68475-2

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No. 68475-2

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND MAK,

Appellant.

STATEMENT OF ADDITIONAL GROUNDS (RAP 10.10)

I, Raymond Mak, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

ADDITIONAL GROUND ONE

EXCESSIVE SENTENCING:

I have no prior convictions and my standard ranges for possession with intent and conspiracy is 12-20 months. For maintaining a vehicle for drug trafficking is 0-12 months. The court has sentenced me 96 months, which is almost 5 times the maximum standard range. This is clearly excessive when this is my first felony offense and the state only prove one aggravating factor which is "larger than personal use" which is a "major drug violation". There was no other evidence to prove of any other factors of a "major drug violation" set in RCW 69.50. The statute also does not distinguish the factor of the amount of controlled substances a person would consider to be beyond personal use, it could from 100grams to 1000grams, and it could be presumed "larger than personal use". The statute has no true definition of "larger than personal use", even if consume over a long period of time. The controlled substance is not defined on a specific quantity, which will determine the sentencing guideline, nor does the statute define the larger amount of drugs possessed, the higher the sentence range. This is a case of a reversal operation from government officials, where the police was soliciting the sale of a controlled substance. The police never really was worried about what control substance were being sold, as long as they can arrest the

person attempting to purchase any kind of drugs. The agents themselves did not know what the illegal substance they brought on the day of the arrest, but only assumes to be cocaine. Agent Delacruz testifies as follows in 1RP 104:

Q: And you said that he requested that you bring cocaine but never actually ever said the word cocaine to you; is that right?

A: That is right.

Q: So he never used that term?

A: Not to the best of my recollection, no.

The drugs were never tested by any agents because the evidence shows that the package was never tampered or opened at anytime until three months after the arrest (May 20th 2011). As testified by Ms. Karen Finney (forensic scientist for the Washington State Patrol Crime Laboratory in Marysville) in 3RP 155:

Q: And was the package intact?

A: Yes, the package was intact.

Q: It did not appear to be tampered with in anyway?

A: That's correct.

Also, the agents did not really know what the illegal substance was to be cocaine, because when Ms. Karen Finney received the package of the 2

kilogram suspected to be cocaine, the package had a description acknowledging the substance could be cocaine, as she stated in 3RP 163:

Q: From Skagit, from here? Is it listed that the substances that you're testing on are suspected cocaine?

A: It does under the item description on request for laboratory examination. It says suspected cocaine.

Q: Does it further indicate to you that substances had not been tested before?

A: Correct.

Q: Okay. When did that get sent to you, or when was it received from the State Patrol?

A: I believe this is received on either August 17th or 18th.....

Basically, no agents knew at the time of the transaction what the substance was and no agents confirm the illegal substance to be cocaine, and when some of the agents were testifying, you can suspect it to be cocaine, but you cannot infer it to be cocaine. There was a transaction of an illegal substance on May 20, 2011, but the substance has a determination of a statutory maximum sentencing range. If infer by the evidence, you may assume a marijuana transaction, because the sheers which was found in Mr. Lin's vehicle, was tested and had marijuana residue on them, stated in 3RP 191:

Q: Okay. Another thing you found in his car were some sheers; is that right?

A: Yes.

Q: You field tested it and it tested positive for marijuana ?

A: Correct.

Q: But you didn't find any marijuana, did you, other than that?

A: No.

So, you could infer from what was found from my co-defendant's car that I could be induced to going up to Skagit County to purchase some marijuana. An illegal substance, which could be assumed, is "Kief" (medical marijuana), 2RP 37:

Q: Is there a drug called Kief?

A: There is. It is a manufactured chemical-based narcotic or drug.

The evidence shows the agent's testimony was inconsistent. The fact the word cocaine has never been used, but "kilo" was to code word for cocaine, and then later the agent stated as well as "keys" were the term used. There were never truly consistent with the agent's stories. "Kilo" does not describe only cocaine because if it does, under RCW 69.50.401 (2)(a) "A controlled substance classified in Schedule I (marijuana) or II (cocaine) which is a narcotic drug or flunitrazepam, including its salts, isomers, and salts of isomers, classified in Schedule IV, is guilty of a class

B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug,...", so by reading this statute, "kilo" is a abbreviation of "kilogram", not what the agent infer the term to be cocaine. The statute does refer to the specific kind of illegal substance by their schedules', and kilogram used as a weight of measurement. The evidence also shows the rest of the world uses kilogram as a weight measurement, and not a term used like the agents refer it to be. The Supreme Court uses kilogram as a measurement of weight. If kilo was referring to cocaine, what was the determination of the amount to be purchased? The agents keep referring the illegal substance only to as cocaine because they wanted to entrap me with cocaine possession, when the possession of cocaine has a maximum sentencing range of 10 years and possession for marijuana is maximum sentencing range of 5 years. The State can infer, on the day of the arrest, maybe there are facts to a purchase of an illegal substance. However, if inferred, "keif" (marijuana) could be the illegal substance to be purchased, because the evidence shows that a couple of pair of sheers was found in Mr. Jia Lin's car with high residue of marijuana

Undercover Agent Delacruz never took notes or saved any notes he had taken, and if he did, he never provided the notes to the state, and he

had testified that he had more than one case at the time. How is Agent Delacruz remember what was to be sold when he has inconsistency in his testimony and a lot of statement of "I don't remember" or "I do recall" in trial? The illegal substance were never tested to what the substance actual were or if the substance in the trunk of my vehicle at the time of my arrest were even drugs to begin with. Therefore, maybe a conspiracy to possession an illegal substance, which I cannot deny, but specifically cocaine with the intent to manufacture or deliver, which the state has not prove beyond a reasonable doubt. There are some untruthful statements by the agents or mistakes, where the agents admitted to the mistakes in their testimony. Therefore, you can conclude mistakes are made in this case too. Agent Delacruz wanted to make an arrest so desperately that he even stated that he would guarantee the product, and if it's not want you want, you can return it with your money back. Because Agent Delacruz did not know the nature of the substance, at the time of the transaction, which he hesitate to allow me to sample the illegal substance. The fact, he had no knowledge of the substance was at the time, he found a way to persuade me to purchase any kind of drug to make an arrest. As Agent Delacruz testified in 3RP 25:

Q: Now, the exact words that you remember Mr. Mak using what were they?

A: After the call he said: It's my brother. He wants me to test. I'm like you can't. You want to do it out in the open? Then he said – I told him look, I guarantee my stuff, you know. At this point I'm going to tell him it's good. So I'm like if you don't like it bring it back. He was like okay. I'll tell my brother I sampled it. I was like okay. That was the end of it.

So, this transaction is not completed, there is a chance that I can return the illegal substance with my money back, or else it would be considered fraud or deception of the truth. In addition, how is it that Agent Delacruz remember the exact words used and forget some other testimonial questions? Agent Delacruz had more than one case load, and by him not taking down notes, what was the determination of the control substance to be sold by him?

How an exceptional sentence be calculated to almost 5 times the maximum standard range of 20 months, even though the court has discretion, is clearly excessive, and abused its discretion. The prosecution offered me a plea deal of 60 months, and if I do not take this to trial. However, if I did, she would seek the maximum of 10 years, only for me to find out that 60 months was already above my standard range. Therefore, I refused the plea deal and took the case to trial to seek a fair and justice sentencing, which are my legal rights. As I found out later

while in county jail, the prosecution made a statement to another attorney saying, "I hope a white jury will scare him in taking the deal". I felt the outcome of the trial would be prejudicial or bias towards me once I heard this statement because of my different ethnic background and how the prosecution portrays me as part of the "drug world" which was never proved in trial or at anytime during my incarceration. After hearing the statement made by the prosecution, I felt if I lost my trial, the court would impose an excessive sentence because I failed to follow their recommendation of 60 months and consumed the court's time to my rights of a fair trial. The trial did not show justice or the facts of the case, just misrepresentation facts. The trial showed me on how to bend the truth to incriminate when there is some inference, and to punish excessively when you fail to follow plea deals. This transaction was never going to be completed, as the agents testified, because I have the option of returning something that I did not want to buy, like cocaine. There was never any prior buys or any prior conversations about meeting up to make a cocaine purchase from any agents. The sting was set up by Mr. Jeff Huynh and Agent Delacruz working together, and if infer by the testimony of the agents, there is no evidence supporting that I knew Mr. Huynh. I did not know Mr. Huynh, only Mr. Lin whom is Chinese.

This is an anticipatory offense, where there are reasonable doubts to the intent and the conclusion, because no one can predict the future, as testified by Agent Delacruz in 2RP 80:

Q: This was never going to happen in this case. It couldn't have happened because you were not going to let them take your drugs?

A: It would have not happened in our case.

Q: So in this case this was never going to happen.

A: That was the purpose of us buying them, correct.

Q: So, it was never going to happen because these drugs were never going to leave Skagit County?

A: Correct.

Agent Delacruz could not even remember if he was buying or selling the product. When government officials honor the deep feelings of mistrust, they are suppressing the virtue of reality and logic, and buying into conviction and hard punishment. Even though the court may not trust it or believe it, just allowing for that possibility has an impact on future decisions of our justice system, as well as peace and balance to the world.

9.94A.500 The intent – 2008c 231 §§2-4: "It is the legislature's intent to ensure that offenders receive accurate sentences that are based on their actual, complete criminal history. Accurate sentences further the sentencing reform act's goals of:

(1) Ensuring that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history:

(2) Ensuring punishment that is just; and

(3) Ensuring that sentences are commensurate with the punishment imposed on others for committing similar offenses.

I would respect the court's decision if the sentencing were fair and justified, but when the State shows some kind of conspiracy or prejudice to the outrageous term, the State has abuse it powers and the court abuse its discretion. *State v. Valencia-Perez*, 128 Wash.App. 1049 (2005) Division One, Mt. Vernon, possession over 1.44 kilograms of cocaine sent to prison for 15 months; *Washington v Mendoza*, 63 Wash.App. 373, 819 P.2d 387 (1991) sentence 84 months exceptional sentence when range is 21-27 months, with intent to purchase 4 kilograms of cocaine in Skagit County (reversed and remanded for resentencing) where he sites RCW 9.94.410 in part: "For person convicted of the anticipatory offenses of criminal attempts, solicitation or conspiracy under chapter 9A.28 RCW, the presumptive sentence is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the crime, and multiplying the range by 75 percent. (Italics ours) A related statute, RCW 9.94A.310 (2), is identical to the above quoted portion of RCW 9.94A.410, except that it states that the

range for anticipatory offenses is determined by reference to "the seriousness level of the completed crime, and multiplying the range of 75 percent" (Italics ours). RCW 69.50.407 provides: "Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy". Mendoza was re-sentence from 0-12 months on conspiracy. In *State vs. Sanchez*, 69 Wash.App. 848, P2d 735 (1993), where Sanchez was selling 2 kilo of cocaine was sentenced to 54 months imprisonment. My case here shows only an anticipatory offense by which the police was selling drugs which they had no knowledge of knowing what the substance was, but assumes it to be cocaine, and there was no conversation between the agents and I about any cocaine purchase, or did I ever had any prior cocaine conversation with the agents. My case was base on speculations and theories from the agents, so, you can also speculate that when I truly found out the content of the product being cocaine, which is not what I wanted to purchase, I have a return policy of the product, guarantee by the under-cover agent. Therefore, this is just an anticipatory offense. Mr. Jai Lin (my third co-defendant) had received a plea deal of 18 months to imprisonment on the exact same charges as me, even though the State

cannot prove his involvement, but that does not set aside the facts he got a plea deal of 18 months and I was offered a plea deal of 60 months. Despite the circumstance, how do you not presume Mr. Lin was the instigator, and he just got away with 18 months? If a defendant can establish that he or she is similarly situated with another defendant by virtue or near identical participation in the same set of criminal circumstances, then the defendant will have established a class of which he or she is a member. Only after membership in such a class is established will equal protection scrutiny be invoked. Then, only if there is no rational basis for the differentiation among the various class members will a reviewing court find an equal protection violation (*State vs. Handley*, 115 2d 275, 290, 796 P.2d 1266 (1990)). The evidence shows a bank receipt found in relation to Mr. Lin had withdrawn of $6,000 prior to the arrest. The State can infer Mr. Lin's involvement was conspired with me as an accomplice. How did the prosecution not assume that Mr. Lin was the person who induced the whole transaction and than receives a lesser sentence?

I was not the person who produced the illegal substance; the police officers produced the suspect cocaine. What was the determination on the amount when it was my first time meeting the under-cover detective, and the testimony was all of the State's witnesses, which distinguish

inconsistency. It is not a harmless error when you are convicting a person to be branded as a bad person, without truly any evidence, except of speculations. The evidence shows the detectives were the aggressors. Therefore, the question of whether a sentence is clearly excessive reviewed under an abuse of discretion standard, when discretion was abused when it was manifestly unreasonable or exercised on untenable grounds or for untenable reasons. It seems there was a conspiracy to convict me of cocaine when I was not there to purchase cocaine. (A clearly excessive sentence is one that no reasonable person would impose.) But a sentence is not clearly excessive merely because it exceeds twice the presumptive range. (This case was close to 5 times the range standard.) However, the length of an exceptional sentence must have "some basis in the record"...*Brown*, 60 Wash.App. at 77. There were no substantial and compelling reasons to justify a 96 months sentence. As defined in the Webster's dictionary: excessive – "exceeding what is proper, normal, or reasonable". Is a 96 months sentence proper, normal or reasonable? If a 96-month sentence is up to the discretion of the trial court, what is the use of a sentencing guideline when the sentencing range is so broad? The offender with an offender score of 5 or 10 can have the same sentencing guideline as an offender score of 0, because 96 months is only 24 months away from the statutory maximum. This is clearly

excessive. The police sold the drugs without confirming what the substance should be at anytime in the transaction on May 20, 2011. This can only be an anticipatory offense on trying to obtain an illegal substance, which if multiplied by 75 percent of the maximum standard range sentencing guideline, it calculates in the range of 35 months, with an offender score of 0.

As I found out, the prosecutor also have made commented to some other attorneys in the area that my case is holding up her other cases because I refuse to take the deal and taking it to trial (when I'm only exercising my legal rights), and "I want the Asians to suffer from it." This statement never recorded, but I did stumble upon some sort of conspiracy while being incarcerated. I also over heard a conversation while in court that the prosecutor seeks the maximum sentence from the judge or else she would send it to Federal Court where they would not even get "good time" off. The court finds the sentence in calculation of "good time" off, for my case. The prosecution persisted on having Judge Susan Cook as the trial judge and most of the court proceedings, which I had a bad impression of the outcome of an extreme punishment and un-justice court system. I do not want to think the court was conspiring against me, but too many comments were made to which I found out later, causes the outcome of a fair trial. In *Washington v. Lopez*, 79 Wash.App. 755, 904 P.2d 1179

(1995), it was under RCW 69.501.401 (a)(1)(i)(B) that dramatically increases the penalty for possession of two or more kilograms of controlled substance. If the source of the drug or the manner in which it was possessed was a determining factor, a careful defendant could avoid the heightened penalty simply by making sure he acquired them in or divided them into amounts of less than two kilograms.

There is no foundation on intent on the illegal substance that was to be purchased from the police. There was no additional element the State could prove my intentions where after obtaining the illegal substance from the police, as admitted by Agent Flyod. Alternatively, would I get away from the conspiracy the agents set out for me, on the day of the arrest? This case is base on speculation and anticipatory offense, which should not carry a sentence of 96 months, which is close to the statutory maximum. Absent an abuse of discretion: "An abuse of discretion occurs when the trial court bases its decision on untenable grounds or exercises discretion in a manner that is manifestly unreasonable. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. The have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." An Equal Protection Challenge to a Sentence raised

by a co-defendant is analyzed in two parts. (*Washington v. Sanchez*, at 69, 1993)

The excessive sentencing is baseless of 96 months, and prejudice has inferred here, if the court affirms its decision on 96 months. When "an inference that the defendant intended to deliver cocaine not yet possessed, and such an inference will not support a conviction for possession with intent to deliver". *State v. Robbins*, 68 Wn.App. 873, 876, 846 P.2d 585 (1993).

ADDITIONAL GROUND TWO

Denial of Motion to Sever.

The court violated my 'due process' rights to a fair trial when the court and the prosecutor denied severance from my co-defendant (Mr. Jeff Huynh), whom I did not know until the day of the arrest. The court refused to grant me a separate trial with my co-defendant where reasons were unknown. The evidence show that the State could not link me with Mr. Huynh, therefore the court denied the severance. The State has not proved sufficiency of the evidence, where every element of the crime committed, because there was a reasonable doubt about my co-defendant and I am accomplices. There was another co-defendant (Mr. Jia Lin, Chinese ethnic) as well as I, who induced me into buying marijuana. The evidence showed that the agents could not link anything between Mr.

Huynh and me, not even a single phone call. Mr. Huynh's ethnic is Vietnamese. As defined, "accomplice liability – Criminal responsibility of one who acts with another before, during or (in some jurisdictions) after a crime." The State only proved in evidence what Mr. Huynh has done on his behalf, and what I have done on my behalf. Even though the testimony of witnesses describing what they perceived are not very accurate, the completion of Mr. Huynh and I are not of the same course.

My co-defendant's lawyer did not admit certain evidence when the evidence was suppressed, where as I had nothing to cover up, and I wanted the evidence to be admitted. The evidence was CDs that were recorded between Mr. Huynh and the under-cover agents. The CDs shows Mr. Huynh made numerous contacts with the agent, bringing different groups of people up to Skagit County to make a control buy of an illegal substance. This CD or recorded phone conversation exist with the State. The evidence reflects how Mr. Huynh was under the guidance of the under-cover police officer to entrap a criminal organization, but Mr. Huynh failed to produce such an organization. Mr. Huynh had exaggerated the story to satisfy Agent Delacruz's approval, as stated in 2RP 181 by Agent Delacruz:

Q: He says to you is: See, I told you I would come through or something like that. He was wanting to get your approval because he came through finally; is that right?

A: Yes

Mr. Huynh was not a broker of sales of drugs, but a mere pawn for the under-cover agent, Agent Delacruz. The evidence shows how Mr. Huynh feared Agent Delacruz, and when the honesty of the agent's testimony fails, the dishonesty will prevail, where the agent fabricated some of his facts. There were never any notes taken to support the agent's theory of a cocaine transaction in trial.

The evidence directs Mr. Jai Lin and Mr. Jeff Huynh drove up together, which inferred that they knew each other. If inferred, it all started with Mr. Huynh trying to purchase an illegal substance and when the situation failed to happen, Agent Delacruz insisted Mr. Huynh to find anyone to the Skagit area to obtain any illegal substance. The evidence reflected other people he brought up to Skagit County, as well as trying to help Agent Delacruz set up numerous purchases with different people. I was induced by Mr. Lin to purchase marijuana by meeting him in Skagit County. The evidence proved I drove my own vehicle and Mr. Lin was the driver of his own vehicle. Whatever Mr. Huynh's intentions were different from the intention I had. When the court denied me of a separate

trial, it violated my due process rights of a fair trial of proving the purchase of cocaine. There was no direct evidence even linking me with Mr. Huynh, when the agents has a substantial amount of resources to prove there case. The evidence is circumstantial, and the story of the case still has inconsistency from the agents. The State used 2 kilograms of cocaine as direct evidence on exhibits (when the cocaine were never tested at anytime before the arrest) shows prejudice to the conviction of specify a conspiracy to purchase of cocaine to the jurors.

Linking me in a same trial with Mr. Huynh shows prejudice and violating my due process rights. The evidence shows in the beginning of this case, where the exhibits and the circumstantial evidence do not reflect me having knowledge about what Mr. Huynh did prior to our arrest. When Mr. Huynh was trying to purchase cocaine, I was in Texas at the time, when Agent Delacruz and Mr. Huynh were meeting up. In addition, during Mr. Huynh and the agent's first meeting, Mr. Huynh brought someone else besides me talking about purchasing an illegal substance. The person Mr. Huynh brought with him to meet the agent was also Vietnamese, so if inferred, he was the person who wanted to purchase the cocaine, but there was no linkage between Mr. Huynh and me. I was in Texas with my vehicle during Mr. Huynh's first transaction, and with the evidence showing that cocaine comes from Mexico or south of America,

does it not conclude that I can purchase cocaine from Texas at a better price and quantity since Texas is next to Mexico? The agents cloud this case, and associating Mr. Huynh and I seem un-justice to my rights of a fair trial. At the beginning of an omnibus hearing, the prosecution had no objection to severance to the case, but later changed her mind, maybe acknowledging she could not prove every element of the crime to convict me of a high sentence range or linking me with the crime of possession with intent to manufacture or deliver - cocaine. The prosecution keeps referring to Judge Susan Cook, and Judge Cook grants all the prosecution's motions. The judge is supposed to uphold the law with fairness and without prejudice.

In my opinion, my rights to a fair trial was violated where the prosecution could not prove my guilt on every element of the case and it was only linking me with Mr. Huynh, on which the prosecution can label me as a high position distribution hierarchy, but no factual evidence to back up the prosecution's theory. This case is not what the prosecution or agent's theory to the "drug world", but is to what they infringe the case to portray. Especially when the prosecution uses "drug world" description in her closing arguments to describe what was fabricated by some of the agents to incriminate me; it shows an un-fair trial to prevail towards the prosecution's side. The agents have some inconsistency, and the

prosecution did a good job of manipulation to the truth of the testimony of some of the agents to make the case incriminating of a cocaine transaction to the jurors.

9A80.010 Official Misconduct of Practicing Law:

(1) A public servant is guilty of official misconduct if, with intent to obtain a benefit or to deprive another person of a lawful right or privilege;

And in 9A.08.020:

(5) Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:

(a) He is a victim of that crime; or...

When the State tried my co-defendant and me together without a separate trial, it violated my legal right to a fair trial. Therefore, the severance of my trial is important to legal rights, where the prosecution did not prove any element linking me with Mr. Huynh prior to the arrest. There is no cause of the denial of severance besides to convict me of a crime which was somewhat fabricated.

ADDITIONAL GROUND THREE

Double Jeopardy.

I am charged with Count I, possession with intent to manufacture or deliver a controlled substance – cocaine; and Count II, conspiracy to possess with the intent to manufacture or deliver a controlled substance – cocaine. Both crimes, which occurred on May 20, 2011 in the State of Washington. I had no prior meetings or any other interactions with the under-cover agents, as well as Mr. Huynh, before the arrest. Under my constitutional rights of the Fifth Amendment that provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend V, Article I, section 9 of the Wash. Const. similarly provides, "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense." These provisions are "identical in thought, substance, and purpose." *State v Ervin*, 158 Wn2d 746, 752, 147 P3d 567 (2006)(internal quotation marks omitted)(quoting In Re Pers Restraint of *Davis*, 142 Wn2d 165, 171, 12 P3d 603 (2000)). The double jeopardy clause protects individuals from three distinct government abuses: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction and multiple punishments for the same offense. The evidence in my trial clearly shows that Count I and Count II occurred on the day of my arrest on May 20, 2011. The evidence does not show prior contacts with any under-cover agents or any contacts with my co-

defendant (Mr. Huynh). There are no other elements to reflect multiple charges. My arrest came with only one element of the fact, but Mr. Huynh might show he could have other intentions before the arrest, and the State tried us together violating our "due process" rights. As testified by Agent Delacruz in 1RP 114-115:

Q: Do you know if you were dealing with more than one buyer when talking with Jeff? Was he talking to you about more than one buyer or one person that was a Vietnamese guy?

A: During the course of the investigation, to the best of my knowledge, at a minimum he went through three people. I don't know actually how many he went through. But that is about how many I would say that I can try to figure out who in the investigation there was at least three separated buyers.

I was the last purchaser of Mr. Huynh, which cause the arrest on May 20th. I was charged with two counts, when the offense which reflects me only, was one same continuing action. The two counts were of a single offense and element. The evidence shows maybe the conspiracy of the intent to manufacture or deliver - cocaine. However, the intention in Count I should be vacated because the evidence concludes the transaction was not completed. This was not a lengthy investigation regarding me, because everything had happened so fast the day of the arrest. The inducement

from Mr. Lin to seeing Mr. Huynh on May 20th only occur that day. The agents never prove any other events of Mr. Huynh and me. There was no extensive conversation with any agents or Mr. Huynh about any further transaction, or what I intended to do with the drugs. When Agent Delacruz never took any notes, how was he to remember who said what under the circumstances, and the agent had multiple cases. In addition, during testimony, the agent could not remember or recall certain answers. Under RCW 9A.08.010:

(1)(a) Intent – A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result, which constitutes a crime.

The evidence never showed an accomplished result of the crime of intent to possess to manufacture or deliver - cocaine. It is impossible for a person to intend to manufacture or deliver a controlled substance without knowing what he or she is doing. By intending to manufacture or deliver a controlled substance, one necessarily knows what controlled substance one possesses as one who acts intentionally acts knowingly. In 4RP 15-16:

Q: I think what you stated is you thought it was very out the ordinary that he did not have a plan to distribute it. Did that surprise you what you said in the interview?

A: Right, as it relates to the volume that was purchased.

Q: Right. There was so much big volume you were kind of surprised at the lack of distribution plan?

A: Correct.

To prove beyond a reasonable doubt, "knowingly" is an element of the completed offense of possession with intent to distribute, so knowledge of the substance is to be determined besides mere possession. There is no other factor of element when the agents cannot conclude the distribution of the illegal substance from me, therefore charging me with two counts on a same offense is double jeopardy, which the State failed to prove each element of the two charges. There was no evidence on manufacturing, the substance was supposed to be already diluted. The agents never really knew what the substance was before May 20th. The substance was never tested on purity level, only on weight with the packaging; also, the evidence shows it was never tested for what kind of controlled substance was before May 20th. This is a double jeopardy charge, where the prosecution tried to convict me of multiple punishments for a fallback in the situation of one count get an acquitted. The court should vacated Count I charged of possession with intent to manufacture or deliver a controlled substance, when all elements of the crime charged not proved beyond a reasonable doubt. The cocaine was sold by the under-cover

agents, where the agents themselves never tested it for a drug sting operation, but insisted that it was cocaine, and only assumed to be cocaine, 3RP 163:

Q: Does it further indicate to you that substances had not been tested before?

A: Correct.

The evidence indicated I had no intentions to deliver it. This is all an anticipatory offense. There was no link between Mr. Huynh and I, 4RP 27:

Q: And you were not ever able to connect a telephone call with Mr. Mak with Mr. Huynh, yes or no?

A: I was not.

The evidence adds up to point to a multiple punishment in the same offense as stated in our Washington provisions. Was I manufacturing or delivering cocaine?

In RCW 69.50.401 (1), it states the mental state of intent. "Guilty knowledge is not an element of unlawful possession of a controlled substance with intent to manufacture or deliver include the requisite mental state, i.e.,..." Also, with inference as to intent, the statute states: **"an inference that the defendant intended to deliver cocaine not yet possessed, and such an inference will not support a conviction for**

possession with intent to deliver". *State v. Robbins*, 68 Wn.App. 873, 876, 846 P.2d 585 (1993).

ADDITIONAL GROUND THREE

Sentence Entrapment/ Entrapment.

The State should vacate Count I, II, and III for charges against the crime I had been convicted of possessing cocaine. The evidence show that the crime was committed on May 20, 2011 was a sting operation by law-enforcement agency. Some of the circumstantial evidence, the State produced contriving traps to my co-defendant (Mr. Huynh) and I was part of an inducement. As stated in *Washington v. Stegall*, 69 Wash.App. 750, 850 P.2d 571 (1993), Division One: "Entrapment is a defense to a criminal charge if the criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and the defendant was lured or induced to commit a crime which the defendant had not otherwise intended to commit." In the Report of Proceedings, the evidence concluded Mr. Huynh initiated a transaction of purchasing cocaine or some illegal substance by starting out to be a broker. As time went by, the evidence guided towards the direction of Agent Delacruz, 3RP 5-6:

Q: Could you tell me when you spoke to Jeff Huynh after that meeting date and you raised that issue with him what were you expressing during that conversation? What specifically were you telling him

you were concerned about and where were you concerned about that conduct in the role you were playing?

A: The fact that they were speaking in their native language. For all I know they could be setting me up. I could be getting ready to be robbed. I mean I don't know if they are making plans that when we walk out the other guy is going to come behind me. I don't know what's going on. I told him that's not the way I did business, you know, that's not the way I conduct myself. How would you like it if I brought another Hispanic with me and all we did was talk Spanish without you knowing. It's not professional.

By this statement, the agent wanted to make sure he knew what was communicated so that he was in the loop of the operation with Mr. Huynh. Whether Mr. Huynh knew he was an agent or not, I have no idea, but the case has stipulated Agent Delacruz be in command of the whole duration. Agent Delacruz did not have the need to take down notes or notes were never turn in to the prosecution, where Agent Delacruz have the confidence to trust Mr. Huynh to bring him buyers to make an arrest. However, without pressure and then later stated that he was upset with Mr. Huynh by wasting his time if he could not come through with any buyers. 3RP 19 and 2RP 181:

Q: But he's apologizing to you for not showing up?

A: Yes.

Q: So you had interaction with Mr. Huynh for a period time. And you told me a minute ago that there were some times when you chewed him out on the phone expressing your displeasure with his behavior, the fact that he didn't come through. So when you are in the car on the 20th on of the things that he says to you is: See, I told you I would come through or something like that. He was wanting to get your approval because he came through finally; is that right?

A: Yes.

This is a case of when honesty fails; the dishonesty prevails because Agent Delacruz needed the fear of Mr. Huynh. The testimony of Agent Delacruz shows the command of his manipulation and intimidation over Mr. Huynh. Because of this action by the agent, Mr. Huynh has to induce other people to help him follow through on his promise to the agent. The agent admits in his testimony that Mr. Huynh brought more than three different buyers to Mr. Vernon area, and Agent Delacruz with Mr. Huynh's assistance tried to setup a controlled sell of illegal substance to the public. In 1RP 115: "...in the investigation there was at least three separate buys." Over the course of Agent Delacruz and Mr. Huynh multiple discussions, maybe over 30, and the evidence could not even produce a single note taken by the agent or notes have being saved. By this inference, trust was affirmed,

and Mr. Huynh was working under the guidance of the government. 1RP 103:

Q: So, we have at least 30 different contacts that were not documented; is that right?

A: That's correct.

The evidence indicates the agents have debriefing in 1RP 112-113: "Yes, there is a case agent. We usually have a debriefing." And "Yes, whoever is in the case, an undercover officer that will have a debriefing afterwards." The agents have debriefing, you would assume the story of the facts be consistent with their testimony, especially on a 5-6 month operation when notes were never taken, but with the guidance of the prosecution, the trial more persuasive to convict. The agents couldn't remember what illegal substance the transaction was regarding or if the word cocaine was ever brought up, also the substance was never tested on the nature or purity of substance, 2RP 102:

Q: Detective Flyod, do you have any different testimony other than Agent Delacruz regarding the use of the word cocaine or kilo? Were those words used when you were overhearing him talk to Mr. Huynh and to the other guy?

A: I did not hear those words used.

How the direct evidence be admitted when the evidence on the agent's product was never tested before the agents met with Mr. Huynh. The product was never tampered. How Agent Delacruz knew which product was step-on or not, when the product was never analyzed until sometime in August of 2011. The purity level of the cocaine is still undeterminable. The suspected cocaine was tested for confirmation of cocaine by Ms. Finney, and nobody really can say the purity of any of the exhibits that was use in trial. It is all made up, because Ms. Finney only tested to be positive of cocaine and the gross weight. One agent testified in 1RP 109:

A: I have no idea of what the purity level of those drugs are.

Q: So you are just making it up?

A: Yes.

This is the government officials using hypothetical situation to induce whatever possibility to a buyer to buy an illegal substances of any kind to incriminate anyone who was not predisposed. The evidence concludes Mr. Huynh was under the direction of Agent Delacruz, 1RP 117:

Q: Not happy with his behavior or the other person's behavior?

A: That is correct.

Only a boss would be unhappy with an employee's behavior, therefore, Mr. Huynh was not a broker, but an employee of the agent. Mr. Huynh seems to be betrayed by Agent Delacruz.

I was induced to this entrapment because I admitted my fault or mistake during my integration of trying to purchase an illegal substance, which was suppose to be marijuana "keif". Mr. Lin persuaded me. He stated I might be able to make some money since I was un-employed at the time, when I was laid-off from bad U.S. economical crises. I was informed the use of keif could be consumed without having to smoke the marijuana substance. In 3RP 191:

Q: Okay. Another thing you found in his car (Mr. Lin's vehicle) were some sheers; is that right?

A: Correct.

You should infer to the "knowledge" of the substance was important as to what I was stipulating from the start. I was induce into the purchase of "keif" (marijuana), but supplied with another illegal substance – cocaine. I might have made a mistake by trying to obtain marijuana with persuasion, but Agent Delacruz had coerced me by guaranteeing his product, because he acknowledges his product not to be tested and could not provide me with a sample of the product. He just wanted an arrest without further investigating the nature of the product, or my intentions. When he guarantee his product, or else you can bring it back with your money, this is also an agreement to honor by any standards. I had an opportunity to return the product if it's not what I want. Agent Delacruz

only assumes the transaction is to be cocaine, but there was never a mention of cocaine or any code words to represent cocaine. The agents only made a guess of trying to entrap me with cocaine because the agents did not really know what term were used for the cocaine. 3RP 25:

Q: Did he use the word cocaine?

A: Kilos.

Q: That's the only descriptive term?

A: Yes.

As stated at a later testimony, the agent indicated "keys" was the term used in 3RP 18. The agents have continuous debriefings, Agent Floyd even testified later in 4RP 28, stating the "keys" are the predominant term for cocaine. In the beginning of the testimony, Agent Delacruz stated cocaine was used in 2RP 155. The stories are not consistent with what the nature of the substance was and "no one" ever tested the substance until 3 months after the arrest. The State could infer to marijuana, "keif", but maybe the knowledge of "keif" is not what the State's conviction case is about. The State's expert testimony should be able to identify "keif" which can be seen as a block form too. All the State has to do is Google it on the internet and find out about the substance without any expert. I had no indication plan to distribute any illegal substance, and Agent Floyd testified in 4RP:

Q: Right. There was so much big volume you were kind of surprised at the lack of distribution plan?

A: Correct.

Some of the facts shows clearly there was inconsistency, and when asked certain questions in detail, it was avoided by stating "I don't recall" or "I can't remember". The circumstantial evidence should be vacated due to either sentencing entrapment or entrapment itself, where government officials guided Mr. Huynh to find a buyer of an illegal substance through the chain of command of the government officials, where Mr. Lin introduce me to the purchase of "keif" where I was never dispose of purchasing "keif". The State condones the actions of the agents by allowing the agent's testimony to abuse the facts of the case, where I was a victim of entrapment and not to the theory of the prosecution. Is there goodness in the eyes of the court to seek a reasonable sentence, or does it participates in the negativity of excessive punishment? We are all brothers and sisters in this universe, we breathe the same air.

Prosecutorial Misconduct @ 2nd Edition 2009-10, § 1:6 Entrapment and Instigation – Extensions of entrapment defense – Sentence entrapment:

"Apart from a defense to guilt, some courts also consider entrapment as a bar to increasing a sentence based on aggravating factors derived from improper governmental inducements. Such conduct might

include law enforcement's continued solicitation of drug transactions until the suspect sells enough drugs to trigger a mandatory minimum sentence, structuring a criminal transaction to artificially inflate the gravity of the defendant's conduct, or insisting on purchasing a particular quantity of drugs from a sting target not predisposed to engage in drug deals of that quantity."

The State never wanted to raise the possibility of marijuana because marijuana carries a maximum sentence of 5 years, and cocaine 10 years. There is no clear indication as to what the substances were, "kilo" was the closest term used, but in reality, "kilo" could have been determined as a weight measurement. However, if "kilo" refers to the substance of cocaine, what was the determination of the quantity to be purchased? This case was fabricated to make an entrapment case to convict a person of a maximum sentencing range. Even though the entrapment never brought up in trial, a conclusion to a sentence entrapment or entrapment is logical. The substance never tested until 3 months after the arrest and the purity of the cocaine is still undetermined. The evidence conclude to the fact which the agents never knew what the illegal substance was on May 20th , but only assumed to be the transaction of cocaine, when the word cocaine was never used in the transaction or any other code worded term used the day of the arrest. This is all

anticipatory theory of the government officials. The agents themselves could not link me with Mr. Huynh, and it was my first time meeting with an under-cover agent, in 4RP 27:

Q: And you were not ever able to connect a telephone call with Mr. Mak with Mr. Huynh. Yes or no?

A: I was not.

By inferring to the evidence, you can only link Mr. Lin and me, because we are Chinese, and evidence found in the trunk of Mr. Lin's car was some sheers with residue of marijuana. In addition, the beginning of Mr. Huynh and Agent Delacruz meeting, I was not even in Washington, therefore, I cannot claim what Mr. Huynh and Agent Delacruz intentions were or what agreement arranged.

This case was based on entrapment or sentencing entrapment for cocaine, because the evidence of the stories of the agents fabricated with inconsistency, 2RP 134:

Q: So he handled the cocaine in the trunk of the vehicle at this point in time?

A: Yes, it was a flash and close it; that was it.

But Agent Neufeld (being surveillance) testified a different side of the story in 3RP 99:

Q: What did they do at the car?

A: Detective Delacruz opened the trunk of the car, and the individual that was with him reached in the general area where the two kilograms of cocaine was, and started manipulating that, and then they both left. They closed the trunk and left.

Agent Neufeld also testified in 3RP 99:

Q: Who was the individual that went out to the car with Agent Delacruz on the first pass?

A: Jefferey Huynh. This is the first time we are talking?

Another agent testified the facts of me going to the under-cover vehicle with Agent Delacruz. Therefore, as the details of the case, the agents try to put together a convincing story of a sting operation to incriminate me. This is a case of entrapment. The cocaine was never sampled, tested or manipulated in any way on May 20th, as testified by Ms. Karen Finney in 3RP 155.

There is more inconsistency, but this was mainly all speculation to the conduct of incrimination of purchasing cocaine, which I had no knowledge of purchasing. How can I manufacture or deliver something that clearly, where I did not know what the substance was, but was induce by the guaranteeing of a product that was returnable. The government entraps me with a higher crime than the actual crime of marijuana after I had admitted the purchase of "keif" in my interrogation by Agent Floyd.

ADDITIONAL GROUND FOUR

Chain of Custody / Illegal Search and Seizure/Tampering with Evidence.

I challenge the Chain of Custody of the cocaine, which was admitted into evidence as exhibit 4 & 5. The evidence indicates that Detective Neufeld took custody of my vehicle before obtaining a search warrant. He had dominion control over my vehicle as he testified in court. If the agents were worried about the cocaine (as Agent Delacruz testified) being missing from my vehicle's trunk, they already had probable cause to open the trunk of my vehicle to locate the cocaine right were I was arrested, why wait to drive my vehicle to the Mr. Vernon Police Department? The Chain of Custody of the drugs used in the case has high questionable doubts as to where the drugs arrived from, and what was the truth nature of the substance in the trunk of my vehicle. The tampering of the product to look incriminating is a wrongful act by the government, but can only describe as an anticipatory offense. Agent Delacruz's statement in 2RP 189: "Yes, we were very interested in finding our product". "Product" was the word, not "cocaine".

In 3RP 122, Agent Neufeld's answers: "I wasn't there for when the dog was run on the vehicle; so I was just told the final result that the dog, there was a positive canine alert on the vehicle". In 3RP 121, Detective Neufeld testified the facts of which he had dominion control of

my keys and my vehicle. How could the agent not be present to realize when the canine unit was there to sniff out the cocaine, so, he could obtain a search warrant? He was the agent to call for a search warrant. In addition, a trained canine were not able to sniff 2 kilograms of cocaine in the trunk of my vehicle, but an unknown agent move the vehicle to the inside of the police garage area. Detective Neufeld did not remember the important fact to who move the vehicle to the police garage when he had control of the keys. He stated that he parked and locked up the vehicle. In 3RP 104:

"After parking the vehicle there I locked it all up and make sure it was completely all locked and kept the keys with me." Then later, he stated something different in 3RP 122: "It was me or one of the other detectives with the Task Force, I was working with that evening."

Detective Neufeld was present, but he seems to have a cover up. The assistance of a canine unit was important to obtain a search warrant, but no agents testified to the fact of the canine unit when there were reasonable doubts to the substance located in the trunk of my car. The agents dodged the question, and the prosecution never subpoenas the officer, in charge of the canine unit, to the discovery of the substance located in my vehicle. The agents had obtained a search warrant because the canine sniffed out the drugs in my car, which was moved two times before the search warrant

was issued by a judge. What was there to hide from the prosecution? The evidence shows the drugs were never tampered or been to Ms. Karen Finney's lab or any other lab before. Agent Floyd stated the substance was checked out from the Sheriff's office, from the 3RP 145: "They are weighed prior to us leaving the Sheriff's office..." and Agent Delacruz state the drugs were issues by DEA in 1RP 93: "They were given to us by the DEA". These are two separate unities by evidence. The evidence shows Agent Delacruz and Floyd checked them out together, but different testimony. As inferred, the testimonies are inconsistent and there are reasonable doubts about the Chain of Custody of the drugs presented in trial, which was an issue, by allowing the juror to infer the transaction was about cocaine. This was not a harmless error to cause the juror to believe the transaction was about cocaine and not any other substance.

Also, the inconsistency for the Chain of custody from the agents on the evidence of the personal property, which was inventoried and collected on the day of May 20th. Detective Meyer stated he could not remember what his statement is in an interview, 3RP 76: "It could be, I don't recall specifically if they were in the same bag or a separate bag." However, Detective Neufeld testified in the RP that all the evidence was collected together in 3RP 116:

Q: Does that contain items that were seized from Mr. Mak's car and Mr. Lin's car?

A: This will cover all of the evidence collected. This is all of the sheets. This will have all of the evidence collected on this particular day.

Q: So of the different people and their cars?

A; Correct, yes.

The consistency of the testimony of different agent's shows that the agents group all the evidence together not paying attention to where every item belongs, or whom the owners of what specific items belong to whom, as stated by Agent Floyd in the 3RP 185:

Q: So of the larger list, as he explained is items that came from various locations, correct; if that true?

A: Correct.

The Chain of Custody for the cocaine was unclear to support as evidence in trial, which presented to the jurors, would look incriminating to one's innocents of the crime charge with possession of cocaine.

ADDITIONAL GROUND FIVE

Prosecutorial Misconduct.

The prosecutor used false and misleading arguments in the trial to influence the jury's delusional mind. The prosecutor insisted to referring

to the "drug world", which the jurors would not comprehend, was an indirect approach to misrepresent critical facts. The evidence clearly indicates the substance was never tested on the day of the arrest, and no direct or circumstantial evidence leading me to a "drug world". The prosecution misquoted key testimony to inflame the passion of the jury. When the prosecution refers me as being in the "drug world", it causes the jurors to be influenced in their mind and mental state where I could inflict harm to the community. When "drug world" was different than what a normal person can comprehend, this can confuse the juries to believing the agent's testimony was accurate and truthful, even though of inconsistency. The prosecution also display the direct evidence of cocaine into exhibits to conclude the transaction were only about cocaine. The prosecutor already has the opportunity to sandbag her arguments in closing statements, because she made it obvious that 8,000 people in the community was going to get high when no one knew the substance from the start. The substance again was never tested until a later time, and the evidence shows that I was not going to get away with any kind of drugs in the first place as admitted by the agents. Under Prosecutorial Misconduct @ 2nd Edition 2009-10, §11:28, False and Misleading Arguments and § 11:30 Misstating the Record is a prosecutorial misconduct which can vacate the charges. Also, in standard 3-5.8, Argument to the Jury:

(a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead jury as to the inferences it may draw.

In standard 3-6.1, Role in Sentencing:

(a) The prosecutor should not make the severity of sentences the index of his or her effectiveness. To the extent that the prosecutor becomes involved in the sentencing process, he or she should seek to assure that a fair and informed judgement is made on the sentence and to avoid unfair sentence disparities.

The prosecution has exaggerated the severity of the offense when the offense was anticipatory, and I was going to get 8,000 people high. The prosecutor had seek the maximum range of the sentencing guideline of 120 months of imprisonment, maybe due to the time and effort the agents contribute to the case with frustration, when evidence indicated the amount of agents involved and the waste of government's time and efforts. The evidence never showed any organized crime. The dishonesty prevails when the honesty fails to convict me of a harsh punishment. The prosecution was wrong to influence the juror's mind about me being in the "drug world" when no evidence supports the fact. From the Report of

Proceeding, the prosecution indicated some coaching towards answers of witnesses, when the witnesses could not remember or they answered incorrectly. The prosecution did not just state the facts of the case, but the misrepresentation of critical facts in the closing argument and during the sentencing. The prosecution already has a lot of leniency to the powers over the common person, but to influence on harsh punishment should be wrong and should cross the line into misconduct.

The Washington Courts will review remarks that are deemed flagrant and ill intentioned that result in prejudice that could not have been neutralized by an admonition to the jury, even if no objection were made at trial. Closing arguments are the defendant's "last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." *State v. Perez-Cervantes* 141 Wn. 2d 468, 6 P.3d 1160 (2000).

ADDITIONAL GROUND SIX

Sufficiency of Evidence.

The court should vacate all charges against my case, because there was not enough evidence to support a conviction on all elements of the crime charged, cocaine. The evidence only support the conspiracy and possession with intent, but the intent on a specific illegal substance has a different statute maximum sentence. If inferred, the court could have an

inference of marijuana, when some sheers were found in the trunk of my co-defendant's vehicle with residue of marijuana. The State has failed to show accomplice liability, just the mere fact that I participated in the purchase of an illegal substance. The evidence was never proved to a specific substance where it carries different statutory sentences. The State also failed to prove my intentions, in 2RP 79:

Q: So you really have no idea what their intentions were with regard to these drugs?

A: I think I have a basis for their intentions.

Q: But you don't know because you didn't talk to them?

A: I know based on –

Q: Just yes or no. Did you talk to him?

A: I didn't talk to them.

Q: So you don't know what they thought?

A: I don't know what they thought.

Also, in 4RP 15 and 16:

Q: I think what you stated is you thought it was very out of the ordinary that he did not have a plan to distribute it. Did that surprise you what you said in the interview?

A: Right, as it relates to the volume that was purchased.

Therefore, the State has failed to prove every element of the crime. A conviction cannot rest on an ambiguous and equivocal jury instruction. An erroneous to-convict instruction that relieves the State of it's burden of proving every essential element of the charged crime beyond a reasonable doubt constitutes prejudicial error requiring reversal of the conviction. *State v. Cronin* 142 Wn. 2d 568, 14 P.3d 752 (2000).

The Due Process clause of the 14th Amendment protects against conviction unless every fact necessary to constitute a crime is proven beyond a reasonable doubt. *Francis v. Franklin* 105 S. Ct. 1965, 471 U.S. 307, 851 L. Ed 2d 344 (1985).

When I was convicted of manufacturing cocaine or conspiracy to manufacture cocaine, the required intent was not proved beyond a reasonable doubt. Manufacture is defined in the SRA Chapter 9, §903: "Manufacture means producing, preparing, propagating, compounding, converting, or processing a controlled substance, whether by chemical synthesis or by extracting it from substances of natural origin...." None of the elements were ever produced or proved of the crime of manufacturing. My lawyer tried to prove the specific substance of marijuana, but the issue was argued and sustained by the judge in 4RP 34-36, where she was brought to a sidebar conference to not bring up that line of questioning of the marijuana issue. My lawyer was trying to

prove the substance in my vehicle was unwitting possession. The issue has foundation to the question that relates to the testimony of the agents, which the States claims as circumstantial. The nature of the substance is critical to the "knowledge" of intent.

Under RCW 9A.28.040, Conspiracy Jury Instruction: "The State concedes that the 'to convict' instruction on the conspiracy count is totally flawed. Citing State v. Miller, 131, Wn.2d 78, 929 P.2d 372 (1997), the State acknowledges that a conspiracy instruction must include the element of delivery to a third person. The omission in the conspiracy elements instruction of a reference to a third person constituted harmful error because it affected the defendant's right to have the jury base its decision on an accurate statement of the law applied to the facts in the case." *Mill*, 131 Wn.2d at 90-91. *McCarty*, 140 Wn.2d at 425-26 ("Conspiracy to deliver a controlled substances, unlike conspiracy in general, necessarily requires the involvement of at least three people because the crime of delivery itself necessarily involves two people. Thus a document charging conspiracy to deliver a controlled substance must allege that persons involved outside the act of delivery two parts in the conspiracy agreement"). There were no intentions to prove delivery as testified by the agents, just mere speculations or theories from the prosecution. The possession of cocaine was unwitting, because the State

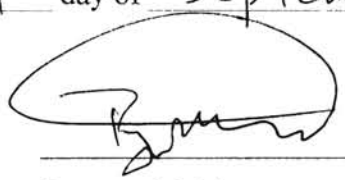
failed to show my intentions. At the time of the arrest, the substance was unknown to the agents, when the agents were the instigators of the drug transaction. I had only momentary possession of an unknown substance in the trunk of my car. Under the definition in WPIC 52.01: Unwitting Possession: "A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person [did not know that the substance was in [his][her] possession][or][did not know the nature of the substance]. As stated in the entrapment issue, the substance of "knowing" was not proved beyond a reasonable doubt by the State. If I had the knowledge of what I was to be purchasing, I would return the product. How would the State charge me in a case of trying to return an illegal substance I did not want to purchase? The State did not have a single phone call linking Mr. Huynh and I to any accomplice liability, therefore, the State failed to prove every element of the crime, which constitutes prejudicial error requiring reversal of the conviction.

The intent of "knowing" the substance is a major factor when no one clearly knew what the substance was. The assumed substance to be purchased was based on assumptions and speculations as to insinuate my intentions. The agents never proved I had knowledge of the nature of the controlled substance to be cocaine, when the agents themselves, did not

know the nature of the substance sold by them. There are reasonable doubts to the sufficiency of evidence proved in this trial. If inferred, you can only assume the transaction were of marijuana because evidence were found in the trunk of my co-defendant's vehicle. The sufficiency of evidence in this conviction raises a lot of question to the burden of proof beyond a reasonable doubt.

If there are any additional grounds, a brief summary is attached to this statement.

DATED this 21 day of September, 2012.



Raymond Mak

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NO. 68475-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent v. RAYMOND MAK, Appellant,	)	**DECLARATION OF MAILING**

I, Raymond Mak, hereby declare:

1. I am over the age of eighteen years and I am competent to testify herein.

2. On the below date, I caused to be placed in the U.S. Mail, first class postage prepaid, one (1) envelope(s) addressed to the below-listed individual(s):

Ms. Rebecca Wold Bouchey Attorneys for Appellant Nielsen, Broman & Koch, PLLC 1908 E Madison Street Seattle, WA 98122	Court of Appeal of the State of Washington, Division One One Union Square 600 University Street Seattle, WA 98101-4170

Mr. Erik Pedersen
Deputy Prosecuting Attorney
Skagit County Prosecuting Attorney's Office
605 South Third Street
Mount Vernon, WA 98273

3. I am a prisoner confined in the State of Washington Department of Corrections ("DOC"), housed at the Monroe Correctional Complex ("MCC"), 16700 177th Avenue S.E., P.O. Box 777, Monroe, WA 98272, where I mailed the said envelope(s) in accordance with DOC and MCC Policy 450.100 and 590.500. The said mailing was witnessed by one or more correctional staff. The envelope contained a true and correct copy of the below-listed documents:

1. Statement of Additional Grounds – RAP 10.10

2. Declaration of Mailing

4. I invoke the "Mail Box Rule" set forth in GR-3.1—the above listed documents are considered filed on the date that I deposited them into DOC's legal mail system.

5. I hereby declare under pain and penalty of perjury, under the laws of State of Washington, that the foregoing declaration is true and accurate to the best of my ability.

DATED this 21 day of September, 2012.

Raymond Mak

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DECLARATION OF MAILING