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Division III
State of Washington
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No. 333132

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

IGNACIO COBOS,

Appellant.

BRIEF OF RESPONDENT

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7. Mr. Cobos' right to present a defense was violated.	
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I. ASSIGNMENTS OF ERROR

1. The Court erred in not allowing Mr. Cobos to represent himself.
2. Mr. Cobos was not validly stopped.
3. The police improperly interviewed Mr. Cobos' passenger.
4. The Court erred in issuing a search warrant.
5. Mr. Cobos was denied his right to counsel at his first appearance.
6. Mr. Cobos' statements were involuntary.
7. Mr. Cobos' right to present a defense was violated.
8. Mr. Cobos' CrR 3.3 time for trial rights were violated.
9. The Court improperly allowed a witness to express an expert opinion.
10. There was insufficient evidence to prove the crimes charged beyond a reasonable doubt.
11. The Court failed to define a term sua sponte.
12. The Court erred in sentencing Mr. Cobos to a combined term of community custody and confinement that exceeded 120 months on a class C felony.
13. The Court erred in imposing a no alcohol condition on Mr. Cobos.
14. The Court erred in not addressing Mr. Cobos' ability to pay legal financial obligations.
15. The Court erred in allowing amendments of the information.
16. The Court erred in failing to hear Mr. Cobos' pro se motions.

17. The Court pressured the jury to reach a verdict.
18. Mr. Cobos did not have a complete record on review.
19. There was cumulative error requiring reversal.
20. The Court erred in closing the courtroom.
21. Mr. Cobos was subject to vindictive prosecution.
22. The Court erred in denying Mr. Cobos' motion to dismiss at the close of the State's evidence.
23. Defense counsel was ineffective.

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did Mr. Cobos adequately request to represent himself prior to his sentencing hearing?
2. Should the Appellate Court consider any of the issues raised that could have been raised in the prior appeal?
3. Does the record adequately demonstrate Mr. Cobos was invalidly stopped?
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29. Did Mr. Cobos have a right to bring a motion to dismiss at the close of the State's case?
30. Was counsel ineffective?
31. Dose the attenuation doctrine defeat Mr. Cobos' CrR 3.6 claim?
32. Can the State assert the defense of laches?

III. STATEMENT OF THE CASE

At about quarter to one in the morning Moses Lake Police Officers Francis and Montgomery stopped Mr. Cobos for driving with no lights. Affiliated Court Reporters RP 46. Officer Francis recognized Mr. Cobos' passenger, J.G. Officer Francis knew J.G., was concerned about her, and asked her if she would speak to him. *Id.* at 47, Wenatchee Valley at 79. She was acting like she was in distress. *Id.* at 57. Officer Francis spoke to Mr. Cobos after giving him his Miranda warnings, although he was not under arrest. *Id.* at 48.

Mr. Cobos claimed J.G. was his girlfriend. Affiliated at 50, Wenatchee Valley Court Reporting at 76. Mr. Cobos acknowledged the two had sex, and that he had videotaped it. *Id.* at 50, 76. When asked if J.G. knew she was being videotaped Mr. Cobos said “I don’t think so.” Wenatchee Valley at 77. Mr. Cobos took the officers to his apartment to show them the video. Affiliated at 51, Wenatchee Valley at 77. Officers applied for a search warrant and seized the video. Wenatchee Valley at 89. They also seized drugs and drug paraphernalia. *Id.* at 93.

During the playing of the video the court proposed covering up the court room door windows. The prosecutor objected, and from the record it appears the windows were not covered. Wenatchee Valley at 113-14. During her testimony J.G. stated that Mr. Cobos would give her methamphetamine for sex. Wenatchee Valley RP 230. She testified that she did not know she was being filmed, although she did know about cameras in the apartment. *Id.* at 234. The video shown to Officer Francis was played to the jury. Ex. 9.

The jury convicted Mr. Cobos of Voyeurism, Delivery of Methamphetamine and Possession of Methamphetamine. Mr. Cobos initially only appealed his offender score. *State v. Cobos*, 178 Wn. App. 692, 315 P.3d 600 (2013); *State v. Cobos*, 182 Wn.2d 12, 13, 338 P.3d 283

(2014). Based on those appeals Mr. Cobos was remanded for resentencing. He now appeals from that resentencing.

IV. ARGUMENT

Structure of Argument

Mr. Cobos separates out his brief into 33 sections. With one exception (issue 12) the Court should ignore the appeal as this is an appeal after resentencing. Several of the sections are repetitive. In order to assist the reader and keep track of the issues, at the beginning of each of the State's sections the numbers match the section numbers which are being responded to. In the case of repetitive issues multiple section numbers will proceed each of the State's sections.

1, 6, 21. Mr. Cobos did not adequately request his right to represent himself until after the trial.

The State has reviewed the record and the clerk's papers. The State cannot find any motion for the defendant to proceed pro se before trial. There is one pro se motion filed on October 13, 2011, titled Defendant's Motion to Quash Information. CP 28. There is also a notice to Mr. Cobos dated December 30, 2011 that he must file motions through his attorney. CP 85. There is no indication in the file that he made the motion he claims to have made. The clerk obviously placed his pro se

motions in the file, as there are several in the Clerk's Papers. Thus there is no evidence Mr. Cobos actually requested to proceed pro se.

A request to represent oneself must be unequivocal in the context of the record as a whole. *In re Detention of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999). [T]he United States Supreme Court requires "that courts indulge in every reasonable presumption" against a defendant's waiver of his or her right to counsel. *Id.* Because Mr. Cobos' motion is not in the record, the Court cannot evaluate whether it was an equivocal request. Assuming the facts are as Mr. Cobos states them, the fact that he either did not bring up the issue with his attorney, or his attorney talked him out of it, and that he never raised the issue again until after trial, makes his request to proceed pro se at least equivocal in light of the record as a whole.

2. The Court should not consider any assignments of error except one, as they were not raised in Mr. Cobos first appeal and were not considered by the trial court on remand.

Mr. Cobos elected to proceed pro se during his sentencing. He then filed a pro se notice of appeal, and filed an appellate brief challenging his offender score. Mr. Cobos represented himself in the Court of Appeals and Supreme Court. *State v. Cobos*, 178 Wn. App. 692, 315 P.3d 600 (2013); *State v. Cobos*, 182 Wn.2d 12, 15, 338 P.3d 283 (2014). *See also*

Mr. Cobos' objection to appointment of amicus counsel. In this appeal Mr. Cobos filed a motion to allow him to continue pro se, which was not objected to. Commissioner's ruling of April 13, 2017. At his sentencing the trial judge stated "You have the right to be represented by a lawyer for the purposes of appeal... I will appoint a lawyer to represent you at public expense. And I would highly recommend to you that you allow me to appoint counsel for you." Sentencing RP 50. Mr. Cobos declined the trial court's offer. Mr. Cobos' waiver of his right to counsel was knowing, intelligent and voluntary, he was never forced to represent himself, and insisted on it for the purposes of his appeals.

Mr. Cobos miscites case law to argue there is no right to represent himself on appeal. There is no federal right. *Martinez v. Court of Appeal*, 528 U.S. 152, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000). However, the right is clear under the Washington Constitution. *State v. Rafay*, 167 Wn.2d 644, 656, 222 P.3d 86 (2009). Mr. Cobos has consistently insisted on his right to pursue his appeal pro se, despite multiple opportunities to obtain an attorney.

Mr. Cobos argument that he should not be held to the requirement to raise these issues in the first appeal might conceivably have merit if he was pro se in the first appeal, but then had an attorney in the second, as this would be the first time an appellate attorney had reviewed the case.

However, Mr. Cobos is pro se in both appeals. The purpose of the law of the case doctrine is to prevent sequential appeals and encourage parties not to save issues. It also promotes judicial economy by resolving all issues in a case at once. “This court from its early days has been committed to the rule that questions determined on appeal or questions which might have been determined had they been presented, will not again be considered on a subsequent appeal in the same case.” *State v. Sauve*, 33 Wn. App. 181, 186, 652 P.2d 967 (1982); *State v. Fort*, 190 Wn. App. 202, 228, 360 P.3d 820, 833 (2015). *Sauve* also explains that RAP 2.5(c) does not permit the court to review issues that could have been raised in the first appeal, despite the restrictions on the law of the case doctrine. *Id.* at 183, n. 2. None of the issues Mr. Cobos raises were considered by the trial court on remand, thus they are not properly before the appellate court. Mr. Cobos gives no valid explanation as to why he did not raise these issues in his first appeal. The Appellate Court should dismiss most of this appeal on this basis and not consider any other claims of error.

In his first appeal on this case Mr. Cobos moved for accelerated review of his sentence. Mr. Cobos then filed a brief opposing his sentence. The Court rejected the filing and informed Mr. Cobos he needed to file a brief raising all of his issues. Mr. Cobos moved to modify this ruling, which was denied. He then filed an amended brief again only

raising the sentencing issue. Mr. Cobos was well aware he was required to raise all issues in his first appeal and chose not to do so. The court should enforce its order and not consider the other issues raised by Mr. Cobos.

Mr. Cobos does make a claim of sentencing error in his second sentencing that has merit. (Issue 12). That issue is ripe for review, was not waived, and the court should review it and remand for resentencing.

3(a). Mr. Cobos was validly stopped.

There was no CrR 3.6 suppression hearing in this case. There was a CrR 3.5 hearing regarding some of the same facts. The Court introduced findings of fact and conclusions of law after that hearing. Mr. Cobos now contends that he was not on a public right of way, so there was no reasonable suspicion that he was committing a traffic infraction under RCW 46.37.020. This argument opens multiple factual questions that are not resolved in the record. These include where exactly Officer Montgomery saw the vehicle with its lights off and whether there was reasonable suspicion that the road Mr. Cobos was on was a public highway under RCW 47.04.010. “Warrantless traffic stops pass constitutional challenge under article I, section 7 as investigative stops, but only if based on a reasonable articulable suspicion of either criminal activity or a traffic infraction, and only if reasonably limited in scope.”

State v. Muhammad, __ Wn. App. __, __ P.3d __ (2018), Slip Op. at 12.

However, even if Mr. Cobos is technically correct that he was on private property, that is not the relevant question; the relevant question is whether the officers had reasonable suspicion that he was on a public road.

Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law.

Heien v. North Carolina, 135 S. Ct. 530, 536, 190 L. Ed. 2d 475 (U.S.

2014). There was no 3.6 hearing in this case. Because the record in this case does not show the facts necessary to conclude that the officers improperly stopped Mr. Cobos he neither establishes manifest constitutional error nor ineffective assistance of counsel. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

3(b), 19. Mr. Cobos has no standing to argue against the officer's discussion with his passenger was inappropriate.

There are many cases where the defendant challenges an officer's actions in speaking to and seizing a passenger in a vehicle or equivalent.

E.g. State v. Flores, 186 Wn.2d 506, 379 P.3d 104 (2016); *State v.*

Mendez, 137 Wn.2d 208, 219, 970 P.2d 722 (1999); *State v. Horrace*, 144 Wn.2d 386, 392, 28 P.3d 753 (2001). What is common about all of these cases is that it is the passenger objecting to the police action. (The normal scenario is the passenger/companion is seized and then contraband is found on them.) The court of appeals has specifically rejected the idea that a driver may object to the questioning of a passenger. *State v. Pettit*, 160 Wn. App. 716, 721, 251 P.3d 896 (2011). Thus Mr. Cobos' challenge to the officer's questions of his passenger fail.

Nor does the case law Mr. Cobos cites prevent the officers from merely speaking to a passenger and inquiring about their welfare. While the officers could not demand her identification, or keep her on the scene against her will, there was nothing keeping them from talking to her and further investigating when something appeared amiss. "Police officers are permitted to approach citizens and permissively inquire into whether they will answer questions as part of their "community caretaking" function. Where an officer commands a person to halt or demands information from the person, a seizure occurs. But no seizure occurs where an officer approaches an individual in public and requests to talk to him or her, engages in conversation, or requests identification, so long as the person involved need not answer and may walk away." *State v. Beito*, 147 Wn. App. 504, 509, 195 P.3d 1023, 1026 (2008) (Internal citations omitted).

Here there is no indication the passenger would have been prevented from walking away if she wished.

Mr. Cobos did not own his passenger such that he had the right to keep officers away from her.

3(c). There was no pretext stop.

Here the officers stopped Mr. Cobos for failure to use his lights after dark. A pretext stop occurs when officers stop an individual based on one reason, but actually have a different reason in mind. For instance, in *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999), the officers followed someone they suspected of being involved with drugs, and then used a traffic violation to pull him over in order to search the car. Here there is no indication or testimony that officers had any knowledge of who was in the car or any non-legitimate reason to stop the car before contacting the car about the lights. There was no underlying reason to provide a pretext for. Therefore there was no pretext stop. The fact that the officer only planned to issue a warning, not a ticket, does not mean that the stop was pretextual. It just means the officers felt the most just way to deal with the issue was issue a warning, not a ticket. That is within the discretion afforded to police officers.

4. The Court did not error in issuing the search warrant.

Mr. Cobos claims that his accuser was not credible, and therefore the judge should not have issued the search warrant. “Generally, citizen-informants (as distinguished from “professional” police informants) are deemed presumptively reliable sources of information.” *State v. Wakeley*, 29 Wn. App. 238, 241, 628 P.2d 835, 837 (1981). J.G. was an identified citizen informant, known to the officers and the magistrate, thus there was a presumption of reliability. Because there was no challenge to the search warrant, it is not present in the court file, and insufficient record exists to determine exactly what was said in the warrant application. Therefore, beyond the fact there was a named citizen informant, this issue is not adjudicable on appeal.

5. Mr. Cobos was not denied his right to counsel at his first appearance.

Mr. Cobos had his first appearance on August 22, 2011. He was represented by the defense attorney of the day Stephan Kozer. Affiliated Court Reporters RP at 3. The Court appointed an attorney at Mr. Cobos’ request. *Id* at 5. The Court had already found probable cause before the hearing. *Id* at 4.

Given that Mr. Cobos had an attorney at his first appearance, his argument is meritless. However, even if he had not, under *In re Pers. Restraint of Sanchez*, 197 Wn. App. 686, 391 P.3d 517 (2017), the error, if

any, was harmless. In *Sanchez* the court held that a preliminary hearing without an attorney that consisted of “ascertaining the defendant's name, advising the defendant of certain rights including the right to counsel, and informing the defendant of the charges that have been filed,” and where the defendant did not waive any rights or make any pleas was subject to harmless error. Here Mr. Cobos claims his attorney could have challenged probable cause. Setting aside the fact that the judge had already found probable cause prior to the hearing, Mr. Cobos was convicted beyond a reasonable doubt at trial where he was fully represented. There was no argument that defense counsel could have made. In addition the permanent defense counsel, once appointed, was free to bring a motion under CrR 8.3(c). Mr. Cobos did not give up the right to challenge probable cause at the preliminary hearing, thus the error, if any, was harmless.

7. Mr. Cobos' statements were properly found to be voluntary.

The purpose of a CrR 3.5 hearing is to determine whether a defendant's statements are voluntary. The State bears the burden of production and persuasion. The purpose of a 3.6 hearing is to determine whether an improper search or seizure was conducted. The defendant has the burden of production. The burden of persuasion generally depends on

whether the search or seizure was pursuant to a warrant or to some exception to the warrant requirement. A person can be improperly seized and still make a voluntary statement. Here Mr. Cobos did not meet his burden of production as far as the seizure was concerned. He never filed a brief or notified the State that it needed to have Officer Montgomery testify in a CrR 3.6 hearing. Mr. Cobos' arguments go to his alleged improper seizure, not to the voluntariness of his statements.

8, 27. Mr. Cobos' right to present a defense was not violated, and there was sufficient evidence to conclude the substance tested was methamphetamine.

Mr. Cobos apparently wished to call a doctor to establish that he had a prescription for Adderall, and that is what was in his pipe. However, the testimony of the expert from the crime lab contradicted that. He testified that he used a test on exhibit 13 that unambiguously identified molecules. RP 197. He also stated the test he used could tell the difference between Adderall and methamphetamine. RP 198. Exhibit 13 contained methamphetamine and a cutting agent. He also tested a white chunky substance in exhibit 12 that contained both amphetamine (possibly Adderall), and methamphetamine. RP 200. The expert did testify that a field test may not be able to distinguish between amphetamine and methamphetamine, but that is what the lab tests were for. RP 207. Thus the fact that Mr. Cobos had a prescription for Adderall is irrelevant, as it

would not have produced a positive test for methamphetamine, which is what the lab expert testified to, and what Mr. Cobos was convicted of.

The tactical decision as to what witnesses to call is for the defense attorney. *State v. Robinson*, 79 Wn. App. 386, 396, 902 P.2d 652, 657 (1995). Here the defense attorney reasonably elected not to call the witness because the lab test could distinguish between Adderall and methamphetamine. Establishing Mr. Cobos had a prescription for Adderall would not have helped his case, thus it was reasonable not to call the witness.

8, 28. Mr. Cobos' rights under CrR 3.3 were not violated.

Defense counsel asked the State for any vacation schedules of witnesses. Defense counsel never brought a motion to enforce the request or complained the State failed to provide it. The case was originally set for trial on October 19, 2011. One of the officers suffered an accident and sustained a concussion, and the assigned prosecutor was ill, so was unable to proceed on the scheduled date. ACR RP 32, CP 18. The case was continued one week to October 24th. CP 29. The Court conducted a CrR 3.5 hearing on the 19th, with a different prosecutor filling in for the hearing. ACR RP 43. The case called ready for trial on the 24th. ACR RP 72. Another case went to trial ahead of Mr. Cobos and the case was recalled on the 31st. ACR RP 83. At that point the State informed the

court the lead officer was on military leave from November 4th through the 10th, and the State would be unable to proceed. ACR RP 84. The Court left the case on that week, but again it did not go to trial due to another case with higher priority. The State then came back on November 7th. ACR RP 97-100. The judge found good cause and continued the case to November 21st. On the 21st the case called ready, but again was bumped for another trial. The same thing occurred on November 28 and December 5th. ACR RP 110. The case started trial on December 14th. WV RP 4.

Mr. Cobos' argument that the late notice of Detective Sursley's military leave somehow requires dismissal. He does not cite any case law for this proposition. He does not show he was prejudiced in his defense by the delay. He does not argue the trial court abused its discretion in granting the continuance. He only argues that somehow his attorney's request to be notified of unavailability dates creates a vested interest in his trial date that cannot be disturbed by later announced issues. There is no case law or authority for this proposition.

8. The Court sustained the objection to Detective Sursley's testimony; Mr. Cobos assignment of error on this issue is unclear.

The prosecutor asked Detective Sursley about his experience investigating drugs. Defense counsel objected based on calling for an expert opinion. The Court allowed the State to ask about Detective

Sursley's experience, but struck the question Mr. Cobos now complains about. Mr. Cobos won the objection, it is unclear what he is assigning error to.

9. There is sufficient evidence to prove delivery beyond a reasonable doubt.

Mr. Cobos seems to argue that in order to complete a delivery a drug must be given to another person, and that other person must not give it back. He cites no case law or reasoning for this argument. Mr. Cobos passed a meth pipe back and forth with the recipient in this case. WV RP 133. There is no requirement in the law or logic for permanent relinquishment, as Mr. Cobos argues. To the extent there is, Mr. Cobos did permanently relinquish some of the drug. He told J.G. to smoke it. WV RP 232. In having her smoke it, Mr. Cobos permanently relinquished whatever quantity J.G. consumed. The quantity of drugs delivered is not an element the State has to prove, only that some were delivered. "RCW 69.50.4013 does not contain a "measurable amount" element, and we are constrained from adding one." *State v. Higgs*, 177 Wn. App. 414, 436, 311 P.3d 1266, 1278 (2013). Thus to the extent a permanent transfer of drugs is necessary to prove, there is adequate evidence of such transfer in this case.

10. There is sufficient evidence to prove voyeurism beyond a reasonable doubt.

The legal standard for courts reviewing the sufficiency of evidence issues are well established. The State bears the burden of proving all the elements of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. CONST. amend. XIV; WASH. CONST, art. I, § 3. To determine if sufficient evidence supports a conviction, we consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (some emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

J.G. stated she did not know she was being filmed. WV RP 234. Officer Miers said J.G. acted surprised when she was told she was filmed. WV RP 68-69. Mr. Cobos said he did not think J.G. knew she was being taped. WV RP 77. Detective Francis noted the computer doing the recording was not obvious without being pointed out. WV RP 83. The prosecutor summarized the evidence on the video in her closing argument.

Now, [J.G.] said "I knew about the camera. The defendant had told me that he had it for security so that people didn't break into his apartment."
Well, people aren't going to break into his apartment through the bedroom. They're going to break in through the front door. So she knew about the camera. But remember

what the defendant told one of the officers when he was asked "Did she know that she was being filmed?" And he said "No, probably not."

[J.G.] in -- towards the end of that video --

And the sound is very poor, so some of you probably heard parts of it and some of you probably heard other parts of it. I know I heard it better here than I heard it at my computer in my office.

Towards the end [J.G.] saw the camera and --

Which was up on the armoire, which Officer Francis said he saw when it was pointed out to him six feet up. Walking into a room you don't look up. You look around at horizon level.

-- said "Are you -- are you recording me?" And he said "No. It's pointed the other way."

In a bedroom you expect privacy. When you have your clothes off you expect privacy. When you're engaged in sexual relationships you expect privacy.

And the defendant was seen at the beginning of that video clearly setting the camera up. And you may recall as you could see [J.G.] on the bed, she had her back turned and she was smoking methamphetamine. So she's not even aware that the camera is being placed onto the bed.

WV RP 363-64. There is clear evidence from which a reasonable juror could conclude that J.G. did not have knowledge of the filming.

J.G. had a reasonable expectation of privacy. For the purposes of the voyeurism statute "Place where he or she would have a reasonable expectation of privacy" means:"

(i) A place where a reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed or filmed by another; or

(ii) A place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance;

RCW 9A.44.115(1)(c). A bedroom of a friend or intimate is certainly a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance. In addition society has a reasonable expectation that sexual partners will not film each other without consent. Thus a partner's bedroom would be a place where one could disrobe in privacy without being photographed or filmed by another. J.G. had a reasonable expectation of privacy in the bedroom as far as not being filmed is concerned.

11. The Court was not required to define transfer sua sponte.

Mr. Cobos argues that the court could have defined transfer for the jury sua sponte. Perhaps so. That does not mean it was required to. “In a criminal case...the trial court is required to define technical words and expressions, but not words and expressions which are of common understanding and self-explanatory.” *State v. O'Donnell*, 142 Wn. App. 314, 324, 174 P.3d 1205 (2007). “A term is considered technical when its legal definition differs from the common understanding of the word. Whether a term is considered technical is left to the trial court's discretion.” *Id.* (internal quotations omitted). Mr. Cobos makes no argument that the court should have or was obligated to define the term. Nor does he establish that the failure to was manifest constitutional error, able to be raised for the first time on appeal. No one asked for the

definition, and Mr. Cobos provides no case law or logic that the court should have provided a definition sua sponte.

12. The Court did error in sentencing Mr. Cobos to a combined sentence that exceeded 120 months.

The trial court could not sentence Mr. Cobos to a combined sentence and community custody time that exceeded 120 months. The “SRA prohibit[s] trial courts from imposing a term of community custody that would, in combination with a defendant's term of confinement, exceed the statutory maximum for the crime. RCW 9.94A.505(5). Trial courts are required to “reduce []” a term of community custody that, in combination with the term of confinement, may exceed the statutory maximum for the crime. RCW 9.94A.701(9). *State v. Bruch*, 182 Wn.2d 854, 858, 346 P.3d 724, 726 (2015).

Of note the trial court disregarded the prosecutor’s recommendation for an exceptional sentence, which, if constructed correctly would have allowed the court to do what it tried to do. Mr. Cobos must be resentenced in accordance with *Bruch*.

13. The court had authority to impose a no alcohol condition on Mr. Cobos.

Mr. Cobos argues that the court could not impose a no alcohol condition of supervision because it was not crime related. However, the prohibition on alcohol consumption is permissible regardless of its

relationship to the crime of conviction. RCW 9.94A.703(3)(e), *State v. Norris*, 404 P.3d 83, 90 (Wash. Ct. App. 2017), *review granted*, 190 Wn.2d 1002, 413 P.3d 12 (2018).

14. Ability to pay legal financial obligations.

The court only imposed the mandatory legal financial obligations of the victim's assessment and the court costs. There was no need to inquire into Mr. Cobos' ability to pay.

18. Mr. Cobos was not entitled to costs on appeal because this issue was not preserved and he did not prevail.

The only path of review from a commissioner's ruling is to file a motion to modify under RAP 17.7. Mr. Cobos did not file such a motion, he cannot now raise the issue on appeal from a remand. In addition Mr. Cobos sought a resentencing where the State would not have further opportunity to present evidence to establish his offender score. Instead he obtained a resentencing where the State did have such an opportunity, and the State established he had a higher offender score than everyone thought he did at the first sentencing. Ultimately Mr. Cobos' appeal left him in the same or worse position than if he had never appealed at all. Therefore he did not prevail on his appeal.

20. The Court did not abuse its discretion in allowing the amendment of the information.

In his brief Mr. Cobos, without citation to the record, claims the information was amended on October 19th. The State cannot find anything in the record supporting that contention. On the 25th the State moved to amend the information. The defense objected based on speedy trial. The Court offered a continuance within the speedy trial period, which the defense declined. Affiliated RP 79-81. The State again amended the information the next week at the same time it asked for a continuance based on the detective's military duty. Defense counsel acknowledged she could adequately represent the defendant even with the amendment. *Id.* at 87.

CrR 2.1 allows amendment of the information as long as the defendant is not prejudiced. Defense counsel acknowledged she could be prepared to adequately defend Mr. Cobos within the speedy trial period under CrR 3.3, even with the amendment. Where the defendant fails to ask for a continuance, there is presumed to be a lack of surprise and prejudice. *State v. Schaffer*, 63 Wn. App. 761, 767, 822 P.2d 292, 296 (1991), *aff'd*, 120 Wn.2d 616, 845 P.2d 281 (1993). Mr. Cobos never pointed to any particular prejudice to the presentation of his case, and does not do so now. "A trial court's ruling on a proposed amendment to an information is reviewed for abuse of discretion." *State v. Lamb*, 175

Wn.2d 121, 130, 285 P.3d 27, 32 (2012). There is no indication the trial court abused its discretion.

22. Mr. Cobos was represented by counsel, he was informed he needed to go through counsel to file a motion. He failed to do so.

There is no right to hybrid representation. *State v. Romero*, 95 Wn. App. 323, 326, 975 P.2d 564, 566 (1999). Mr. Cobos claims that the court never heard his motions. The clerk advised Mr. Cobos that as a represented defendant he was obligated to work through his counsel in filing the motions. CP 85.

23, 24. There is no evidence the clerk failed to file Mr. Cobos' pleadings.

Mr. Cobos claims that the clerk failed to file a motion for self-representation. However, there is no evidence of such a motion, and no place in the record where Mr. Cobos raised the issue, either with his attorney or with the court. With no evidence in the record the Appellate Court is unable to address this issue. There are multiple hand-written motions in the file written by Mr. Cobos, including one entitled "defendant's request to court appointed attorney." It is clear that the clerk was filing documents received by Mr. Cobos. There is no evidence in the record to support his claim.

25. The jury was not pressured by an administrative question.

The Court was very careful not to suggest to the jury that they had to reach a conclusion. Instead it simply asked the jury whether they wished to keep deliberating or come back the next business day. This is simply not a coercive question. It does not imply the jury had to reach a verdict in a particular time. The Court needs to manage its staff and the courtroom. It is reasonable to ask this question.

26. Mr. Cobos received a complete record on review.

Mr. Cobos complains that he does not have a complete record. As he acknowledges this issue has already been addressed up through the Supreme Court. Thus it is not properly in this appeal. In addition he does not point to any issue or fact that he is unable to adequately address because of a missing word in a transcript.

29. There being only one sentencing error worthy of remand, cumulative error simply does not apply.

30. There was no courtroom closure within the meaning of the public trial right.

“[T]he closure of a trial or similar proceeding occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.” *State v. Berg*, 177 Wn. App. 119, 126, 310 P.3d 866, 870 (2013), *rev'd on other grounds*, 181 Wn.2d 857, 337 P.3d 310 (2014). Covering up windows in the door to the courtroom

is not a closure under this definition. There is no indication that anyone was not free to come and go as they wish. As far as the State is aware there is no requirement that courtroom doors even have windows. In addition from the record it appears the windows were not covered. There simply was no closure in this case.

31. There is no evidence of vindictive prosecution.

“Prosecutorial vindictiveness is the intentional filing of a more serious crime in retaliation for a defendant's lawful exercise of a procedural right. Prosecutorial vindictiveness must be distinguished, however, from the rough and tumble of legitimate plea bargaining. *State v. Lee*, 69 Wn. App. 31, 35, 847 P.2d 25, 28 (1993) (internal citation omitted). Mr. Cobos does not identify any procedural right he exercised that the prosecutor retaliated against. The record does not reflect that the prosecutor even read Mr. Cobos’ letters attacking the case. To the extent they were influential, they do not give rise to a finding of vindictiveness. Defense attorneys, as part of plea bargaining, often point out perceived weaknesses in the State’s case in the hope of obtaining a dismissal or a reduction from the prosecutor. Prosecutors often amend charges to address perceived weaknesses in their case. This is simply part of the rough and tumble of litigation, and does not give rise to a finding of vindictiveness.

33. Mr. Cobos had no right to a motion to dismiss at the close of the State's case, and the appellate court does not review motions to dismiss, but instead reviews sufficiency of evidence, and there was sufficient evidence.

As discussed in sections 8, 9, 10 and 27 there was sufficient evidence presented by the State to establish Mr. Cobos was guilty of the crimes charged beyond a reasonable doubt. An appellate court does not review a motion to dismiss for lack of evidence at the close of the State's case, but instead reviews for lack of evidence based on the record as a whole. "[A] defendant who presents a defense case in chief "waives" (*i.e.*, may not appeal) the denial of a motion to dismiss made at the end of the State's case in chief, and a defendant who goes to trial may not appeal the denial of a *Knapstad* motion." *State v. Jackson*, 82 Wn. App. 594, 608, 918 P.2d 945, 953 (1996). Thus the court only reviews whether there was sufficient evidence as a whole. In addition Mr. Cobos was not entitled to a motion to dismiss at the close of State's evidence.

A. *Basis for motions at close of the State's evidence.*

Defendants routinely bring motions to dismiss at the close of the State's evidence. However, such motion is not authorized by rule and entails considerable cost. The defendant should not be permitted to bring such a motion. A midtrial motion to dismiss is unreviewable under the double jeopardy clauses of both the U.S. and Washington Constitutions. It

violates the Washington Constitution and RCW 10.43.050.¹ The defendant may, of course, bring such a motion either pre or post trial in accordance with CrR 8.3(c) or 7.4(a).

In *Evans v. Michigan* all parties agree the trial judge made a mistake. Relying on an incorrect pattern jury instruction he dismissed an arson case at the close of the State's evidence, wrongly requiring the State to prove an element that was not part of the crime charged. *Evans v. Michigan*, 133 S. Ct. 1069, 1073-74, 185 L. Ed. 2d 124 (2013). The State appealed, arguing the judge's misconstruing a statute was an error of law, not fact, and therefore the double jeopardy clause did not apply. In an 8-1 decision the Supreme Court rejected this argument holding that the double jeopardy clause prevented retrial. *Id.* at 1081. However, in making that decision, the court also held:

Nothing obligates a jurisdiction to afford its trial courts the power to grant a midtrial acquittal, and at least two States disallow the practice. Many jurisdictions, including the federal system, allow or encourage their courts to defer consideration of a motion to acquit until after the jury returns a verdict, which mitigates double jeopardy concerns.

¹ No order of dismissal or directed verdict of not guilty on the ground of a variance between the indictment or information and the proof, or on the ground of any defect in such indictment or information, shall bar another prosecution for the same offense....

Id. See e.g. Fed. Rule Crim. Pro. 29(b). Washington, under its criminal rules, also disallows Superior trial courts from granting a midtrial acquittal in Superior Court.

The trial court was correct that by custom courts have routinely heard motions at the close of the State's evidence. However, custom is not precedent, and this custom is harmful and contrary to law. Courts "can reconsider our precedent not only when it is has been shown to be incorrect and harmful but also when the legal underpinnings of our precedent have changed or disappeared altogether." *W.G. Clark Construction Co. v. Pacific Northwest Regional Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014). In addition no Washington court has actually considered all of the issues involved in midtrial motions in a precedential decision. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994); accord *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 220, 995 P.2d 63 (2000) (quoting *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) (if a case fails to specifically raise or decide an issue, it cannot be controlling precedent for the issue)). "Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or

consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court. An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered." *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014). All cases that discuss midtrial motions to dismiss take them as a matter of routine, and never analyze their benefits and drawbacks. Thus midtrial motions are not supported by precedent, they are merely custom. The legal foundations upon which a midtrial motion to dismiss in a criminal trial were based have been obliterated, they are harmful, and have not been upheld under valid precedent. The motions should not be permitted.

An example of the problem can be found in *State v. Underwood*, 33 Wn. App. 833, 658 P.2d 50 (1983). In *Underwood* the jury hung and the court declared a mistrial. The trial court then dismissed, feeling that there was not enough evidence for the State to convince a jury beyond a reasonable doubt. The Court of Appeals reversed, holding there was sufficient evidence to retry the case. If the trial judge, instead of dismissing after declaring a mistrial, dismissed midtrial, there would have been no appeal, and no opportunity for the court to correct this error.

Another example can be found in *State v. Collins*, 112 Wn.2d 303, 771 P.2d 350 (1989). In *Collins* the Court indicated it was dismissing an Assault 3 charge. Then a few minutes later the prosecutor introduced a case on point, and, after discussion, the trial judge reversed himself. A trial outcome should not hinge on the ability of the parties to find relevant precedent on short notice.

As an example of how the system should work can be found in *State v. Pearson*, 180 Wn. App. 576, 321 P.3d 1285 (2014). In *Pearson* the trial court expressed skepticism about the State's evidence prior to presenting an instruction on a school bus stop enhancement. However, the court submitted the enhancement to the jury, which found the enhancement. The court then dismissed the enhancement after the verdict. The State appealed, and the Court of Appeals, exercising its constitutional duties, affirmed the trial court in a published opinion. The defendant was never punished for a crime for which there was insufficient evidence, and the case was fully adjudicated according to the constitution.

B. *Criminal Rules and RCW 10.43.050 Prohibit Midtrial Motions to Dismiss.*

Interpretation of court rules is reviewed de novo. *State v. McEnroe*, 174 Wn.2d 795, 800, 279 P.3d 861 (2012). Court rules are interpreted using the rules of statutory construction. *Id.* While a party challenging

the constitutionality of a statute or a court rule faces a beyond a reasonable doubt standard, the State is not challenging a rule or statute. It is challenging a custom of the court. No such burden applies. Indeed, the burden should be on the party invoking the power of the court to demonstrate the court has such power to go beyond the rules and contravene a statute.

CrR 8.3(c)² allows a defendant to challenge the State's evidence pretrial. CrR 8.3(a) and (b) do not restrict themselves to pretrial motions, thus 8.3(c), which is limited by its terms to pretrial motions, cannot be expanded to be the basis for such motion. CrR 7.4(a)(3) is a procedure following conviction and allows for arrest of judgment for "insufficiency of the proof of the material element of a crime." Prosecutors are obligated to dismiss charges if they do not believe there is probable cause to support the charges. RPC 3.8(a). Thus the only way the State moves past the close of State's evidence is if the State believes the charge is supported by law and evidence. It is not arbitrary action or mismanagement to disagree with the court on the law or the evidence. Nor is the defendant materially prejudiced by lack of a midtrial motion to dismiss, thus CrR8.3(b) does not provide a basis for routine dismissals midtrial. There is therefore no

² CrR 8.3(c) is entitled "On Motion of Defendant for *Pretrial* Dismissal." (Emphasis added)

Superior Court criminal rule allowing for a midtrial judgment as a matter of law.

A comparison with the other rules governing the various types of trials show that such a rule is necessary to allow such a motion. CrRLJ 6.1.3(d)³ allows such a motion in courts of limited jurisdiction, however, there is no such rule in Superior Court Criminal trials. CR 50(a)(1) allows a midtrial motion in civil trials, and CRLJ 50 provides likewise. The Court cannot use civil rules to fill in for missing criminal rules. *See State v. Bianchi*, 92 Wn.2d 91, 92, 593 P.2d 1330 (1979) (cannot use civil rules regarding interveners in criminal trials). The juvenile court rules allow application of other rules. JuCR 1.4. However, there is no equivalent Criminal Rule. Only in Superior Court criminal trials, where the cost of a mistake by the trial judge is greatest, and no appeal may be taken from a midtrial judgment as a matter of law, do the rules not allow for a midtrial dismissal motion by the defense.

RCW 10.46.070 is titled “conduct of trial—*Generally*, (emphasis added) and provides that “The court shall decide all questions of law which shall arise in the course of the trial, and the trial shall be conducted in the same manner as in civil actions.” First, CrR 6 superseded this

³ The State does not concede the constitutionality of CrRLJ 6.1.3(d), but that is not an issue in this case.

statute in part, and does not provide for a midtrial motion as a matter of law. Comment to CrR 6 (1973). Second, it is clear that a dismissal by the judge was not intended as a bar to appeal. RCW 10.43.050 provides that judicial dismissals shall not bar retrials, and that statute was not superseded by CrR 6. Indeed, the only way to reconcile RCW 10.43.050 and the double jeopardy clause is to disallow midtrial motions. In addition, RCW 10.46.070 does not specify when the court should decide the issues of law, and the last update to this statute was in 1891. LAWS of 1891 c 28 § 70. This was long before the double jeopardy clause was considered to cover judgments as a matter of law, which has not fully recognized in Washington, even up to 2010. *See State v. Matuszewski*, 30 Wn. App. 714, 715, 637 P.2d 994 (1981); *State v. Portee*, 25 Wn.2d 246, 170 P.2d 326 (1946); *State v. Morton*, 83 Wn.2d 863, 870, 523 P.2d 199 (1974) (Supreme Court upheld midtrial dismissal of a count, which would not have been necessary had there be no way to appeal it); *State v. Gallagher*, 15 Wn. App. 267, 549 P.2d 499 (1976) (Affirming in part and reversing in part a trial court's dismissal of a case after opening statement to a jury). Apparently it was not clear even up until *Evans* that there was no appeal from a midtrial motion to dismiss. *State v. McPhee*, 156 Wn. App. 44, 65-66, 230 P.3d 284 (2010) (State can retry improperly dismissed charge). In addition it is a rule that governs criminal trials as a

general proposition. The specific criminal rules govern when they cover a specific issue or civil rules do not make sense to apply to the case. *See Bianchi*, 92 Wn.2d at 92. Even if the civil rules may make sense to apply, they have not been applied. *See State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). (Pretrial judgment as a matter of law was appropriate as a matter of inherent authority, not under the civil rules.) The criminal rules have occupied the field in judgments as a matter of law with CrR 7.4(a) and 8.3(c). In addition, applying CR 50 to criminal trials carries a significant cost not present in civil trials, thus the rule does have the same underpinnings in a criminal trial as it does in a civil trial.

In *Knapstad* the Washington Supreme Court held that the trial court had inherent power to dismiss *prior to trial* when the State had insufficient evidence to make a prima facie case. In doing so it held:

The State is correct in its assertion that there should be a clarification of the procedure for ruling on such motions. Several questions we need to address are: (1) *when such a motion should be filed*; (2) whether the State's evidence should be presented by affidavit or by in-person testimony; (3) whether a summary of the State's evidence is sufficient; and (4) whether the State can refile the charge if it obtains new evidence after the case is dismissed.

Id. at 52 (emphasis added). This led to the adoption of Rule 8.3(c). Of note, CrR 8.3(c) by its own terms limits itself to pretrial motions, when the

adoption of the rule could have covered any motion as a matter of law up to conviction.

There are basically four sets of procedural rules that govern trials in Washington (CR's, CrR's, CRLJ's and CrRLJ's). All of them have rules for pre and post-trial judgments as a matter of law, all but the CrRs have rules for midtrial judgments as a matter of law. The drafters know how to write these rules, and have chosen not to include a procedure for a midtrial decision as a matter of law in Superior Court criminal cases, particularly when the Supreme Court specified in *Knapstad* that the rule drafters should determine when motions as a matter of law should be filed. "Under expressio unius est exclusio alterius, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other." *Scanlan v. Townsend*, 181 Wn.2d 838, 849, 336 P.3d 1155 (2014). Thus the CrR's do not permit midtrial motions to dismiss.

Also, the court in *Knapstad* held "Trial courts are often asked to decide procedural questions which have not before arisen and for which there exist no formal, written rules. Trial courts must necessarily have some inherent authority to devise appropriate rules in such situations. This [the Supreme] court will later determine whether these actions are a proper exercise of the trial court's authority." Because of the intersection of the double jeopardy clause, midtrial rulings and RAP 2.2(b) the Supreme

Court is never able to exercise its supervisory authority in relation to midtrial motions, which was critical to the *Knapstad* decision for pretrial motions.

Even if courts have inherent authority to hear motions as a matter of law despite rules occupying the field, they have inherent authority not to hear them as a matter of public policy. Indeed, in later cases the Supreme Court has strictly limited the trial courts ability to create procedures where needed, instead relegating that function to the legislative process. See *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007); *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005) (Overruled on other grounds *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546 (2006). (Courts do not have authority to create procedures to try aggravators on remand, they must have a statute from the legislature.) The limited authority to create a procedure includes the authority to consider the policies behind such a procedure and not use it.

1. Midtrial motions to dismiss violate the State Constitution and are not supported by case law.

In addition the Washington State Constitution provides that “[t]he judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.” Wash Cons’t Art IV §1 and “[t]he Supreme Court shall have ...

appellate jurisdiction in all actions and proceedings...” Wash Cons’t Art IV § 4. Inherent in the idea of a Supreme Court and lower courts is that is that the Supreme Court supervises the lower courts and harmonizes the law between them.⁴ The Supreme Court is unable to do so with motions at the close of the State’s case during trial, thus such motions violate the State Constitution. *See State ex rel. Schloss v. Superior Court of Jefferson County*, 3 Wash. 696, 701, 29 P. 202 (1892) (Supreme Court has power to issue writ of prohibition under Art. IV §4 when Superior Court acts to render an appeal nugatory).

There are some cases that stand for the proposition that it is error to submit a jury instruction to the jury that is not supported by the facts of the case. *E.g. State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000) (citing *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986)) (citing *Albin v. National Bank of Commerce*, 60 Wn.2d 745, 754, 375 P.2d 487 (1962)); *State v. Heath*, 35 Wn. App. 269, 271-72, 666 P.2d 922 (1983). First it should be noted that jury instructions do not need to be determined until the end of all the evidence, not at the end of the State’s case. *State v. Mendes*, 180 Wn.2d 188, 194, 322 P.3d 791 (2014). The

⁴ For a discussion of trial court behavior when decisions are unreviewable *see* Bennardo, Kevin, *Incentivizing Lawfulness Through Post-Sentencing Appellate Waivers* at 28-31 (May 10, 2013). Available at SSRN: <http://ssrn.com/abstract=2263389> or <http://dx.doi.org/10.2139/ssrn.2263389> (Last visited September 16, 2015).

cases stating these jury instructions are error rely on authority which tracks back to before 1981, when the double jeopardy clause was first found to prevent the State from appeal dismissals entered when jeopardy was attached. In addition in criminal cases this authority always, to the State's knowledge, arises from the defendant not getting a jury instruction on an affirmative defense or a lesser included charge, and is obviously subject to review by appellate courts. These cases do not address the issue of dismissal of an independent count. In the case of an independent charge it is not prejudicial error because the court can dismiss post trial, and none of the cases regarding this proposition balance the issue of non-prejudicial jury instructions versus the constitutional problems raised by motions as a matter of law during trial. CrR 7.4(a) makes any error in this regard harmless because the trial court can dismiss the charge after the verdict. "The rule is now definitely established in this state that the verdict of the jury in a criminal case will be set aside and a new trial granted to the defendant, because of an error occurring during the trial of the case, only when such error may be designated as prejudicial." *State v. Martin*, 73 Wn.2d 616, 627, 440 P.2d 429 (1968).

Jurors are routinely instructed to consider each count separately. WPIC 3.01. Jurors are presumed to follow instructions. *State v. Emery*, 174 Wn.2d 741, 754, 278 P.3d 653 (2012). Thus jurors are able to separate

out one count from another. In addition the State is aware of many cases where there were multiple counts charged and the Appellate Courts dismissed one or more counts or separate enhancements for insufficiency of evidence. The State is unaware of a single appellate case where counts that were supported by substantial evidence were dismissed or remanded because they happened to be tried with counts that were not. *See, e.g. State v. Bluehorse*, 159 Wn. App. 410, 248 P.3d 537 (2011) (insufficient evidence to support group aggravator under RCW 9.94A.535(3)(s), case remanded for entry of standard range sentence of underlying drive by shooting charge). The defendant will avoid any prejudice of being convicted of a charge not supported by the evidence. First, if the charge is not supported by the evidence the jury is unlikely to convict. In that case that is the end of the matter in accordance with the double jeopardy clause. If the jury does convict the court can dismiss the conviction in accordance with CrR 7.4(a)(3), curing any prejudice, and then the appellate courts can exercise their constitutional duty to review the decision.

In *State v. Jackson*, 82 Wn. App. 594, 607-608, 918 P.2d 945 (1996) (citing *See State v. Brown*, 55 Wn. App. 738, 742, 780 P.2d 880 (1989)), the court stated, in dicta, “[i]n a criminal case, a defendant may challenge the sufficiency of the evidence (a) before trial, (b) at the end of the State's case in chief, (c) at the end of all the evidence, (d) after verdict,

and (e) on appeal.” However, *Brown*, which was cited to support propositions b and c, does not analyze the issue of the midtrial motions, but simply took them as a matter of course. Neither *Jackson* nor *Brown* analyze this statement in light of the double jeopardy clause. Thus neither *Brown* nor *Jackson* is precedent for this issue. For discussions of how long running dicta and custom can mislead the judicial system, see e.g. *State v. Miller*, 181 Wn. App. 201, 209-14, 324 P.3d 791 (2014). “In this inquiry we keep in mind that where courts and practitioners have uniformly worked under the assumption that a certain principle is the law, no occasion may have arisen for an appellate court to repudiate that principle for a long span of time.” *State v. Peltier*, 181 Wn.2d 290, 332 P.3d 457, 459 (2014); *State v. Fort*, 190 Wn. App. 202, 218, 360 P.3d 820, 828 (2015) (long running custom of questioning jurors in chambers on sex cases, which has led to numerous reversals).

2. *Costs of motions at the close of the State’s case.*

- a. The costs of a motion to dismiss midtrial are significant.

In a civil case either side may appeal from such a midtrial motion. A court of limited jurisdiction only deals with minor criminal cases, thus the costs of an unreviewable mistake are not as great as with a Superior trial court. In addition appellate courts only indirectly supervise courts of limited jurisdiction, the cases being generally reviewed by superior court

judges, thus the supervisory duties of the appellate court are somewhat limited as to them.

Washington case law does not recognize a due process right to an unreviewable decision of law by a trial judge. In *State v. Portee*, 25 Wn.2d 246, 170 P.2d 326 (1946), the trial judge granted judgment to the defendant at the close of the State's case as a matter of law. The Supreme Court ruled that the State could appeal the trial court's decision. Obviously modern double jeopardy law has overruled the specific facts in *Portee*; *State v. Matuszewski*, 30 Wn. App. 714, 715, 637 P.2d 994 (1981), but it still stands for the proposition that the defendant is not entitled to an unreviewable ruling as a matter of due process, as does *Evans v. Michigan*. In addition the Washington constitution does not provide more protection for due process than the federal constitution. See *In re Pers. Restraint of Dyer*, 143 Wn.2d 384, 394, 20 P.3d 907 (2001); *State v. Morgan*, 163 Wn. App. 341, 352, 261 P.3d 167 (2011).

The costs of an error by the trial court judge are apparent in *Evans*. An arsonist probably walked free, the people were denied their day in court and the one clear chance to present their case to a jury and, for the victims involved, their confidence in the justice system was undoubtedly shaken. There are also other costs. Currently a defendant who knows he will have an unreviewable midtrial motion is incentivized to not bring a

motion under 8.3(c). Why bring a motion that, even if granted, would allow the State to appeal and/or gather more evidence? Why not take the case to trial and then bring an unreviewable motion? This requires the justice system to bear significant costs in terms of going to trial because defendants do not bring motions testing the State's case under CrR 8.3(c).

- b. There are no significant countervailing concerns to justify the costs of midtrial motions to dismiss.

The defendant does not have significant interests in a midtrial motion. There is no doubt the defendant has a substantial interest in not being punished for an offense that is not supported by law. However, that interest can be vindicated by CrR 8.3(c) or 7.4(a). As *Evans* and *Portee* demonstrate the defendant does not have an interest in an unreviewable decision, nor does a defendant have an interest in not seeing the case to completion. While the defendant may gain some tactical advantage in not having to put on a case, this is not a constitutional right, and is no different than the choice a defendant faces when he chooses to talk to the police or not, chooses to testify at trial or not, or any of the other myriad choices a defendant is required to make under our system. The Washington Supreme Court has explicitly held, in a 9-0 decision, that the defendant's rights are not implicated when a defendant chooses to take the stand in his own trial after the trial judge refuses to inform the defendant as to whether

the evidence is sufficient for a self-defense instruction. *Mendes*, 180 Wn.2d at 195. The costs for the defendant in being denied a motion at the close of the State's evidence are minimal, and not constitutional cognizable.

3. *Assuming, arguendo, the trial court has authority to hear midtrial motions to dismiss, it should use the authority sparingly, and abused its discretion in this case.*

The State does not believe the Court has authority to hear a motion to dismiss at close of State's evidence based on the authority cited above. However, assuming, arguendo, that it does, the only possible source of that authority is the Court's inherent power. If the Court does have inherent authority to hear the motion it is incumbent upon the moving party, in this case the defendant, to establish that the Court *should* exercise its inherent authority. Where it has discretion a court errors by not at least considering exercising its discretion as a matter of policy. *See State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). "Discretion is abused when it is exercised on untenable grounds or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Here the only reason given for the trial court's decision was custom. Custom is not the same as precedent. There was no analysis of the State's arguments or reasons. The trial court erred by not

at least considering putting off the motion to dismiss. The State suggests some factors to consider below.

Knapstad provides some guidance. The Supreme Court in *Knapstad* stated: “Trial courts are often asked to decide procedural questions which have not before arisen and for which there exist no formal, written rules. Trial courts must necessarily have some inherent authority to devise appropriate rules in such situations.” *Id.* at 353. Motions at the close of the plaintiff’s case simply cannot be described as procedurally novel, and are procedurally governed by rule in all types of cases except superior court criminal cases. They date back in the English common law system to basically time immemorial. What does not date back to time immemorial is the recent interpretation of the double jeopardy clause precluding appeals from such motions, thus seriously undermining the rationale for such motions as demonstrated by the court’s next line in *Knapstad*. “This [the appellate] court will later determine whether these actions are a proper exercise of the trial court’s authority.” Because the Court’s exercise of inherent authority is supposed to be limited to unusual situations the defendant should be required to establish that his situation is different than the run of the mill midtrial motion.

In deciding that a pretrial motion to dismiss was appropriate the Supreme Court noted that “[f]airness and judicial efficiency both demand

that in such a case a procedure be made available to the trial court to dismiss the prosecution prior to trial for insufficient evidence.” *Id.* at 347. While a CrR 8.3(c) motion may promote fairness and judicial efficiency, a midtrial motion does not. As already noted, a midtrial motion comes when the majority of cost and effort for the trial already have been spent, cost and effort that the defendant may have avoided with a CrR 8.3(c) motion, which the defendant is incentivized not to bring under a midtrial motion as of right scheme. In this case several expert witnesses had testified and there had been days of jury trial before the motion to dismiss. Also a midtrial motion does not promote fairness. In addition to the asymmetry of only one side being able to appeal a midtrial motion, they also typically occur while a jury is waiting and there is significant time pressure. This requires both the parties and the judge to operate somewhat “off the cuff”, rather than in a deliberate and researched fashion. *See Association of Administrative Law Judges v. Colvin*, 777 F.3d 402 (7th Cir, 2015) (Administrative Law Judges complaining about the quality of rushed, unreviewable decisions). This does not promote fairness or accurate resolution of the case. Thus the court should consider whether the midtrial motion could have reasonably been brought as a pretrial 8.3(c) motion.

Like other constitutional provisions, Wash Cons't Art IV §§ 1 and 4 must be balanced against other needs. However, the court should consider the fact that a motion at the close of State's evidence usurps the appellate courts' constitutional role in our system, and should weigh this factor appropriately.

Another factor the court may wish to consider is the clarity of the issue. If the issue is one of first impression the trial court should wait until after the jury has made its decision. If the issue is clearly on all fours with a published case then a motion at the close of the State's case may be more appropriate, as long as all parties have had time to review the issue.

Finally the court may consider the prejudice to the defendant on other counts. Juries are routinely instructed to consider each count separately. WPIC 3.01. If the defendant can somehow establish prejudice this might be something for the court to consider.

The State does not assert these are the only factors that should be considered, but believes that these provide good initial guides for trial courts to consider in determining if the defendant has met his burden of convincing the Court to hear a motion at the close of State's evidence under its inherent authority, should it find such inherent authority exists.

Mr. Cobos does not establish he was entitled to a midtrial motion to dismiss at all. Its denial cannot be error.

33. Counsel was not ineffective for failing to file a motion to dismiss, failure to investigate, failing to prepare a defense or failing to call a witness.

A court reviews ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient and (2) the performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Id.* at 700.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Grier*, 171 Wn.2d at 34. A defense attorney is not deficient for failure to anticipate changes in the law. *State v. Brown*, 159 Wn. App. 366, 372, 245 P.3d 776

(2011). Nor is a defense attorney ineffective for failing to pursue avenues unlikely to succeed. *Id.* at 371.

A. *Defense counsel was not deficient in failing to file an 8.3(b) motion to dismiss.*

Mr. Cobos mostly rehashes his previous arguments in the guise of ineffective assistance of counsel. The dismissal of charges under CrR 8.3(b) is an extraordinary remedy. A trial court may dismiss charges under CrR 8.3(b) if the defendant shows by a preponderance of the evidence (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial. Mr. Cobos does not make any showing of the sort. There is no evidence the prosecutor timely failed to produce discovery. The prosecutor is not obligated to set witness interviews for the defendant. Their sole legal obligation in regards to witness interviews is to avoid impeding the defense investigation. CrR 4.7(h)(1). Prosecutors often go further than is absolutely required in assisting the defense investigation, but that does not mean it is mismanagement when interviews do not occur in the time wished for by the defendant. The crime lab report may have come in after the omnibus, but there is no showing of prejudice by the defendant. A motion to dismiss would have been unsuccessful, therefore there is no ineffective assistance of counsel in failing to bring one.

B. *Defense counsel was not deficient in failing to present a defense.*

Mr. Cobos complains about the failure to prepare and present a defense and call witnesses. These are all related to his contention that Mr. Cobos had a prescription for Adderall and that the lab test could not distinguish between them. But the testimony of the lab scientist was that they could, and there is no contrary evidence in the record. Again Mr. Cobos' contention fails.

Mr. Cobos also complains that his counsel's failure to file a CrR 3.6 suppression motion was ineffective. These claims are supported by Mr. Cobos' self-serving statements, not facts in the record. Where the facts on appeal do not appear in the record the remedy is a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995). The trial court never had the opportunity to resolve the factual issue of whether the officer had reasonable suspicion Mr. Cobos was on a public highway. Therefore the facts are not sufficient in the record.

34. Attenuation Doctrine

In order to preserve the issue the State also asserts that even if the stop was invalid the search warrant was not under the attenuation doctrine. *Utah v. Strieff*, 136 S. Ct. 2056, 2058, 195 L. Ed. 2d 400 (2016). There were several intervening events between the stop and the search warrant,

including the officer's interview with J.G. and Mr. Cobos' voluntary production of the video. Because the facts are not fully developed in the record, and the application of the attenuation doctrine is highly fact specific, the State only mentions this doctrine to preserve the issue, if it should arise later in the case.

35. Doctrine of Laches

The State also raises the defense of laches in order to preserve the issue. Mr. Cobos has caused an inordinate delay of over seven years now due to the fact that he did not raise all issues in his first appeal. Some of the issues are factually intensive and may involve evidentiary hearings in the future, either on remand or in a personal restraint petition. There are three elements to a laches claim. (1) Knowledge of a potential claim by a party, (2) an unreasonable delay in asserting the claim, and (3) damage to the other party resulting from the delay. *Club Envy of Spokane, LLC v. Ridpath Tower Condo. Ass'n*, 184 Wn. App. 593, 603, 337 P.3d 1131 (2014). On this record Mr. Cobos had knowledge of his CrR 3.6 claim, and there was an unreasonable delay in asserting the claim. On this record the State cannot establish damage resulting from the delay, but may be able to in further fact finding. Therefore the State raises the defense of laches in order to preserve the issue, should it be needed in further

proceedings. *See State v. Faletogo*, 34944-6-III, 2018 WL 3031657, (Wn. App. 2018) (Unpublished)⁵

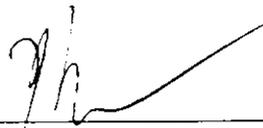
V. CONCLUSION

Because Mr. Cobos could have raised most of these issues in his first appeal, the court should not review them. They are without merit anyway. The one exception is the error that the court committed when it sentenced Mr. Cobos to a combined term of community custody and prison time that exceeded the statutory maximum. The court should remand to remedy that sole error.

Dated this 17th day of August 2018.

Respectfully submitted,

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Prosecuting Attorney

By: 
Kevin J. McCrae – WSBA #43087
Deputy Prosecuting Attorney

⁵ Cited pursuant to GR 14.1 This decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate. *Crosswhite v. Wash. Dep't of Social and Health Services*, 197 Wn. App. 539, 544, 389 P.3d. 731 (2017).

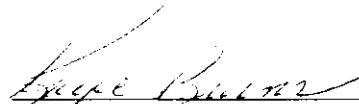
DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Brief of Respondent in the above-entitled matter.

Ignacio Cobos - #920217
Washington State Correction Center
PO Box 900
Shelton WA 98584

Dated: August 15, 2018 at Ephrata, Washington.


Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

August 15, 2018 - 1:40 PM

Transmittal Information

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Appellate Court Case Number: 33313-2
Appellate Court Case Title: State of Washington v. Ignacio Cobos
Superior Court Case Number: 11-1-00445-0

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