still relevant
4 and admissible to that charge. Petitioner fails to show that had his attorney objected to the
5 testimony or moved to exclude it, that the court would have upheld the objection or
6 granted the motion. Without this showing, petitioner cannot show that his attorney was
7 deficient for failing to make an objection or moving to exclude.
8

9 Petitioner makes no effort to show deficient performance based upon the entire trial
10 record below. As such he has failed to demonstrate that he was denied his right to counsel
11 under the standard set forth in *Strickland*. Counsel successfully challenged the search
12 warrant executed at petitioner's house, and tried to negotiate the case on petitioner's
13 behalf. RP (10/16/14 JBC) 12. Counsel argued an assortment of pretrial motions. *See, e.g.,*
14 RP (10/16/14 JTF) 9, 10, 17. Thereafter, he cross-examined witnesses, proposed
15 instructions, moved for dismissal at the end of the State's case, presented closing argument,
16 argued for post-verdict dismissal, and sought favorable treatment for petitioner at
17 sentencing. *See, IRP* 85, 112, 123, 129, 138, 153; 2RP 163, 180, 185, 213; 3RP 270, 275,
18 303, 333, 337, 342. Looking at trial counsel's performance in its entirety, his performance
19 was not objectively unreasonable such that petitioner was denied his Sixth Amendment
20 right to counsel.
21

22 Petitioner has failed to show either prong of the *Strickland* standard with regard to
23 his claim of ineffective assistance of counsel. This Court should dismiss this claim.
24
25

1 D. CONCLUSION.

2 As petitioner has failed to raise any meritorious claim in his petition, it should be
3 dismissed. Petitioner's claims that are reformulations of issues resolved on direct appeal
4 and claims that are unsupported by competent evidence should be summarily dismissed.
5 Petitioner has not shown either prong of the *Strickland* test for ineffective assistance of
6 trial counsel which is necessary before relief can be granted. The court should dismiss the
7 petition.
8

9 DATED: June 6, 2018.

10
11 MARK E. LINDQUIST
12 Pierce County
13 Prosecuting Attorney

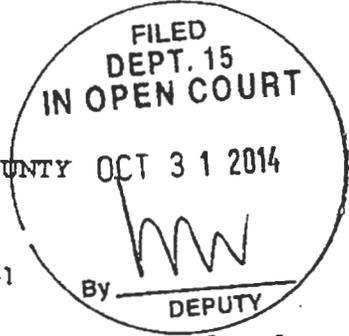
14 JASON RUYF
15 Deputy Prosecuting Attorney
16 WSB # 38725

17 
18 KATHLEEN PROCTOR
19 Deputy Prosecuting Attorney
20 WSB #14811

21 Certificate of Service:
22 The undersigned certifies that on this day she delivered by U.S. mail or
23 ABC-LMI delivery to the attorney of record for the appellant and appellant
24 c/o his attorney or to the attorney for respondent and respondent c/o his or
25 her attorney true and correct copies of the document to which this certificate
is attached. This statement is certified to be true and correct under penalty of
perjury of the laws of the State of Washington. Signed at Tacoma, Washington,
on the date below.

23 6.6.18 Sharon Ka
Date Signature

APPENDIX "A"



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).

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

Dated: 10.31.14

By direction of the Honorable

[Signature]

JUDGE Thomas J. Felnagle
KEVIN STOCK

CLERK

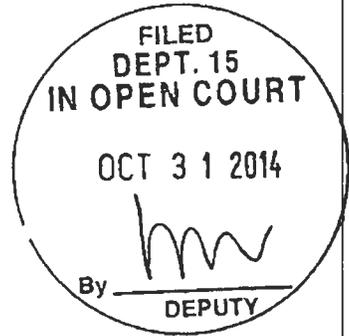
[Signature]

DEPUTY CLERK



CERTIFIED COPY DELIVERED TO SHERIFF

OCT 31 2014 By *[Signature]*



STATE OF WASHINGTON

ss:

County of Pierce

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.

IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this _____ day of _____, _____.

KEVIN STOCK, Clerk

By: _____ Deputy

ajm

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

FILED
DEPT. 15
IN OPEN COURT
OCT 31 2014
By *mm*
DEPUTY

STATE OF WASHINGTON,

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

vs.

JEREMY EDWARD GAINES

Defendant.

JUDGMENT AND SENTENCE (FJS)

- 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

SID: WA15619093
DOB: 07/29/1978

OCT 31 2014

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 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

JUDGMENT AND SENTENCE (JS)
(Felony) (7/2007) Page 1 of 9

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, (VH) Veh. Horn, 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 ADLTY 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):

2.3 SENTENCING DATA:

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

2.4 EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence:

within below the standard range for Count(s) _____

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 furthers 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.

Life w/o possibility of early release if Persistent Offender

2.5 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:

2.6 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.

3.2 The court DISMISSES Counts IV The defendant is found NOT GUILTY of 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
(Felony) (7/2007) Page 3 of 9 w/FASE.

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

RTNR/JN \$ _____ 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).

[X] 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.

JUDGMENT AND SENTENCE (JS)

(Felony) (1/2007) Page 4 of 9

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

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

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

11 4.3 **NO CONTACT**

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

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

17 4.4 **OTHER:** Property may have been taken into custody in conjunction with this case. Property may be
18 returned to the rightful owner. Any claim for return of such property must be made within 90 days. After
19 90 days, if you do not make a claim, property may be disposed of according to law.

20 4.4a All property is hereby forfeited

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

24 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

<u>116</u>	months on Count	<u>II</u>
_____	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. RCW9.94A.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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//

JUDGMENT AND SENTENCE (JS)

(Felony) (7/2007) Page 7 of 9

5.10 OTHER: _____

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

JUDGE
Print name

Thomas J. Feinagle
Thomas J. Feinagle

Jesse Williams

Deputy Prosecuting Attorney

Print name: Jesse Williams

WSB # 35543

Attorney for Defendant

Print name: _____

WSB # _____

[Signature]

Defendant

Print name: _____

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

VOTING RIGHTS 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

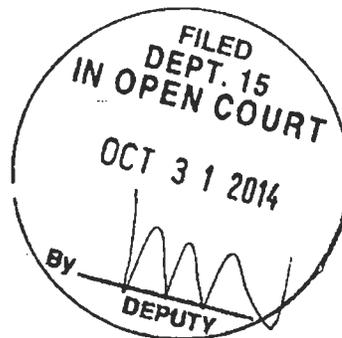
I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

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

Sheni Schelbert
Court Reporter



IDENTIFICATION OF DEFENDANT

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

Date of Birth 07/29/1978

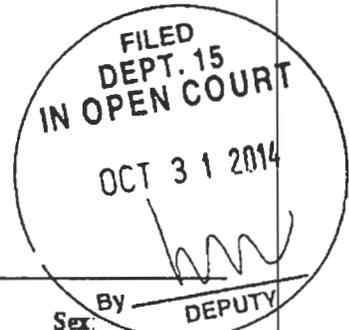
FBI No. 521592EB3

Local ID No. CHRI#863280001

PCN No. 541005978

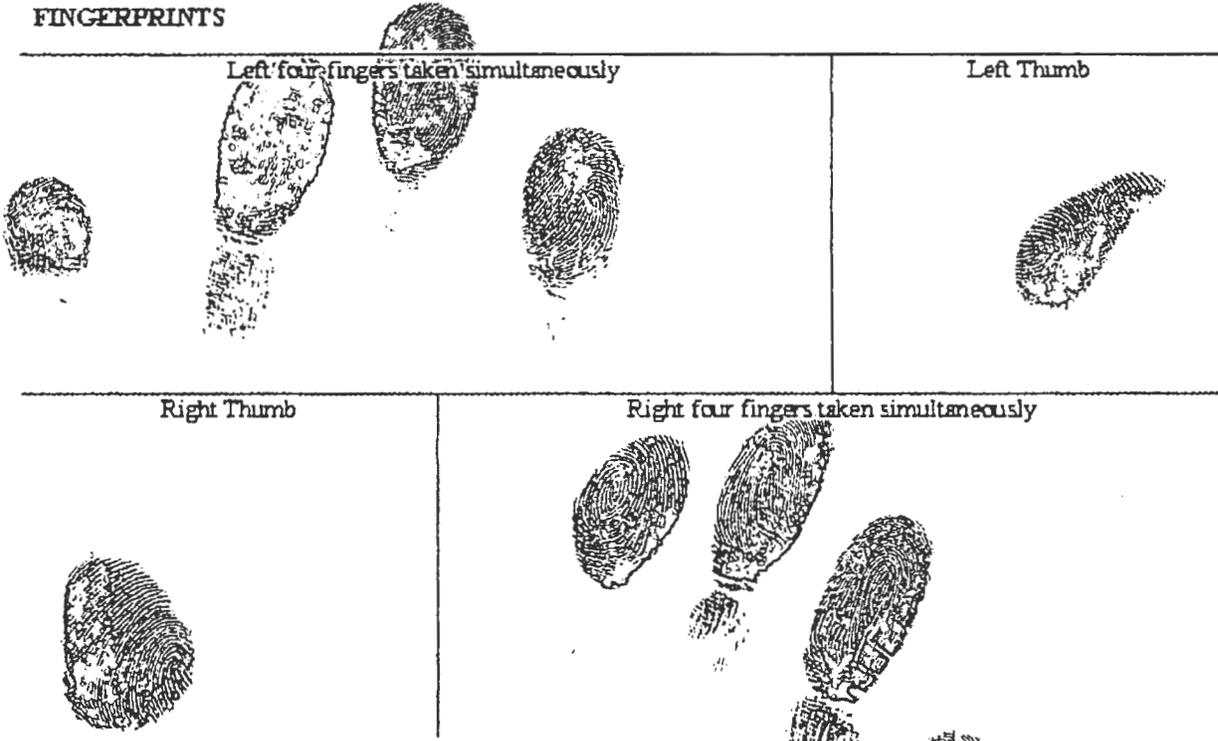
Other

Alias name, SSN, DOB:



Race:				Ethnicity:		Sex:	
[] Asian/Pacific Islander	[] Black/African-American	[X] Caucasian	[] Hispanic	[X] Male			
[] Native American	[] Other: :	[X] Non-Hispanic	[] 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: PC JAIL

JUDGMENT AND SENTENCE (JS)
(Felony) (1/2007) Page ____ of ____

0021
11/23/2014 3:12:31 PM

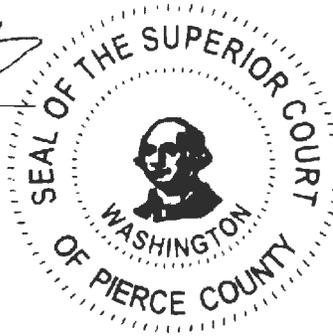
State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 06 day of June, 2018



Kevin Stock, Pierce County Clerk

By /S/Linda Fowler, Deputy.

Dated: Jun 6, 2018 11:12 AM



Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:

<https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm>,
enter **SerialID: F361DB9E-863E-40A6-8CED9F8037442053**.

This document contains 12 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

APPENDIX "B"



13-1-02515-1 43551735 VRD 10-30-14

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,

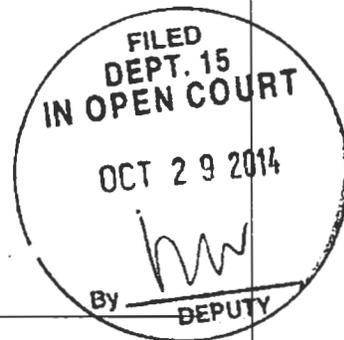
vs.

JEREMY EDWARD GAINES,

Defendant.

CAUSE NO. 13-1-02515-1

VERDICT FORM
COUNT I



We, the jury, find defendant Jeremy Edward Gaines NOT GUILTY (write
in "Not Guilty" or "Guilty") of the crime of delivery of an imitation controlled substance as
charged in Count I.

Cory T. [Signature] 10-28-14
PRESIDING JUROR

0044

3875

10/31/2014

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 06 day of June, 2018



Kevin Stock, Pierce County Clerk

By /S/Linda Fowler, Deputy.

Dated: Jun 6, 2018 11:12 AM



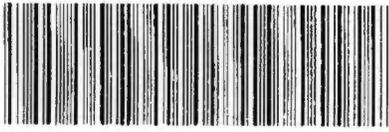
Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:

<https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm>,

enter **SerialID: 75B913DF-89B4-4513-9A8207D53739A3CA**.

This document contains 1 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

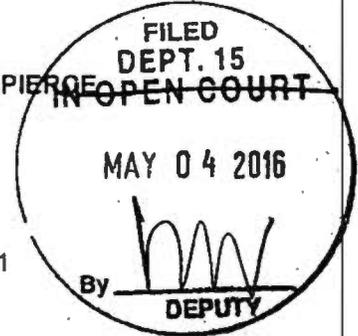
APPENDIX "C"



13-1-02515-1 48850077 CPOPN 05-08-16

Case Number: 13-1-02515-1 Date: June 6, 2018
SerialID: BBD92E1F-1CB7-41DA-AA77FD025A0EE725
Certified By: Kevin Stock Pierce County Clerk, Washington

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE



STATE OF WASHINGTON,

Plaintiff

vs.

GAINES, JEREMY EDWARD,

Defendant

Cause No. 13-1-02515-1

Unpublished Opinion

0220

11978

5/9/2016

Filed
Washington State
Court of Appeals
Division Two

May 3, 2016

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
UNPUBLISHED OPINION
13-1-02515-1

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.

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.

We decline to address the merits of Gaines's search warrant argument, because it was not adequately addressed in his briefing. As to his other arguments, we hold that the trial court did

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5/9/2016

No. 46852-2-II

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.

Accordingly, we affirm.

FACTS

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

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

¹ According to the record, a “controlled buy” is where police officers arrange and observe a drug transaction to acquire information about potential illegal drug activity. Verbatim Report of Proceedings (VRP) at 19-20.

² The 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.

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5/9/2016

No. 46852-2-II

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.

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 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.

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 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.

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 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

³ According 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.

No. 46852-2-II

requested solely by the prosecutor to accommodate his trial schedule,⁴ but most were requested by both parties.⁵

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 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.

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

⁴ On 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.

⁵ On 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.

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

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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 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.

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 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

⁷ On 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.

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motions to substitute had been denied at least “twice”⁸ previously, *id.* at 18, and that if Gaines 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.

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

Gaines appeals.

ANALYSIS

I. SEARCH WARRANT

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, he “abandoned the claim by failing to address it in the body of the opening brief.” Br. of Resp’t at 25. We agree.

⁸ It 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.

⁹ Cross also stated in his affidavit to the motions 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.

¹⁰ Gaines 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.

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“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 (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 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.

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 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.

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.

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.

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II. RIGHT TO CHOOSE PRIVATE COUNSEL

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.

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)). "'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).

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

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

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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 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 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. LAFAVE, WASHINGTON PRACTICE: CRIMINAL PROCEDURE 11.4(c), at 718-20 (3d ed.2007)).

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.

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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 heightened by the trial court's characterization of Gaines's behavior as amounting "to kind of a tantrum." VRP (Oct. 16, 2014) at 18.

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.

¹³ Gaines 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.

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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

We hold that, taking all the facts into consideration, the trial court did not abuse its discretion in denying Gaines’s motion for a continuance.¹⁵

¹⁴ Gaines also argues that that the State incorrectly presented 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.

¹⁵ Gaines 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.

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III. CRIMINALIZATION OF SOLICITATION TO DELIVER A CONTROLLED SUBSTANCE

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.

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* 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

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

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*,

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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 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

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

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

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).

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conspiracy is at work, and is neither a project still resting solely in the minds of the conspirators 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 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).

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 to being on his way to pick up two pounds of methamphetamine.

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

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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.

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 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.

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.

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

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

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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 *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.

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.

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 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

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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

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

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

First degree unlawful possession of a firearm requires proof that a defendant "owns, has in his or her possession, or . . . control any firearm after having previously been convicted . . . of any serious offense as defined in this chapter."¹⁸ Former RCW 9.41.040(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.

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

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.

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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.*

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 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.

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.

Accordingly, we hold the State presented sufficient evidence to convict Gaines of first degree unlawful possession of a firearm.

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CONCLUSION

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.

A majority of the panel having determined that this 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.

Byrnes, C.J.

BYRNES, C.J.

We concur:

Maxa, J.

MAXA, J.

Sutton, J.

SUTTON, J.

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State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 06 day of June, 2018



Kevin Stock, Pierce County Clerk

By /S/Linda Fowler, Deputy.

Dated: Jun 6, 2018 11:12 AM



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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

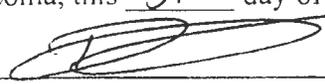
Pierce County Cause No.
13-1-02515-1

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

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Mandate No. 46852-2-II

Jason Ruyf
Pierce County Prosecutor's Office
930 Tacoma Ave S Rm 946
Tacoma, WA 98402-2102
jruf@co.pierce.wa.us

Jeremy Edward Gaines
DOC#776863
Pierce County Jail
910 Tacoma Ave South
Tacoma, WA 98402

Barbara L. Corey
Barbara@bcoreylaw.Com
902 S 10th St
253-779 0844
Tacoma, WA 98405-4537
barbara@bcoreylaw.com

Hon. Thomas J. Felnagle
Pierce County Superior Court Judge
930 Tacoma Ave South
Tacoma, WA 98402

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 06 day of June, 2018



Kevin Stock, Pierce County Clerk

By /S/Linda Fowler, Deputy.

Dated: Jun 6, 2018 11:12 AM



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APPENDIX "E"

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,) NO. 13-1-02515-1
10)
11 Plaintiff,)
12 and)
13 JEREMY EDWARD GAINES,)
14)
15 Defendant.)

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

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

Declaration of
Geoffrey C. Cross - 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

ORIGINAL

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

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.

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26 

27 _____
GEOFFREY C. CROSS

28 Declaration of
Geoffrey C. Cross - 2

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

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 06 day of June, 2018



Kevin Stock, Pierce County Clerk

By /S/Linda Fowler, Deputy.

Dated: Jun 6, 2018 11:12 AM



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APPENDIX "F"



13-1-02515-1 43551185 AMINF3 10-30-14

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 13-1-02515-1

vs.

Third JCV

JEREMY EDWARD GAINES,

~~AMENDED~~ AMENDED INFORMATION

Defendant.

DOB: 7/29/1978
PCN#: 541005978

SEX : MALE
SID#: 15619093

RACE: WHITE
DOL#: WA GAINEJE224M9

COUNT I

I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse JEREMY EDWARD GAINES of the crime of UNLAWFUL DISTRIBUTION OF AN IMITATION CONTROLLED SUBSTANCE ~~IN THE STATE OF WASHINGTON~~ JCV
~~DISTRIBUTION~~ committed as follows:

That JEREMY EDWARD GAINES, in the State of Washington, on or about the 3rd day of June, 2013, did unlawfully, feloniously, and knowingly distribute an imitation controlled substance, to-wit: a substance similar in appearance to methamphetamine, classified under Schedule II of the Uniform Controlled Substance Act, contrary to RCW 69.52.030(1), and against the peace and dignity of the State of Washington.

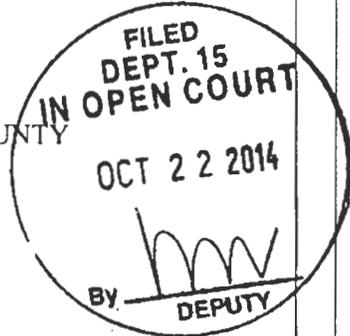
COUNT II

And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse JEREMY EDWARD GAINES of the crime of UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

SECOND AMENDED INFORMATION- I

ORIGINAL

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400



10/31/2014 3874 0177

1 That JEREMY EDWARD GAINES, in the State of Washington, on or about the 20th day of
2 June, 2013, did unlawfully, feloniously, and knowingly own, have in his possession, or under his control
3 a firearm, he having been previously convicted in the State of Washington or elsewhere of a serious
4 offense, as defined in RCW 9.41.010, contrary to RCW 9.41.040(1)(a), and against the peace and dignity
of the State of Washington.

COUNT III

5 And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the
6 authority of the State of Washington, do accuse JEREMY EDWARD GAINES of the crime of
7 UNLAWFUL SOLICITATION TO DELIVER A CONTROLLED SUBSTANCE, a crime of the same or
8 similar character, and/or a crime based on the same conduct or on a series of acts connected together or
9 constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and
10 occasion that it would be difficult to separate proof of one charge from proof of the others, committed as
11 follows:

12 That JEREMY EDWARD GAINES, in the State of Washington, on or about the 20th day of
13 June, 2013, with intent to promote or facilitate the commission of the crime of UNLAWFUL DELIVERY
14 OF A CONTROLLED SUBSTANCE, as prohibited by RCW 69.50.401(1)(2)(a) - D, did offer to give or
15 give money or other thing of value to another to engage in or cause the performance of conduct which
16 would constitute the crime of UNLAWFUL DELIVERY OF A CONTROLLED SUBSTANCE or which
17 would establish complicity of such other person in the commission or attempted commission of
UNLAWFUL DELIVERY OF A CONTROLLED SUBSTANCE had it been attempted or committed,
and in the commission thereof the defendant, or an accomplice, was armed with a firearm, that being a
firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.530, and adding
additional time to the presumptive sentence as provided in RCW 9.94A.533, contrary to RCW 9A.28.030,
and against the peace and dignity of the State of Washington.

COUNT IV

18 And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the
19 authority of the State of Washington, do accuse JEREMY EDWARD GAINES of the crime of
20 UNLAWFUL SOLICITATION TO POSSESS A CONTROLLED SUBSTANCE WITH INTENT TO
21 DELIVER, a crime of the same or similar character, and/or a crime based on the same conduct or on a
22 series of acts connected together or constituting parts of a single scheme or plan, and/or so closely
connected in respect to time, place and occasion that it would be difficult to separate proof of one charge
from proof of the others, committed as follows:

23 That JEREMY EDWARD GAINES, in the State of Washington, on or about the 20th day of
24 June, 2013, with intent to promote or facilitate the commission of the crime of UNLAWFUL
POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER, as prohibited by
SECOND AMENDED INFORMATION- 2

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10/31/2014

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10/31/2014

1 RCW 69.50.401(1)(2)(a) - I, did offer to give or give money or other thing of value to another to engage
2 in or cause the performance of conduct which would constitute the crime of UNLAWFUL POSSESSION
3 OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER or which would establish
4 complicity of such other person in the commission or attempted commission of UNLAWFUL
5 POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER had it been
6 attempted or committed,, and in the commission thereof the defendant, or an accomplice, was armed with
7 a firearm, that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW
8 9.94A.530, and adding additional time to the presumptive sentence as provided in RCW 9.94A.533,
9 contrary to RCW 9A.28.030, and against the peace and dignity of the State of Washington.

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COUNT V

And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse JEREMY EDWARD GAINES of the crime of CONSPIRACY TO DELIVER A CONTROLLED SUBSTANCE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That JEREMY EDWARD GAINES, in the State of Washington, on or about the period starting on the 3rd day of June, 2013 and ending on the 20th day of June, 2013, with intent that conduct constituting the crime of UNLAWFUL DELIVERY OF A CONTROLLED SUBSTANCE, as prohibited by RCW 69.50.401(1)(2)(a)-(d), be performed, agree with two or more persons, to engage in or cause the performance of such conduct, and any one of the persons involved in the agreement did take a substantial step in pursuance of the agreement, and in the commission thereof the defendant, or an accomplice, was armed with a firearm, that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.530, and adding additional time to the presumptive sentence as provided in RCW 9.94A.533, contrary to RCW 69.50.407, and against the peace and dignity of the State of Washington.

It is further alleged that persons involved outside the act of delivery took part in the conspiracy agreement.

DATED this 22nd day of October, 2014.

TACOMA POLICE DEPARTMENT
WA02703

MARK LINDQUIST
Pierce County Prosecuting Attorney

jcw

By: _____
JESSE WILLIAMS
Deputy Prosecuting Attorney
WSB#: 35543

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10/31/2014

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State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 06 day of June, 2018



Kevin Stock, Pierce County Clerk

By /S/Linda Fowler, Deputy.
Dated: Jun 6, 2018 11:12 AM



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PIERCE COUNTY PROSECUTING ATTORNEY

June 06, 2018 - 1:37 PM

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Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51871-6
Appellate Court Case Title: Personal Restraint Petition of Jeremy Edward Gaines
Superior Court Case Number: 13-1-02515-1

The following documents have been uploaded:

- 518716_Motion_20180606133652D2076119_5163.pdf
This File Contains:
Motion 1 - Other
The Original File Name was GAINES MOTION.pdf
- 518716_Personal_Restraint_Petition_20180606133652D2076119_2624.pdf
This File Contains:
Personal Restraint Petition - Response to PRP/PSP
The Original File Name was GAINES RESPONSE TO PRP.pdf

A copy of the uploaded files will be sent to:

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