

Case No. 46149-8-II

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IN THE COURT OF APPEALS, DIVISION TWO OF THE STATE  
OF WASHINGTON

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STATE OF WASHINGTON  
Plaintiff/Respondent,

vs.

APRIL HANCOCK,  
Defendant/Appellant.

---

Appeal from the Superior Court of Mason County

Superior Court Case No. 12-1-00520-6  
District Court Case No. 2Z327384

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APPELLANT'S BRIEF

---

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ASSIGNMENTS OF ERROR

1. The District Court erred when it ruled that although RCW 46.20.005 is a lesser included offence of RCW 46.20.342(1), the element of operating a vehicle on a highway is not element of RCW 46.20.342(1).
  - a. The lower court erred when it found that a privately owned and maintained parking lot was a "publicly maintained" highway.
2. The lower courts erred in misapplying the rules of statutory construction when they only looked at the wording of RCW 46.20.342(1), failed to consider legislative intent, and give effect to conflicting statutes.
3. The Superior Court erred in denying Defendant's appeal when it found that RCW 46.20.005 was an inferior degree offense of RCW 46.20.342(1) rather than a lesser included offense as described in the statute by the legislature.
4. There is insufficient evidence to support a conviction under RCW 16.20.342(1) beyond a reasonable doubt.
5. The lower courts erred in disallowing jury instructions for DWLS that contained the element of driving on a highway.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 46.20.005 Driving Without a License (DWOL) is a "lesser included offense" within RCW 46.20.342(1) Driving While License Suspended or Revoked (DWLS). Can RCW 46.20.005 define itself as a "lesser included offense" within RCW 46.20.342(1)?
2. The rules of statutory construction require the court to give effect to legislative intent. This requires a court to look beyond the language of one statute where another statute purports to modify the first and potential conflicts arise. The court should look at the legislative scheme, similar statutes, legislative intent and history. Do the rules of statutory construction require a court to give effect to legislative intent by giving full effect to two potentially conflicting statutes if possible?
3. RCW 46.20.005 is defined by statute as a "lesser included offense" within RCW 46.20.342(1). It is not an "inferior degree offense." When the tests for "lesser included offense" and "inferior degree offense" are applied as they have been established RCW

1 46.20.005, as enacted, can only function as a "lesser included  
2 offense." Is DWOL a "lesser included offense" or a "inferior  
3 degree offense" with DWLS?

4 4. The State bears the burden of proving each element of the charged  
5 crime beyond a reasonable doubt. Because RCW 46.20.005 is a  
6 "lesser included offense" within DWLS all of its elements must be  
7 part of the greater offense, including driving on a highway. The  
8 State did not put on any evidence to show that Ms. Hancock drove  
9 on any public road, and therefore failed to prove the essential  
10 element of driving on a public highway. Did the State fail to prove  
11 DWLS?

12 5. The jury instructions were misleading in that they did not list  
13 driving on a highway as an element of the charged crime and,  
14 therefore, did not list all essential elements That the State was  
15 required to prove. This prejudiced the Defendant's case and  
16 requires dismissal or remand for a new trial. Should Jury  
17 instructions for DWLS contain the element of driving on a  
18 highway when that is an issue at trial?

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STATEMENT OF THE CASE

25 On April 3, 2012, April Hancock asked a friend, Chris Griner, to  
26 use her car to drive her to a doctor's appointment because she had a  
27 suspended license. While on the way, they decided to stop at Deer Creek  
28 Store on Highway 3 and parked in the private parking lot next to the store  
29 (it is not physically possible to park on the shoulder of Highway 3 at this  
30 location). Both April Hancock and her friend entered the store and made  
31 purchases. April Hancock completed her purchases first and waited  
32 outside by the car. When Mr. Griner exited the store, he asked April  
33 Hancock to move the car to the gas pumps so he could fill the tank. VRP  
34 at 41-42. April Hancock complied and backed the car over to the pumps.



1           During the time Ms. Hancock was at the store, Deputy Christopher  
2 T. Gaynor of the Mason County Sheriff's Department was travelling south  
3 bound on SR 3. While passing Deer Creek Store, he observed a white  
4 vehicle with the defendant, April Hancock, standing near it, in the  
5 privately owned and maintained parking lot owned by the store. Deputy  
6 Gaynor testified that he recognized the car and Ms. Hancock from a  
7 previous contact. RP at 11 - 12. After running the plates and verifying that  
8 Ms. Hancock had a suspended license, Deputy Gaynor returned to the  
9 store parking lot and observed the vehicle had moved approximately 20  
10 feet and was backing up to the gas pumps. Deputy Gaynor pulled up  
11 behind the vehicle and activated his lights at which point Ms. Hancock  
12 exited the driver side door, and a male passenger got out of the passenger  
13 side door. At no time did the deputy or any other witness observe Ms.  
14 Hancock operating the vehicle on a public road.

15           The deputy obtained the identification of both Ms. Hancock and  
16 the passenger and determined that Ms. Hancock's license was suspended  
17 in the 1st degree, and the passenger was suspended in the 3rd degree (the  
18 passenger reported being unaware of his suspension). Deputy Gaynor  
19 issued Ms. Hancock a citation, told the passenger that he could not drive  
20 and directed him to park the car in one of the parking lot's parking spaces.

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1 Ms. Hancock was charged with a violation of RCW 46.20.342.1A  
2 DWLS 1st Degree. Prior to trial, the defense filed a motion to dismiss  
3 based upon the fact that RCW 46.20.005 "is a lesser included offense  
4 within the offenses described in RCW 46.20.342(1)," making operation of  
5 an vehicle upon a public highway an element of the alleged crime; and the  
6 fact that Ms. Hancock did not drive upon a public highway. Motion and  
7 Memorandum in Support of Motion to Dismiss, July 27, 2012. This  
8 motion was denied orally by the trial court and findings of fact and  
9 conclusions of law were signed later. Findings of Fact and Conclusions of  
10 Law, August 31, 2012.

11 A jury trial was held in the Mason County District Court on  
12 October 26, 2012. The prosecution called two witnesses, Deputy Gaynor  
13 and Julie Burrow from the DOL. Deputy Gaynor testified regarding the  
14 traffic stop as described above. Ms. Borrow testified that Ms. Hancock  
15 was suspended in the 1st degree, but because there were some  
16 irregularities in the documentation presented at trial, the court reserved  
17 ruling on the validity of the suspension order. RP at 53. The defense called  
18 one witness, Chris Griner, the passenger mentioned above.

19 At the end of the trial, the jury returned a verdict of guilty on the  
20 charge of DWLS 1st Degree, from which Ms. Hancock made a RALJ  
21 appeal to the Superior Court. The Superior Court denied the appeal,  
22

1 finding that RCW 46.20.005 was an inferior offense to RCW 46.20.342(1)  
2 rather than a lesser included offense, and does not require proof of driving  
3 on a public highway. Memorandum Opinion and Order Affirming  
4 Conviction, dated April 14, 2014. The Superior Court also found that the  
5 "[s]tatutory rules of construction require the court to give statutory  
6 language its plain meaning," and because "highway" had been removed  
7 from RCW 46.20.342(1), it was not an element of the crime. *Id.* Ms.  
8 Hancock appeals.

1 ARGUMENTS

2 I. RCW 46.20.005 DWOL defines itself as a lesser included  
3 offense within RCW 46.20.342(1) DWLS that does not apply  
4 to private parking lots.

5 On April 3, 2012, April Hancock was charged with driving while  
6 her license was suspended in the 1st degree pursuant to RCW  
7 46.20.342(1). That section reads in pertinent part as follows:

8 (1) It is unlawful for any person to drive a motor vehicle in this  
9 state while that person is in a suspended or revoked status or  
10 when his or her privilege to drive is suspended or revoked in  
11 this or any other state. Any person who has a valid Washington  
12 driver's license is not guilty of a violation of this section.

13 (a) A person found to be a habitual offender under chapter  
14 46.65 RCW, who violates this section while an order of  
15 revocation issued under chapter 46.65 RCW prohibiting  
16 such operation is in effect, is guilty of driving while license  
17 suspended or revoked in the first degree, a gross  
18 misdemeanor... *(The remainder of this section deals with  
19 sentences and reinstatement.)*

20 RCW 46.20.342.1(a). However, RCW 46.20.342 cannot be read as a  
21 standalone statute and does not include all necessary elements of the  
22 crime. This is because another section is, as a matter of law, a lesser  
23 included offence. RCW 46.20.005 states:

24 Driving without a license — Misdemeanor, when.

Except as expressly exempted by this chapter, it is a misdemeanor  
for a person to drive any motor vehicle upon a highway in this  
state without a valid driver's license issued to Washington residents  
under this chapter. This section does not apply if at the time of the  
stop the person is not in violation of RCW 46.20.342(1) or  
\*46.20.420 and has in his or her possession an expired driver's  
license or other valid identifying documentation under RCW

1           46.20.035. A violation of this section is a lesser included offense  
2           within the offenses described in RCW 46.20.342(1) or \*46.20.420.

3 (Emphasis added.) The legislature has made a specific and extremely clear  
4 determination that RCW 46.20.005 "is a lesser included offense" for the  
5 purposes of RCW 46.20.342(1), the very section with which April  
6 Hancock was charged. This means that all elements of RCW 46.20.005  
7 must be included in the greater offense, RCW 46.20.342(1), including the  
8 element of driving "upon a highway."

9           In Washington, as in all other states, a lesser included offense is  
10 one where all of the elements of the lesser offense are also elements of the  
11 greater offense. *State v. Allen*, 116 Wn.App. 454, 463, 66 P.3d 653  
12 (Wash.App. Div. 3 2003); *State v. Aumick*, 126 Wn.2d 422, 426, 894 P.2d  
13 1325 (Wash. 1995); *State v. Berlin*, 133 Wash.2d 541, 545 - 546, 548,  
14 550, 947 P.2d 700 (Wash. 1997); *State v. Walden*, 67 Wn.App. 891, 893,  
15 841 P.2d 81 (Wash.App. Div. 1 1992); *State v. Workman*, 90 Wn.2d 443,  
16 447 - 448, 584 P.2d 382 (Wash. 1978) . If all the elements of a crime are  
17 not elements of what is alleged to be a greater crime, then it cannot be a  
18 lesser offense, because it would be possible to commit the greater offense  
19 without committing the lesser offense. *State v. Allen*, at 464; *State v.*  
20 *Aumick*, at 428; *State v. Walden*, at 893. Because the legislature in  
21 enacting RCW 46.20.005 specifically, made that section "a lesser included

1 offense within the offenses described in RCW 46.20.342(1)," it  
2 necessarily follows that all the elements of RCW 46.20.005 are also  
3 elements of RCW 46.20.342(1). In this case, because the lower courts  
4 erred in finding that the elements of the lesser included offense were not  
5 elements of the greater offense; a key element was left out of the jury  
6 instructions provided to the jury. Further, the element was definitely not  
7 proven at trial. The missing element is that the defendant must be proven  
8 to have driven a "motor vehicle upon a highway". RCW 46.20.005.

9         The trial court relied on *State v. Day*, 96 Wn.2d 646, 638 P.2d 546  
10 (1981) to rule that RCW 46.20.342(1) applied to private parking lots,  
11 believing that the issue is whether the parking lot was intended for public  
12 use rather than publicly maintained. However, that would only be an issue  
13 if another statute, other than RCW 46.20.342, were at issue, such as the  
14 city codes discussed in *City of Seattle v. Tolliver*, 641 P.2d 719, 31  
15 Wn.App. 299 (Wash.App. Div. 1 1982) and *City of Seattle v. Wright*, 433  
16 P.2d 906, 72 Wn.2d 556 (Wash. 1967). Further, *State v. Day*, deals with  
17 RCW 46.61.506, which is made applicable "upon highways and elsewhere  
18 throughout the state" by RCW 46.61.005(2). RCW 46.61.005 limits  
19 enforcement of provisions relating to the operation of motor vehicles  
20 exclusively public highways, and RCW 46.20.342 is not one of the  
21 exceptions listed in RCW 46.61.005(2).

1           The District Court believed that *Day* could be distinguished, which  
2 is true but not in the way the court thought. In *State v. Day*, the Court  
3 addressed the issue of whether RCW 46.61.506 applied on private  
4 property anywhere in the State. The defendant was charged with RCW  
5 46.61.506 (now RCW 46.61.502), driving under the influence. The acts  
6 occurred while on private property, far from any property open to the  
7 public. Like RCW 46.20.342(1), there is another statute that played a role  
8 in interpreting the elements of RCW 46.61.506. However, this was not a  
9 statute that is a lesser included offense, rather it was RCW 46.61.005 that  
10 established "exceptions" to the rule that the "*provisions of this chapter*  
11 *relating to the operation of vehicles refer exclusively to the operation of*  
12 *vehicles upon highways*" (Emphasis added). RCW 46.61.005(2) states  
13 that the provisions RCW 46.61.506 "shall apply upon highways and  
14 elsewhere throughout the state." This language made RCW 46.61.506  
15 applicable everywhere in the state. Even so, the court still looked at the  
16 statutory scheme to protect the public and found that it would be  
17 unreasonable to allow the "exercise of police power to extend the  
18 prohibition to petitioner's conduct," where the conduct was on private  
19 property and posed no threat to the public. *State v. Day*, at 649. Although  
20 the case is not directly on point, it still supports the defendant's position  
21 and not the State's. First, unlike the present case, in *State v. Day*, there was

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1 specific language extending statutory application of RCW 46.61.506  
2 beyond public highways. Second, even with this extended application  
3 beyond highways, the court looked at the statutory scheme and found that  
4 the statute did not apply.

5       When Washington courts have found private parking lots to be  
6 covered by a State statute such as RCW 46.20.342(1) it has been because a  
7 local statute exists that makes the State statute applicable. In *City of*  
8 *Seattle v. Tolliver*, 31 Wn.App. 299, 641 P.2d 719, 721 (Div 11992) the  
9 court upheld the defendant's conviction for DUI and DWLS in a privately  
10 owned paved parking lot because the Seattle Traffic Code was "applicable  
11 to "all persons operating vehicles upon the streets, alleys and ways open to  
12 the public of the city of Seattle except as otherwise specifically provided."  
13 *City of Seattle v. Tolliver*, at 301. Similarly, *City of Seattle v. Wright*, was  
14 also decided based upon the city traffic code. In *Wright*, the Court noted  
15 that the "state statute does not regulate vehicular traffic on private  
16 roadways not publicly maintained which have been opened to public use".  
17 *City of Seattle v. Wright*, at 560. However, cities have the power to make  
18 regulations pertaining to public safety that go beyond what State statutes  
19 provide. *Id.*, at 558. *City of Seattle v. Tolliver* does not control here  
20 because only state statutes apply to the current case, and these "exclude



1 private property from the classification of 'public highway'". *City of*  
2 *Seattle v. Wright*, at 559.

3 *II. Statutory Construction requires the court to resolve*  
4 *conflicting statutes so as to give effect to both.*

5 The State argued in the Superior Court that because the legislature  
6 removed the public highway requirement from RCW 46.20.342(1),  
7 statutory construction allowed the court to conclude that the legislature  
8 intended to remove the "highway" requirement altogether, despite any  
9 other provisions. However, this over simplifies statutory construction as  
10 the courts will look at related statutes and other items to determine the  
11 intent of the legislature. *State v. J.P.*, 69 P.3d 318, 149 Wn.2d 444, 450  
12 (Wash. 2003). The courts do this to ensure the intent of the legislature is  
13 implemented. "The rules of statutory construction require that a court  
14 confronted with conflicting statutes should, when possible, reconcile them  
15 and give effect to each provision." *Elford v. City of Battle Ground*, 941  
16 P.2d 678, 87 Wn.App. 229, 234 (Wash.App. Div. 2 1997), citing *King v.*  
17 *Department of Social and Health Servs.*, 110 Wash.2d 793, 799, 756 P.2d  
18 1303 (1988). Although, RCW 46.20.342(1) does not contain the word  
19 "highway," RCW 46.20.005 does and it also clearly states that it "is a  
20 lesser included offense within the offenses described in  
21 RCW 46.20.342(1)." Because the definition of "lesser included offense"

1 requires that all of the elements of the lesser be included within the  
2 greater, RCW 46.20.005 demands that "highway" be an element of  
3 RCW 46.20.342(1). The State's argument that "highway" was removed  
4 from RCW 46.20.342(1), at best, simply demonstrates that there is a  
5 conflict between the two statutes, which needs to be resolved.

6       However, the mere fact that the public highway requirement was  
7 removed from RCW 46.20.342 does not mean that the intent was to delete  
8 the element from DWLS offenses. This is because other interpretations are  
9 available. RCW 46.20.005 states that it is a lesser included offense for two  
10 sections, RCW 46.20.342(1) and RCW 46.20.020 (renumbered as RCW  
11 46.20.345). Both of these sections relate to DWLS violations. Both  
12 originally contained the language relating to driving on a public highway.  
13 1967 Wash. Laws c 167 § 7; 1961 Wash. Laws c 134 § 1. And both had  
14 the language deleted. 1990 Wash. Laws c 210 § 5; 1967 Wash. Laws c 32  
15 § 35. If RCW 46.20.005 is a lesser included offense, then the term  
16 "highway" is unnecessary to include the word in RCW 46.20.342(1). Even  
17 so, the confusion created by the deletion of "highway" exists only because  
18 we have forgotten the circumstances surrounding the history of RCW  
19 46.20.342(1) and RCW 46.20.005 over the past 35 plus years. Further, if  
20 we examine the legislative history of RCW 46.20.342(1), we find that  
21 DWOL was a "lesser included offense within DWLS prior to the deletion

1 of "highway" from RCW 46.20.342(1) in 1990, it was originally included  
2 in RCW 46.20.342(1). 1979 Wash. Laws ch 136 § 62. The "lesser  
3 included offense" language was not deleted from the law, only moved to a  
4 better location. DWOL has continued to be a "lesser included offense"  
5 within DWLS under Washington law, without interruption, since 1979.  
6 The legislature intended this result and the legislature understood the  
7 meaning of the term "lesser included offense" and the results that arise  
8 from that legal definition.

9       The court should give deference to the clear language of a statute  
10 in determining its intent. *State v. J.P.*, 69 P.3d 318, 149 Wn.2d 444, 450  
11 (Wash. 2003). However, it must also do the same for other enactments of  
12 the legislature such as RCW 46.20.005. Further, the primary duty of the  
13 court is to "discern and implement the intent of the legislature." *Id.* This  
14 cannot be done without an understanding of the legislative history of the  
15 statutes involved and a consideration of related statutes.

16               1. *Legislative history of RCW 46.20.342(1) and RCW*  
17               *46.20.005 demonstrates that the legislative intent is and the*  
18               *law has always been that DWOL is a "lesser included*  
                  *offense" and driving on a highway is an element of DWLS*

19       RCW 46.20.005 was created in 1997, but its history goes back  
20 much further and is closely intertwined with RCW 46.20.342(1). Prior to  
21 1985, RCW 46.20.342(1) contained not only the "public highway"  
22  
23

1 requirement,<sup>1</sup> but also a statement that "the offences described in RCW  
2 46.20.021 and 46.20.190, as now or hereafter amended, are lesser  
3 included offenses within the offense described by this section." 1979  
4 Wash. Laws ch 136 § 62. After this language was added to RCW  
5 46.20.342(1) in 1979 the statute read as follows:

6 Any person who drives a motor vehicle on any public  
7 highway of this state at a time when his privilege so to do is  
8 suspended or revoked or when his policy of insurance or  
9 bond, when required under this chapter, shall have been  
10 canceled or terminated, shall be guilty of a misdemeanor:  
11 **PROVIDED, That the offenses described in RCW**  
12 **46.20.021 and 46.20.190, as now or hereafter amended,**  
13 **are lesser included offenses within the offense described**  
14 **by this section.** Upon the first conviction therefor, he shall  
be punished by imprisonment for not less than ten days nor  
more than six months. Upon the second such conviction  
therefor, he shall be punished by imprisonment for not less  
than ninety days nor more than one year. Upon the third  
such conviction therefor, he shall be punished by  
imprisonment for one year. There may also be imposed in  
connection with each such conviction a fine of not more  
than five hundred dollars.

15 *Id.* (emphasis added). At that time, RCW 46.20.021 was the statute that  
16 prohibited operation of a motor vehicle upon a highway without a valid  
17 driver's license. In 1985, these statutes were modified to remove the  
18 "lesser included" language from RCW 46.20.342(1) and put it in RCW  
19 46.20.021. *See*, 1985 Wash. Laws ch. 302 §§ 2 and 3. RCW 46.20.021(1)  
20 was modified to read as follows:

21 <sup>1</sup> RCW 46.20.342(1) was first enacted in 1965 and included the "highway" requirement.  
22 *See*. 1965 Wash. Laws ch 121 § 43.

1 No person, except as expressly exempted by this chapter,  
2 may drive any motor vehicle upon a highway in this state  
3 unless the person has a valid driver's license issued under  
4 the provisions of this chapter. ***A violation of this  
subsection is a misdemeanor and is a lesser included  
offense within the offenses described in RCW  
46.20.342(1), 46.20.416, 46.20.420, and 46.65.090.***

5 *Id.*, at § 2 (emphasis added). This change had absolutely no effect on the  
6 existing state of the law because it simply transferred the wording of the  
7 existing requirement relating to "lesser included offense" from RCW  
8 46.20.342(1) to the related statute. Presumably, it was simpler to make a  
9 single statement about a "lesser included offense" in the actual DWOL  
10 statute rather than make the statement in four other sections. This language  
11 is very similar to the current language of RCW 46.20.005 and maintained  
12 the designation of driving without a valid driver's license as a lesser  
13 included offense within DWLS. The lesser included language has been  
14 included in all iterations of the DWOL statute since 1985.

15 In 1990, the legislature took up SB 6608, which was the bill that  
16 deleted the word "highway" from RCW 46.20.342(1) and placed it in  
17 RCW 46.20.005. The "highway" requirement had been part of RCW  
18 46.20.342(1) since it was first created in 1965. *See*, 1965 Wash. Laws ch  
19 121 § 43. The defense has been unable to find any explanation for the  
20 removal of "highway" from the statute, however, it is clear that the  
21 legislature and proponents of the changes considered DWOL to be a lesser

1 "included offense" within DWLS and that the main concern of SB 6608 in  
2 relation to DWLS were inconsistencies with the penalties. At a public  
3 hearing on January 23, 1990, proponents provided testimony from three  
4 witnesses.<sup>2</sup> None of the witness mentioned the term "highway" or its  
5 deletion and all of the witnesses described their concerns as being with  
6 inconsistencies and ambiguity in relation to discrepancies in penalties in  
7 the existing law. Transcript of Public Hearing SB 6608, January 23, 1990  
8 (See, Appendix A). The witnesses noted that the existing statutes provided  
9 for maximum \$500 fines for some gross misdemeanors, while providing  
10 greater penalties for a lesser misdemeanor. Public Hearing SB 6608, at 6.  
11 For example, Judge Ron Rayne testified that "[i]n particular, the charge of  
12 no-valid operator's license which is a lesser offense than driving while  
13 suspended, carries a higher monetary penalty." *Id.* The intent of the  
14 legislature was to correct these discrepancies in the penalties, not alter the  
15 elements of RCW 46.20.342(1). This is supported by the Senate Reports  
16 put out by the legislature, all of which state the following:

17           Driving while license suspended (DWLS) and driving  
18           while license revoked (DWLR) are classified as gross  
19           misdemeanor charges. However, the maximum fine for  
20           these crimes is \$500. In comparison, the *lesser included  
          offense of driving without a valid operator's license*  
          carries a maximum sentence of not more than 90 days in  
          jail and a fine of not more than \$1,000.

21 \_\_\_\_\_  
22 <sup>2</sup> There were no opponents to the legislation.

1 *See*, Senate Committee on Law & Justice, SSB 6608, Synopsis as Enacted,  
2 June 7, 1990 (emphasis added. *See*, Appendix B). The legislature always  
3 intended and believed that DWOL was a lesser included offense to  
4 DWLS. Further, the judges who testified on the matter were certainly  
5 aware of the several legislative synopsis published by the committee  
6 calling DWOL a lesser included offense, but never argued otherwise.  
7 Judge Rayne even called DWOL a "lesser offense" in relation to DWLS.  
8 For the judges, the issue was the discrepancies in penalties.

9  
10 In 1997, the legislature again modified the DWOL statute. Prior to  
11 this time, RCW 46.20.021 contained both the criminal misdemeanor  
12 offense and the infraction for DWOL. The legislature felt that having both  
13 offenses listed in the same subsection created confusion and decided to  
14 split the two offences into separate RCW sections. *See*, Senate Committee  
15 on Law & Justice, SSB 5060, Synopsis as Enacted, July 27, 1997 (*see*,  
16 Appendix B). This was considered to be a "strictly a technical change to  
17 current law which will end the confusion for courts and police." *Id.* As a  
18 result, RCW 40.20.005 was created for the criminal misdemeanor offense  
19 of DWOL and RCW 40.20.015 for the infraction. RCW 40.20.005  
20 contained the same language making it a "lesser included offense within

1 the offenses described in RCW 46.20.342(1) or 46.20.420."<sup>3</sup> As a result,  
2 the creation of RCW 40.20.005 in 1997, which has not been amended  
3 since, did not create a new offense, nor did it change the law. Rather, it  
4 maintained DWOL as a "lesser included offense" within DWLS. In fact,  
5 because the "lesser included offense" language has existed in Washington  
6 laws since well before the "highway" language was removed from RCW  
7 46.20.342(1), this demonstrates that there was no intent on the part of the  
8 legislature to change the law in relation to RCW 46.20.005 DWOL being a  
9 lesser included offense within RCW 46.20.342(1).

10           When resolving a possible conflict between two statutes, the Court  
11 should attempt to give effect to the intent of the legislature. *State v. Evans*,  
12 298 P.3d 724 (Wash. 2013). The legislative history of RCW 46.20.342(1)  
13 and RCW 46.20.005 demonstrates that the legislative intent has been to  
14 maintain DWOL as "a lesser included offense within the offenses  
15 described in RCW 46.20.342(1)." This language has been included in the  
16 Revised Code of Washington without interruption for over 35 years. The  
17 legislature has made no attempt to change or remove this requirement, but  
18 has endeavored to maintain DWOL as a "lesser included offense" within  
19 DWLS to the present time. There is no conflict between RCW

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20  
21 <sup>3</sup> Over time renumbering and other changes have resulted in some of the *greater offenses*  
being deleted from the list contained in the DWOL statute. RCW 46.20.420 has been  
renumbered as RCW 46.20.345.



1 46.20.342(1) and RCW 46.20.005, However to the extent there is, the  
2 court should interpret them so as to give effect to both. *Elford v. City of*  
3 *Battle Ground*, 941 P.2d 678, 87 Wn.App. 229, 234 (Wash.App. Div. 2  
4 1997), citing *King v. Department of Social and Health Servs.*, 110  
5 Wash.2d 793, 799, 756 P.2d 1303 (1988). This cannot be done if the Court  
6 accepts the argument that the "highway" element was deleted from RCW  
7 46.20.342(1) because it means that RCW 46.20.005 cannot be "a lesser  
8 included offense within the offenses described in RCW 46.20.342(1)."  
9 However, if the Court applies RCW 46.20.005 as written, finding that it is  
10 a "lesser included offense," then full effect is given to both statutes, as  
11 well as legislative intent, without the need for any modification at all.

12           2. *Statutory construction requires giving effect to the*  
13           *legislature's intent to make RCW 46.20.005 a lesser*  
14           *included offense within RCW 46.20.342(1)*

15           Courts should give deference to the clear language of a statute in  
16 determining its intent. *State v. J.P.*, 69 P.3d 318, 149 Wn.2d 444, 450  
17 (Wash. 2003). The primary duty is to "discern and implement the intent of  
18 the legislature." *Id.* However, this cannot be done without consideration  
19 to other statutes that directly impact upon the statute being considered, in  
20 this case RCW 46.20.005.

21           When the Superior Court applied a rule of statutory construction  
22 for RCW 46.20.342(1) that requires a court "to give statutory language its

1 plain meaning and to not read in something that is not there"  
2 (Memorandum Opinion, at 3), but failed to do the same for RCW  
3 46.20.005, it created a conflict between the statutes that needed to be  
4 resolved. As a result, the court needed to apply other rules of statutory  
5 construction to resolve the issue. "The rules of statutory construction  
6 require that a court confronted with conflicting statutes should, when  
7 possible, reconcile them and give effect to each provision." *Elford v. City*  
8 *of Battle Ground*, 941 P.2d 678, 87 Wn.App. 229, 234 (Wash.App. Div. 2  
9 1997), citing *King v. Department of Social and Health Services.*, 110  
10 Wash.2d 793, 799, 756 P.2d 1303 (1988); See also, *Gorman v. Garlock,*  
11 *Inc.*, 118 P.3d 311, 155 Wn.2d 198, 210 (Wash. 2005). The rules of  
12 statutory construction require that deference be given by the court to RCW  
13 46.20.005's more specific language over that of RCW 46.20.342(1).  
14 *Gorman v. Garlock, Inc.*, at 210; *Probst v. Department of Labor and*  
15 *Industries*, 230 P.3d 271, 155 Wn.App. 908, 917, 918-919 (Wash.App.  
16 Div. 2 2010); See also, *Herrett Trucking Co. v. Washington Public Service*  
17 *Commission*, 364 P.2d 505, 58 Wn.2d 542, 543-545 (Wash. 1961). Courts  
18 will look at related statutes and other items to determine the intent of the  
19 legislature. *State v. J.P.*, 69 P.3d 318, 149 Wn.2d 444, 450 (Wash. 2003).  
20 Legislative intent and the "plain meaning is derived from the context of  
21 the entire act as well as any related statutes..." *Jametsky v. Rodney A.*, 317

22

23 Appellant's Brief

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1 P.3d 1003, 1006, 179 Wn.2d 756 (Wash. 2014); see also, *State v. Budik*,  
2 272 P.3d 816, 173 Wn.2d 727, 733 (Wash. 2012). Statutory construction  
3 also requires the court to presume that the legislature understood the  
4 meaning of its words and acted "with full knowledge of existing laws."  
5 *Jametsky v. Rodney A.*, at 1008, citing *Thurston County v. Gorton*, 85  
6 Wash.2d 133, 138, 530 P.2d 309 (1975). "Statutes must be interpreted and  
7 construed so that all the language used is given effect, with no portion  
8 rendered meaningless or superfluous." *Gorman v. Garlock, Inc.*, at 210  
9 citing *Davis v. Dep't of Licensing*, 137 Wash.2d 957, 963, 977 P.2d 554  
10 (1999). When the court failed to properly apply the rules of statutory  
11 construction to resolve the perceived conflict and instead addressed RCW  
12 46.20.342(1) as if it existed independent of any other provisions, the  
13 court's application of statutory construction was in conflict with the  
14 decisions of the Court of Appeals and Supreme Court as cited above.

15 In the lower court, the State cited *Herrett Trucking Co. v.*  
16 *Washington Public Service Commission*, 364 P.2d 505, 58 Wn.2d 542  
17 (Wash. 1961), for the proposition that an "earlier special statute must yield  
18 to latter general statute when there is manifest legislative intent that the  
19 latter statute should have effect or where the two statutes cannot otherwise  
20 be reconciled and given effect." However, *Herret Trucking* actually says  
21 the following:

1 A statute may be repealed by implication. **Ordinarily, a**  
2 **general statute does not repeal an earlier special statute**  
3 **by implication.** However, there is no rule which prohibits  
4 the repeal by implication of a special statute by a general  
5 one. The question is always one of legislative intent. **The**  
6 **earlier special statute must yield to the later general**  
7 **statute where there is a manifest legislative intent that the**  
8 **general statute shall have universal application.**

6 *Herrett Trucking, Co. v. Washington Public Service Commission*, 364 P.2d  
7 505, 58 Wn.2d 542, 543-544 (Wash. 1961) (citations omitted). Thus the  
8 rule stated in *Herret Trucking* is actually that a general statute will not  
9 repeal an earlier specific statute unless there is a clear legislative intent to  
10 do so. This is not the case with RCW 40.20.005, in fact the opposite  
11 appears true. Not only is the "lesser included offense" requirement part of  
12 an earlier statute, it is also part of a later enacted statute. The "lesser  
13 included offense" requirement has been in force continually since 1979.  
14 Further, RCW 40.20.005 specifically and in plain language applies itself  
15 to RCW 40.20.342(1). The "manifest legislative intent" is to maintain the  
16 "lesser included offense" requirement in relation to the sections listed in  
17 RCW 40.20.005.

18 When interpreting a statute Washington courts will, when possible,  
19 derive legislative intent solely from the plain language  
20 enacted by the legislature, considering the text of the  
21 provision in question, the context of the statute in which the  
22 provision is found, related provisions, and the statutory

1 scheme as a whole. Plain language that is not ambiguous  
2 does not require construction.

3 *State v. Evans*, 298 P.3d 724 (Wash. 2013) (citations omitted). The court  
4 will assume at the outset "that the Legislature meant what it said in the  
5 plain language of the statute." *State v. Tran*, 69 P.3d 884, 117 Wn.App.  
6 126, 131 (Wash.App. Div. 2 2003), citing *Geschwind v. Flanagan*, 121  
7 Wash.2d 833, 841, 854 P.2d 1061 (1993). And if the statutory language is  
8 unambiguous, it is not subject to judicial construction. *Id.*, citing *State v.*  
9 *Howell*, 119 Wash.2d 513, 518, 833 P.2d 1385 (1992). "If the plain  
10 language of the statute is unambiguous, then this court's inquiry is at an  
11 end. The statute is to be enforced in accordance with its plain meaning."  
12 *State v. Armendariz*, 156 P.3d 201, 160 Wn.2d 106 (Wash. 2007) citing  
13 *State v. J.P.*, 69 P.3d 318, 149 Wn.2d 444 (Wash. 2003). This does not  
14 mean that one looks at a statute by itself in a vacuum, without taking into  
15 consideration other related statutes.<sup>4</sup> The Court must consider the statutory  
16 scheme surrounding RCW 46.20.342(1). *State v. J.P.*, 69 P.3d 318, 149  
17 Wn.2d 444, 450 (Wash. 2003). This is necessary because of the large  
18 number of laws that directly affect the implementation of RCW  
19 46.20.342(1). These statutes must also be considered in the same light and

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20 <sup>4</sup> Many statutes rely on other statutes or common law to define their elements. For  
21 example see RCW 9A.36.041 Assault in the Fourth Degree, which defines itself in terms  
22 of other types of assault.

1 given their meaning and intent. When this is done, the plain language of  
2 RCW 40.20.005 states that "A violation of this section is a lesser included  
3 offense within the offenses described in RCW 46.20.342(1)," is that RCW  
4 40.20.005 "is a lesser included offense within the offenses described in  
5 RCW 46.20.342(1)."

6 Statutory construction requires that the court interpret statutes so  
7 that they do not conflict. *Gorman v. Garlock, Inc.*, 118 P.3d 311, 155  
8 Wn.2d 198, 210 (Wash. 2005). Generally, "[s]tatutes must be interpreted  
9 and construed so that all the language used is given effect, with no portion  
10 rendered meaningless or superfluous." *Id.*, citing *Davis v. Dep't of*  
11 *Licensing*, 137 Wash.2d 957, 963, 977 P.2d 554 (1999). In this case, there  
12 is a clear conflict between RCW 40.20.005 and 46.20.342(1) if the court  
13 does not recognize the lesser included status of RCW 40.20.005; but there  
14 is no conflict at all if the court enforces the statutory language that it is a  
15 lesser included offense. Further, ignoring the language of RCW 46.20.005  
16 relating to lesser included offense effectively deletes the wording and  
17 alters the clause without legislature approval. This violates the rule that  
18 "Statutes must be interpreted and construed so that all the language used  
19 is given effect, with no portion rendered meaningless or superfluous."  
20 *State v. J.P.*, at 450. For these reasons, the rules of statutory construction  
21 require that the court find RCW 46.20.005 to be a lesser included offense

1 within RCW46.20.342(1) and that driving on a highway is an element of  
2 DWLS.

3 *3. The Court should avoid the erroneous effects that would*  
4 *result if RCW 46.20.005 is not a lesser included offense*  
*within RCW 46.20.342(1)*

5 The Court should also consider the erroneous effects that could  
6 occur if driving on a highway is not an element of DWLS and RCW  
7 46.20.005 is not found to be a "lesser included offense" as written. RCW  
8 40.20.342(1) states:

9 It is unlawful for any person to *drive a motor vehicle* in this  
10 state while that person is in a suspended or revoked status or  
11 when his or her privilege to drive is suspended or revoked in  
this or any other state. Any person who has a valid Washington  
driver's license is not guilty of a violation of this section.

12 RCW 46.04 provides definitions to be used for the title. The word "drive"  
13 is not defined, but driver is. RCW 46.04.370 states:

14 "Operator or driver" means every person who drives or is in  
15 actual physical control of a vehicle.

16 One can infer that "drive" also means to have control of the vehicle. There  
17 is some support for this reading in RCW 46.25.010, which defines the  
18 word "drive" to meaning "operate, or be in physical control of a motor  
19 vehicle in any place open to the general public for purposes of vehicular  
20 traffic." If this is the definition of "drive," a person with a suspended  
21 license would be guilty of DWLS simply for starting his/her car in his/her

1 own garage during his/her suspension to prevent engine deterioration, or  
2 just for sitting behind the wheel on his/her own property. There seems to  
3 be no valid state interest or safety issues involved in this result.

4 The term "motor vehicle" is defined in RCW 46.04.320. That  
5 section states:

6 "Motor vehicle" means every vehicle that is self-propelled  
7 and every vehicle that is propelled by electric power  
8 obtained from overhead trolley wires, but not operated  
9 upon rails. "Motor vehicle" includes a neighborhood  
10 electric vehicle as defined in RCW 46.04.357. "Motor  
11 vehicle" includes a medium-speed electric vehicle as  
12 defined in RCW 46.04.295. An electric personal assistive  
13 mobility device is not considered a motor vehicle. A power  
14 wheelchair is not considered a motor vehicle. A golf cart is  
15 not considered a motor vehicle, except for the purposes of  
16 chapter 46.61 RCW.

12 If the prohibition against driving while a person's license is suspended  
13 applied to the entire state including private property, this definition when  
14 applied to RCW 46.20.342(1) would prohibit the use of a self-propelled  
15 lawn mower to mow one's lawn; one could not move his/her car on his/her  
16 own property to make repairs or wash it; and a farmer could be deprived  
17 of his/her livelihood because he/she would not be permitted to drive a  
18 harvester or tractor on his/her own land. A person with a suspended  
19 license could not mow their lawn, but could drive a golf cart anywhere.  
20 Courts should take care to avoid such results "because it will not be  
21 presumed that the legislature intended absurd results." *State v. J.P.*, at 450.



1 When looking at the definition of motor vehicle and the exceptions  
2 thereto, it makes sense if applied to public highway, but becomes absurd if  
3 applied everywhere in the state. Further, such results would not occur if  
4 RCW 46.20.005 is a lesser included offense of RCW 46.20.342(1).

5 *4. The definition of highway is a publicly maintained road*

6 The term "highway" is defined in RCW 46.04.197. That statute states that  
7 a "[h]ighway means the entire width between the boundary lines of every  
8 way ***publicly maintained*** when any part thereof is open to the use of the  
9 public for purposes of vehicular travel." RCW 46.04.197 (emphasis  
10 added). Similarly, RCW 46.04.500 defines "roadway" as follows:

11 "Roadway" means that portion of a highway improved,  
12 designed, or ordinarily used for vehicular travel, exclusive  
13 of the sidewalk or shoulder even though such sidewalk or  
14 shoulder is used by persons riding bicycles. In the event a  
highway includes two or more separated roadways, the  
term "roadway" shall refer to any such roadway separately  
but shall not refer to all such roadways collectively.

15 Based upon these two statutes WAC 232-13-030(21) defines "road" as:

16 "Road," pursuant to RCW 46.04.500 and 46.04.197, means  
17 that portion of an every way ***publicly maintained*** for the  
18 purposes of vehicular travel. For purposes of this chapter,  
19 "road" means a road wholly or partly within or adjacent to  
and serving department-owned or controlled public lands,  
waters, or access areas under the jurisdiction of the  
department.

1 All of these definitions are restricted to roads that are "publicly  
2 maintained" and do not include private property, whether or not the  
3 property is located adjacent to the road or Highway.

4         The Washington Supreme Court has found private property and  
5 "publicly maintained" roads to be key factors in finding liability for  
6 statutes that contain that highway requirement. In *Kim v. Budget Rent A*  
7 *Car Systems, Inc.*, 15 P.3d 1283, 143 Wn.2d 190 (Wash. 2001), the  
8 Supreme Court addressed the issue of whether Budget Rent A Car was  
9 liable for vehicular assault where a car it owned was stolen because  
10 Budget had left the keys in the car's ignition while it was located in  
11 Budget's parking lot. The Plaintiff had argued that Budget was in violation  
12 of RCW 46.61.600, which prohibited a person from leaving a car  
13 unattended on a highway without stopping the engine and removing the  
14 keys. The court affirmed the dismissal of the plaintiff's case for several  
15 reasons, but noted that the term "highways" is defined by RCW 46.04.197  
16 to include only those areas that are "publicly maintained." *Kim v. Budget*  
17 *Rent A Car Systems, Inc.*, at 201. As a result, the Court found that  
18 "because Budget's administrative facility is not a 'publicly maintained  
19 highway,' we hold that Budget had no statutorily imposed duty to remove  
20 the keys from its vehicles." *id.* The main points to be taken from this is  
21 that a law that creates a duty or obligation for an act occurring on a

1 highway does not create a duty or obligation for the same act occurring on  
2 private property, and that a private parking lot is not covered by the term  
3 "highway" if it is not publicly maintained. This proposition is universally  
4 supported in other jurisdictions that use the same definition for "roads"  
5 and "highway" as is found in RCW 46.04.197. *See, Kim v. Budget Rent A*  
6 *Car Systems, Inc.*, at 201 (citing, *Schaff v. R.W. Claxton, Inc.*, 144 F.2d  
7 532 (1944); *Harper v. Epstein*, 16 Ill.App.3d 771, 306 N.E.2d 690 (1974);  
8 *George v. Breising*, 206 Kan. 221, 477 P.2d 983 (1970); *Berluchaux v.*  
9 *Employers Mut. Of Wausau*, 182 So.2d 98 (La.Ct.App.1966); *Curtis v.*  
10 *Jacobson*, 142 Me. 351, 54 A.2d 520 (1947); *Kalberg v. Anderson Bros.*  
11 *Motor Co.*, 251 Minn. 458, 88 N.W.2d 197 (1958); *Elliott v. Mallory Elec.*  
12 *Corp.*, 93 Nev. 580, 571 P.2d 397 (1977); *Stone v. Bethea*, 251 S.C. 157,  
13 161 S.E.2d 171 (1968); *Martel v. Chattanooga Parking Stations, Inc.*, 224  
14 Tenn. 232, 453 S.W.2d 767 (1970)). This continues to be the rule in more  
15 recent cases. *See, State of Hawaii v. Kelekolio*, 94 Hawai'i 354, 14 P.3d  
16 364 (Hawai'i App. 2000)(Holding that the defendant could not be  
17 convicted of operating a vehicle without a license ... because he was  
18 operating the vehicle in the parking lot of a private hotel, rather than on a  
19 public highway.); *Commonwealth of Pennsylvania v. Owen*, 580 A.2d 412,  
20 397 Pa.Super. 507 (Pa.Super. 1990)(State failed to provide evidence that a  
21 parking lot was a publicly maintained highway.); *People v. Kozak*, 264

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1 N.E.2d 896, 130 Ill.App.2d 334 (Ill.App. 1 Dist. 1970)(Conviction for  
2 driving while license suspended was overturned because a parking lot was  
3 not a publicly maintained highway.); *Carma v. Swindler*, 228 S.C. 550, 91  
4 S.E.2d 254 (S.C. 1956)(Plaintiff sought to base personal injury suit on  
5 statute that made operator of vehicle liable for her injuries if they occurred  
6 on a public highway. The case was dismissed and upheld on appeal  
7 because the dirt road was not a public highway as it was not "publicly  
8 maintained".); *Vincen v. Lazarus*, 456 P.2d 789, 93 Idaho 145 (Idaho  
9 1969)(The fact that a private road intersects with a public road does not  
10 make it part of the highway. The private road must be publicly maintained  
11 to be a "statutory intersection" and part of the highway.); *Vazquez v.*  
12 *Pacific Greyhound Lines*, 178 Cal.App.2d 628, 3 Cal.Rptr. 209  
13 (1960)(Appellants in a civil case were properly denied instruction because  
14 they were not driving on a public road. The "proper construction of  
15 'publicly maintained' is 'maintained by some public agency'" and a road  
16 that does not meet this definition is not a highway.); *State of Texas v.*  
17 *Ballman*, 157 S.W.3d 65 (Tex.App.—Fort Worth 2004)(Motion to  
18 suppress was granted because Defendant was stopped for failing to signal;  
19 however, the term "highway" did not apply to parking lot that was not  
20 publicly maintained.); *Lucero v. Holbrook*, 2012 WY 152, 288 P.3d 1228,  
21 1232-1233 (Wyo. 2012)(Driveway to private residence was not subject to

1 statute because it was neither publicly maintained nor open to public use  
2 and therefore not part of the public highways.). It is clear that a statute  
3 whose application is limited to publicly maintained highways does not  
4 apply to private property.

5         The key focus for determining whether a statute that is restricted to  
6 "publicly maintained" roads can be enforced on private property is  
7 whether the private property is "publicly maintained". *People v.*  
8 *Culbertson*, 630 N.E.2d 489, 196 Ill.Dec. 554, 258 Ill.App.3d 294, 297  
9 (Ill.App. 2 Dist. 1994). When courts have enforced a statute similar to  
10 RCW 46.20.342(1) against a driver on private property, it has been  
11 because the private road or parking lot was actually publicly maintained,  
12 or because the statute or ordinance specifically called for enforcement  
13 over such areas. Courts have upheld convictions because the privately  
14 owned property was publicly maintained and operated. *See, People v.*  
15 *Culbertson*, 630 N.E.2d 489, 196 Ill.Dec. 554, 258 Ill.App.3d 294  
16 (Ill.App. 2 Dist. 1994); *People v. Jensen*, 347 N.E.2d 371, 37 Ill.App.3d  
17 1010 (Ill.App. 1 Dist. 1976); *Bardfield v. New Orleans Public Belt*  
18 *Railroad*, 371 So.2d 783 (La. 1979); *People v. Bailey*, 612 N.E.2d 960,  
19 184 Ill.Dec. 84, 243 Ill.App.3d 871 (Ill.App. 5 Dist. 1993); *Village of Lake*  
20 *Villa v. Bransley*, 809 N.E.2d 816, 284 Ill.Dec. 250, 348 Ill.App.3d 280  
21 (Ill.App. 2 Dist. 2004). Courts in other jurisdictions have upheld

1 convictions where the language specifically covered private property,  
2 *State of Florida v. Lopez*, 633 So.2d 1150, 19 Fla. L. Weekly D611  
3 (Fla.App. 5 Dist. 1994) (Overturning dismissal of charges for driving with  
4 a suspended license because parking lots were specifically covered by  
5 statute and therefore subject to the suspended license law); *People v.*  
6 *Erickson*, 246 N.E.2d 457, 108 Ill.App.2d 142 (Ill.App. 2 Dist. 1969)  
7 (Conviction for DUI on private property upheld because Illinois, unlike  
8 other states, did not restrict operation of statute to highways, but included  
9 other areas "devoted to a semi-public use."); *State of New Jersey v. Sisti*,  
10 162 A.2d 297, 62 N.J.Super. 84 (N.J.Super.A.D. 1960) (Conviction for  
11 DUI upheld because DUI statute did not contain words which would  
12 restrict its application to violations occurring on the highways); *McClellan*  
13 *v. State*, 2003 WY 17, 62 P.3d 595 (Wyo. 2003) (Conviction for driving  
14 while license suspended upheld because Wyoming statute included  
15 language that "if not publicly maintained then dedicated to public use  
16 when any part is open to the use of the public for purposes of vehicular  
17 travel," which made privately maintained road subject to statute because it  
18 was dedicated to public use).

19           It is also possible for local governments to pass ordinances that  
20 will extend jurisdiction over public property, even though state law does  
21 not. In *City of Seattle v. Wright*, 433 P.2d 906, 72 Wn.2d 556 (Wash.

1 1967), the court upheld the convictions of the defendant for DUI because,  
2 although State statutes "did not regulate vehicular traffic on private  
3 roadways not publicly maintained which have been opened to public use,"  
4 a Seattle City ordinance specifically extended jurisdiction over the private  
5 parking lot. *Seattle v. Wright*, at 908 -909. The court noted that while the  
6 City was not obligated to do so, it did have the authority to pass  
7 regulations that extended its jurisdiction over areas that would otherwise  
8 not be covered. *id.* However, no violation of any similar local ordinance  
9 was alleged to be applicable in the current case here.

10 The Appellant has been unable to find any cases where a  
11 conviction for operating a vehicle on private property while license  
12 suspended (or under the influence) was upheld when the property was not  
13 "publicly maintained" or absent a statutory language that extended the  
14 application of the law to private property. In the current case, the opposite  
15 is true. There is no evidence that the parking lot was "publicly  
16 maintained," and there is no statutory language that would indicate a  
17 statutory exception to the highway requirement found in RCW 46.20.005.  
18 The language used in Washington statutes for defining a "highway" is  
19 commonly used in other jurisdictions, and those jurisdictions have  
20 overwhelmingly held, as has Washington, that the laws relating to  
21 "highways" do not extend to private property unless the property is

1 "publicly maintained" or a statutory exception exists. *See, Kim v. Budget*  
2 *Rent A Car Systems, Inc.*, at 201.

3 5. *Statutes can and do modify other statutes and the elements*  
4 *thereof*

5 It is necessary to consider the statutory scheme when interpreting a  
6 statute and legislative intent, because other statutes will often affect the  
7 implementation of a given statute. *State v. J.P.*, at 450. Other sections of  
8 RCW 46 RULES OF THE ROAD play a role in determining whether  
9 "highway is an element of DWLS. For example, RCW 46.61.005 limits  
10 the enforcement of the provisions of RCW 46 MOTOR VEHICLES to the  
11 operation of vehicles upon highways, thereby excluding private property  
12 except in certain limited exceptions. RCW 46.61.005 states:

13 The provisions of this chapter relating to the operation of  
14 vehicles refer exclusively to the operation of vehicles upon  
15 highways except:

- 16 (1) Where a different place is specifically referred to in  
17 a given section.  
18 (2) The provisions of RCW 46.52.010 through  
19 46.52.090, 46.61.500 through 46.61.525, and  
20 46.61.5249 shall apply upon highways and  
21 elsewhere throughout the state.

22 At first glance, one might suspect that this only applies to RCW 46.61, but  
23 46.61.005(2) clearly contemplates a broader application because it lists  
24 exceptions in RCW 46.52. The only exceptions to the "highway"  
requirement are for accident reporting and reckless driving, driving under



1 the influence, vehicular homicide and assault. Driving on suspended  
2 license is conspicuously absent for the list of exceptions. This supports the  
3 argument that RCW 46.20.005 is a lesser included offense and that driving  
4 a vehicle on a publicly maintained road is a required element of RCW  
5 46.20.342(1). Other examples of statutes that must be considered in order  
6 to properly interpret a different statute include the definitions in RCW  
7 46.04 or the licensing act in RCW 46.25. RCW 46.20.342 itself list  
8 numerous sections throughout RCW 46 that must be taken into account to  
9 determine what elements the State must prove to obtain a conviction in a  
10 given situation. *See*, RCW 46.20.342. It is not uncommon for the  
11 legislature to modify the elements of one statute by provisions contained  
12 in another. This is what was done in RCW 46.20.005 and earlier in RCW  
13 46.20.021 and RCW 46.20.342(1) when those statutes referred to other  
14 statutes to make DWOL a lesser included offense within DWLS.

15 *III. RCW 46.20.005 Driving Without a Valid License is a lesser*  
16 *included offense within RCW 46.20.342(1) DWLS, and it is*  
*not an inferior offense of DWLS.*

17 On RALJ appeal the Superior Court found that RCW 46.20.005  
18 was not a lesser included offense within RCW 46.20.342(1) as stated in  
19 the DWOL statute, rather the Superior Court held that RCW 46.20.005  
20 was an inferior degree offense within RCW 46.20.342(1). This is in direct  
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1 conflict with the plain language of RCW 46.20.005, but it is also in  
2 conflict with existing case law.

3           The Superior Court cited two cases, *State v. Peterson* and *State v.*  
4 *Jasper*, for the proposition that DWLS 3rd and 2nd were not lesser  
5 included offenses with DWLS 1st, rather they were inferior crimes.  
6 Inferior crimes are crimes that have the same elements as the greater  
7 crime. *State v. Peterson*, 948 P.2d 381, 133 Wn.2d 885, 891 (Wash. 1997).  
8 An inferior crime is essentially the same act as the greater crime. "Unlike  
9 a lesser-included offense, an inferior degree offense may have an element  
10 that is not an element of the greater offense." *State v. Jasper*, 245 P.3d  
11 228, 158 Wn.App. 518, fn 8 (Wash.App. Div. 1 2010). Lesser included  
12 crimes are those where all of the elements of the lesser crime are  
13 necessarily included within the greater crime. *State v. Allen*, 116 Wn.App.  
14 454, 463, 66 P.3d 653 (Wash.App. Div. 3 2003); *State v. Aumick*, 126  
15 Wn.2d 422, 426, 894 P.2d 1325 (Wash. 1995); *State v. Berlin*, 133  
16 Wash.2d 541, 545 - 546, 548, 550, 947 P.2d 700 (Wash. 1997); *State v.*  
17 *Walden*, 67 Wn.App. 891, 893, 841 P.2d 81 (Wash.App. Div. 1 1992);  
18 *State v. Workman*, 90 Wn.2d 443, 447 - 448, 584 P.2d 382 (Wash. 1978).  
19 The lesser crime can be committed without violating the greater, but the  
20 greater cannot be committed without also committing the lesser included  
21 offense. This is not the case with inferior crimes

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23 Appellant's Brief

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1 The dicta in *Jasper* notes that:

2 The varying degrees of driving while license suspended or  
3 revoked are not lesser-included offenses of the greater  
4 degrees of the crime. Rather, they are inferior degree  
crimes. A person does not commit the lower degree crime  
when he or she commits the higher degree crime.

5 *State v. Jasper*, at fn 8. While it may be true that DWLS 2<sup>nd</sup> and 3<sup>rd</sup> are  
6 inferior crimes within DWLS 1<sup>st</sup> rather than lesser included offenses, this  
7 is not the issue in the present case. DWLS 2<sup>nd</sup> and 3<sup>rd</sup> are crimes set out in  
8 RCW 46.20.342(1), the same section that defines DWLS in the 1<sup>st</sup>. DWLS  
9 2<sup>nd</sup> is defined in RCW 46.20.342(1)(b) and 3<sup>rd</sup> is defined in RCW  
10 46.20.342(1)(c). However, RCW 46.20.005 Driving Without a License, is  
11 not the same crime as those described in RCW 46.20.342(1) Driving  
12 While License Invalidated. It is possible to drive without a license without  
13 violating RCW 46.20.342(1). This is because RCW 46.20.342(1) requires  
14 the additional elements of having obtained a valid license and then having  
15 had that license suspended.

16 RCW 46.20.005 reads as follows:

17 Except as expressly exempted by this chapter, it is a  
18 misdemeanor for a person to drive any motor vehicle upon  
19 a highway in this state *without a valid driver's license*  
20 issued to Washington residents under this chapter. This  
21 section does not apply if at the time of the stop the person  
is not in violation of RCW 46.20.342(1) or \*46.20.420 and  
has in his or her possession an expired driver's license or  
other valid identifying documentation under RCW  
46.20.035. A violation of this section is a lesser included

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1 offense within the offenses described in RCW 46.20.342(1)  
or \*46.20.420<sup>5</sup>.

2 RCW 46.20.005 defines itself as a lesser included offense within the  
3 offenses described in RCW 46.20.342(1). This is not just DWLS 1<sup>st</sup>, the  
4 crime April Hancock was charged with, but it is a lesser included offense  
5 within all degrees of DWLS as defined by RCW 46.20.342(1).<sup>6</sup> *State v.*  
6 *Peterson* defined the test for determining if a crime is an inferior degree of  
7 another as:

8 (1) the statutes for both the charged offense and the  
9 proposed inferior degree offense "***proscribe but one***  
10 ***offense***"; (2) the information charges ***an offense that is***  
11 ***divided into degrees***, and the proposed offense is an  
inferior degree of the charged offense; and (3) ***there is***  
***evidence that the defendant committed only the inferior***  
***offense.***

12 *State v. Peterson*, at 891. The various levels of DWLS fit this test (*See*  
13 RCW 46.20.342), but it is not true for RCW 46.20.005 when compared  
14 with RCW 46.20.342(1).

15 RCW 46.20.005 can be committed without committing a violation  
16 of any degree DWLS, which violates the first requirement of the test that  
17 the crimes "proscribe but one offense." Further, RCW 46.20.005 is not a  
18 "degree" of nor is it defined as a "degree" of RCW 46.20.342(1), which  
19 violates the second requirement of the test. The various degrees of DWLS  
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21 <sup>5</sup> Now RCW 46.20.343.

22 <sup>6</sup> This may not have been apparent from the previous discussions, as the parties were  
23 focused on the charged crime.

1 are defined in subsections (a), (b), and (c) of RCW 46.20.342(1). The third  
2 requirement of the test is irrelevant when the first two requirements are not  
3 met. Thus, when applying the *Peterson* test to RCW 46.20.005, we find  
4 that DWOL cannot be an inferior degree crime to the various DWLS  
5 crimes listed in RCW 46.20.342(1).

6       However, if we apply the clear meaning of RCW 46.20.005 that it  
7 "is a lesser included offense within the offenses described in RCW  
8 46.20.342(1)" and apply the element of driving on a highway to various  
9 DWLS crimes listed in RCW 46.20.342(1), we find that RCW 46.20.005  
10 exactly fits the test for a lesser included offense perfectly. First, RCW  
11 46.20.005 can be committed without committing the greater crime of  
12 DWLS because it does not require a suspended license or any license at  
13 all. Second, DWLS cannot be committed without violating RCW  
14 46.20.005 because driving on a suspended license is the same as driving  
15 without "a valid driver's license." The fact that RCW 46.20.005 perfectly  
16 fits the definition of a lesser included offense for DWLS when it is applied  
17 as written, shows that the legislature not only knew what it was doing, but  
18 understood the legal meaning of "lesser included offense," when it chose  
19 to make RCW 46.20.005 "a lesser included offense within the offenses  
20 described in RCW 46.20.342(1)."

1 RCW 46.20.005 only works as a "lesser included offense" and fails  
2 the *Peterson* test for an inferior degree offense. As a result, the Superior  
3 Court erred when it misapplied the test for inferior offenses and found  
4 RCW 46.20.005 to be an inferior offense to RCW 46.20.342(1). For these  
5 reasons, the elements of RCW 46.20.005, including driving a "motor  
6 vehicle upon a highway," are also elements of DWLS, and the court  
7 should apply the law as it was enacted by the legislature.

8 IV. There is insufficient evidence to support a conviction under  
9 RCW 16.20.342(1) because driving on a highway is an element  
10 of DWLS and no evidence was presented showing that the  
11 defendant drove on a public highway.

12 While it is true that on appeal, the court will look at the evidence in  
13 the light most favorable to the prosecution, *Jackson v. Virginia*, 443 U.S.  
14 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Salinas*, 119  
15 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing, *State v. Green*, 94 Wash.2d  
16 216, 220-22, 616 P.2d 628 (1980), there is no evidence that would meet  
17 the requirements of *State v. Salinas*, that the evidence would support a  
18 guilty verdict beyond a reasonable doubt. *State v. Salinas*, at 201.

19 The existing language of RCW 46.20.005 and legislative history  
20 show that it is, in fact, "a lesser included offense within the offenses  
21 described in RCW 46.20.342(1)." The rules of statutory construction  
22 require that the court find RCW 46.20.005 to be a "lesser included

1 offense" and give effect to the intent of the legislature. Further, because  
2 RCW 46.20.005's status as a "lesser included offense" requires that all  
3 elements of the lesser offense be included in the greater offense;  
4 "highway" is necessarily an element of RCW 46.20.342(1). The  
5 prosecution is required to prove each and every element of the crime  
6 beyond a reasonable doubt. *State v. Alvarez-Abrego*, 225 P.3d 396, 154  
7 Wn.App. 351, 371 (Wash.App. Div. 2 2010) citing, *In re Winship*, 397  
8 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Finally, the State  
9 failed to prove that Ms. Hancock drove on a publicly maintained highway,  
10 the State failed to meet its burden of proof.

11 Deputy Gaynor testified that he "observed a vehicle that I had  
12 made contact with previously and a female standing outside the vehicle  
13 that I had recognized from the previous contact." Report of Proceedings  
14 (RP) at 12, line 20. When Deputy Gaynor first observed the car, it was  
15 "parked right near the store." RP at 13, line 21.<sup>7</sup> After verifying that the  
16 owner's license was suspended, the Deputy returned to the location and  
17 reports that:

18 As I passed the Deer Creek Store, I did observe the vehicle  
19 in the gas station area. As I was coming up to Deer Creek  
20 to make a turn towards the entrance, the vehicle was in  
21 motion. I turned into the gas station, and as I turned in the

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24 <sup>7</sup> It is physically impossible to park on the highway. In the area of Dear Creek Store,  
Highway 3 has a shoulder of approximately a foot wide and immediately bordered by  
deep irrigation ditches on both sides of the road.

1           vehicle began backing up to one of the pumps. That's  
2           when I pulled in behind the vehicle and activated my  
            emergency overhead lights.

3    RP at 12, line 16 - 22. The stop was, therefore, made on private property.

4    The Deputy testified under cross examination that he did not observe the  
5    vehicle moving on Route 3 or anywhere outside of the parking lot. RP at  
6    21 - 22. And even in the parking lot, Deputy Gaynor only observed the  
7    car move about 20 feet as it moved to the gas pumps. Report of  
8    Proceedings (RP) at 12, line 20. From the deputy's own testimony, it is  
9    clear that there was no evidence that April Hancock operated the car on  
10   the public roads. In fact the only testimony that related to driving the  
11   vehicle on any public road came from defense witness, Chris L. Griner,  
12   who was the other person in the vehicle that day. Mr. Griner testified that  
13   April Hancock had asked him to drive her to the doctor. And as a result,  
14   he met Ms. Hancock at her house and used her car to drive her to the  
15   doctor, stopping at the store at Deer Creek on the Way. RP at 41 - 42.  
16   They both went into the store and after making purchases, Mr. Griner  
17   asked Ms. Hancock to back the car up to the pumps so he could get some  
18   gas, which she did. It was at this point that the deputy made the traffic  
19   stop. *id.* This testimony was not disputed at trial. But even if the jury  
20   chose not to believe this, it could not invent facts that were not in  
21   evidence. It could not invent testimony that Ms. Hancock drove the

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1 vehicle on a publicly maintained road, when the state put on no evidence  
2 to show she did. Deputy Gaynor testified only that he saw Ms. Hancock  
3 operate the vehicle in the private parking lot and nowhere else. Because of  
4 this, there is no evidence whatsoever that can be used to prove the  
5 essential element that the defendant operated the vehicle on a publicly  
6 maintained highway.

7 "In every criminal prosecution, the State must prove each element  
8 of the crime charged beyond a reasonable doubt." *State v. Alvarez-*  
9 *Abrego*, 225 P.3d 396, 154 Wn.App. 351, 371 (Wash.App. Div. 2 2010)  
10 citing, *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368  
11 (1970). And without such evidence, the state failed to prove an essential  
12 element of the crime, and thereby failed to prove its case "beyond a  
13 reasonable doubt" as required by law. It follows that when there is no  
14 evidence of an essential element of a charged crime, it is impossible for  
15 "any rational trier of fact [to find] guilt beyond a reasonable doubt" as  
16 required by *Salinas*. *State v. Salinas*, at 201. Implications that the  
17 defendant was seen near a car, or drove the car on private property that is  
18 not maintained at public expense, will not suffice to create criminal  
19 liability. It is not illegal for a person with a suspended license to be seen  
20 near a car, the state must prove beyond a reasonable doubt that the person  
21 drove the vehicle on a publicly maintained highway. Further, because the

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1 only evidence produced at trial was that the car was only operated by the  
2 defendant in the private parking lot, there was no evidence that could lead  
3 a reasonable jury to infer otherwise.

4 V. The Jury instructions were misleading in that they  
5 did not list all elements of the charged crime. This  
6 prejudiced the Defendant's case and requires  
7 dismissal or remand for a new trial.

7 For the reasons stated above, the standard WPIC does not contain  
8 all the elements required by Washington law because it leaves out the  
9 elements of the lesser include offense of RCW 46.20.005. This materially  
10 prejudiced the defendant's case, allowed the prosecution to avoid proving  
11 all elements, prevented the jury from considering all elements, and directly  
12 resulted in her conviction for a crime she did not commit. If the  
13 "instructions in question go to the heart of the case against [the] Defendant  
14 in that they define the elements of the crime. They are not merely  
15 tangential, and so their accuracy is especially important." *United States v.*  
16 *Hicks*, Cr. 08-1976 JH (D. N.M. 2010). Further, jury instructions are  
17 improper if they mislead the jury, or if they do not properly inform the  
18 jury of the applicable law. *State v. Vander Houwen*, 163 Wn.2d 25, 29,  
19 177 P.3d 93 (2008). When this happens, the court should reverse and  
20 vacate the convictions. *See, State v. Vander Houwen*, at 40.

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1 RCW 46.20.342 explicitly requires proof on three elements. First,  
2 the offender's license must be suspended. Second, the offender must have  
3 been properly found to be a "habitual offender." And third, the first two  
4 elements must be in effect at the time of the alleged violation. Based upon  
5 this statute the court gave Jury Instructions 6 and 7.

6 Those Jury Instructions read as follows:

7 Jury Instruction 6

8 WPIC 93.01 Driving While License Revoked—First Degree—  
9 Definition

10 A person commits the crime of driving while license  
11 revoked in the first degree when he or she, having been found  
12 by the Department of Licensing to be *a habitual traffic  
offender*, drives a motor vehicle while an order of revocation is  
in effect.

12 Jury Instruction 7

13 WPIC 93.02 Driving While License Revoked—First Degree—  
14 Elements

15 To convict the defendant of driving while license  
16 revoked in the first degree, each of the following elements of  
17 the crime must be proved beyond a reasonable doubt:

- 18 (1) That on or about April 3, 2012, the defendant drove  
19 a motor vehicle;
- 20 (2) That at the time of driving an order of revocation  
21 was in effect;
- 22 (3) That the order of revocation was based on a finding  
23 by the Department of Licensing that the defendant  
24 was *a habitual traffic offender*; and
- (4) That the driving occurred in the County of Mason,  
State of Washington.

If you find from the evidence that each of these  
elements has been proved beyond a reasonable doubt, then it  
will be your duty to return a verdict of guilty.

1                   On the other hand, if, after weighing all the evidence,  
2                   you have a reasonable doubt as to any one of these elements,  
3                   then it will be your duty to return a verdict of not guilty.

4                   Both jury instructions are based on the Washington Pattern Jury  
5                   Instructions. However, because neither included the essential element of  
6                   driving on a publicly maintained highway as required by RCW 46.20.005,  
7                   both instructions suffer from a fatal flaw in the current case and were  
8                   improper. The reason for this is that the instructions are based solely on  
9                   RCW 46.20.342 and that statute does not list all of the required elements  
10                  of the charged crime. As a result, Jury Instructions 6 and 7 do not contain  
11                  all of the required elements of the charged crime. This "[f]ailure to instruct  
12                  the jury on every element of the crime charged is an error of constitutional  
13                  magnitude that may be raised for the first time on appeal." *State v. Mills*,  
14                  154 Wn.2d 1, 6, 109 P.2d 415 (Wash. 2005), citing, *Mills*, 116 Wash.App.  
15                  at 110, 64 P.3d 1253, *State v. Roberts*, 142 Wash.2d 471, 500-01, 14 P.3d  
16                  713 (2000); *State v. Eastmond*, 129 Wash.2d 497, 502, 919 P.2d 577  
17                  (1996). Such errors are manifest "when they have practical and  
18                  identifiable consequences in the trial of the case." *Id.* The jury instructions  
19                  serve as the "yardstick by which to measure a defendant's guilt or  
20                  innocence." *Id.* For this reason, jury instructions "must contain all  
21                  elements essential to the conviction. *State v. Mills* at 7, citing, *State v.*

1 *Smith*, 131 Wash.2d 258, 263, 930 P.2d 917 (1997); *State v. Emmanuel*,  
2 42 Wash.2d 799, 819, 259 P.2d 845 (1953). Because the instruction failed  
3 to include the "highway" requirement, which is an essential element in this  
4 case, the instructions were defective and failed to properly instruct the  
5 jury, requiring a reversal in this case.

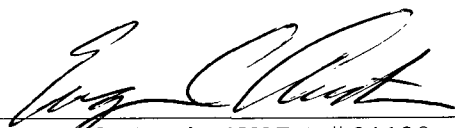
#### 6 CONCLUSION

7 The language currently contained in RCW 46.20.005 -- "a lesser  
8 included offense within the offenses described in RCW 46.20.342(1)" --  
9 has been part of Washington law since 1979 when the language was  
10 included in RCW 46.20.342(1). The legislature carefully ensured that this  
11 language was maintained in the RCW. The legislature's intent that RCW  
12 46.20.005 be a "lesser included offense" is clear and it meets the test for a  
13 "lesser included offense" when the plain language of RCW 46.20.005 is  
14 given effect. It is not necessary that the word "highway" appear in RCW  
15 46.20.342(1) because it appears in the lesser included offense and  
16 elements of a crime may be provided by different statutes. The means that  
17 driving on a public "highway" is an element of RCW 46.20.342(1) DWLS  
18 and must be proven by the prosecution beyond a reasonable doubt. The  
19 failure to prove this element is reversible error, as is the failure to allow an  
20 instruction that included the element as part of the charged crime.

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Ms. Hancock's conviction should be reversed and remanded to the lower court with instructions to enter a verdict of not guilty.

**DATED** this 12<sup>th</sup> day of November, 2014.

  
Eugene C. Austin, WSBA # 31129  
Attorney for Defendant/Appellant

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that a true and correct copy of the foregoing was sent, via

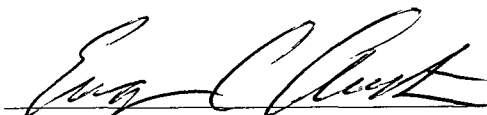
\_\_\_\_\_ U.S.P.S. First Class mail, to the Mason County Prosecutor's Office, PO Box 639, Shelton, WA 98584.

\_\_\_\_\_ Hand delivered to the Mason County Prosecutor's Office, 521 N 4th St #B, Shelton WA 98584.

\_\_\_\_\_ Faxed to the Mason County Prosecutor's Office at 360-427-7754.

Emailed to Tim Higgs, Mason County Prosecutor's Office.

**DATED** this 12<sup>th</sup> day of ~~August~~ **NOVEMBER**, 2014.

  
Eugene C. Austin, WSBA # 31129

APPENDIX A

Transcript of Public Hearing SB 6608, January 23, 1990



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

STATE OF WASHINGTON  
  
Plaintiff/Respondent,  
  
vs.  
  
APRIL HANCOCK,  
  
Defendant/Appellant.

**Case No. 46149-8-II**  
Superior Court No. 12-1-00520-6  
District Court No. 2Z327384

**TRANSCRIPT OF PUBLIC  
HEARING, EXECUTIVE  
SESSION, JANUARY 23, 1990,  
SB 6608**

Senate Committee on Law & Justice

Testimony Taken in Executive Session, SB 6608

January 23, 1990

MR. CHAIRMAN: We will move to the next bills, Mr.  
Armstrong, Traffic violations and the Uniform Misdemeanor Criminal  
Code penalties. For the benefit of the committee, these bills all we have is  
proponents, we have no opponents to the driving infraction bills, Mr.  
Armstrong?

MR. ARMSTRONG: Mr. Chairman and the community. The bill  
is a little long and the bill is a little bit long but basically what the district  
court judges want is in the various sections of the codes where the

1 penalties are proscribed for suspended sentence and hit-and-run attended  
2 vehicle. The penalties that attached are gross misdemeanors, but then the  
3 current statutes go on and put limitations on the amount of the penalty  
4 which don't correspond with what the general penalties are for a gross  
5 misdemeanor and so throughout the bill there are several sections where  
6 they're crossing out of limitations of the amount of the penalty and want it  
7 to be a standard gross misdemeanor.

8           The one issue in here that probably is a policy matter and it's  
9 already been alluded to by a couple of the speakers is that right now to  
10 possess a canceled or revoked or suspended driver's license is a  
11 misdemeanor. The judges are of the opinion that the law enforcement and  
12 the judges are reluctant to impose a criminal penalty when oftentimes the  
13 people are not aware that it's a crime to possess a suspended or cancelled  
14 license. They did it for one reason or another, perhaps moved and didn't  
15 get the notice from the Department of Licensing, and so this bill will  
16 reduce that down to a traffic infraction. The others, I think, are pretty  
17 much self-explanatory and I think Judge McBeth is here to elaborate on  
18 the bill.

19           MR. CHAIRMAN: Any questions for Mr. Armstrong? Judge  
20 McBeth, would you like to bring Melanie Stewart forward as well? As she

1 is apparently gone, Melanie Stewart waives to the judges. Thank you very  
2 much.

3 JUDGE MCBETH: Are we taking the Uniform Criminal Code  
4 Penalty bill also or . . . (inaudible).

5 MR. CHAIRMAN: I have that in here as well. I am looking to see  
6 if you could defer comment on that because I would like to get Ms.  
7 McQueen in for the Uniform Misdemeanor Criminals Code.

8 JUDGE MCBETH: The bill is really a straight forward bill in an  
9 attempt to try to get some uniformity in the criminal law and very simply,  
10 we are simply trying to create . . . if you call it a gross misdemeanor, we  
11 want gross misdemeanor penalties, if you are going to call it a  
12 misdemeanor, to apply misdemeanor penalties. And all we've really done  
13 is to go through and make those changes throughout. We've not otherwise  
14 changed the substantive law at all. So everything is the same. It simply  
15 increases the penalty to make it consistent. One gross misdemeanor  
16 carries the same penalty as the other gross misdemeanor. One change in  
17 the first and second pages which doesn't do that is the failure to appear. If  
18 a person does not . . . if a person receives a traffic infraction and either  
19 does not appear at all, doesn't do anything, or appears, schedules a  
20 hearing, then does not show up. The notice is sent to Olympia, it shows  
21 up on that person's driving record as a FTA.

1 MR. CHAIRMAN: I am sorry, which page is that on?

2 JUDGE MCBETH: First page.

3 MR. CHAIRMAN: Right here at the bottom. Lines 16 through  
4 19?

5 JUDGE MCBETH: There's been some real debate among the  
6 judges as to whether the failure to appear or the failure to respond really  
7 makes any difference at all, and so we are trying to treat them  
8 synonymously. The third category that shows up on the DOL records is  
9 the failure to pay. Somebody who makes an arrangement to pay and then  
10 does not. [We] have some real concerns about including that. Because  
11 many times the failure to pay is simply an inability to pay and we don't  
12 put people in jail because of an inability to pay without showing in a  
13 hearing showing they have the ability to pay and choose not to. So the  
14 significant change is on second page, line 16, and it says "a person who is  
15 driving" so we make it a moving violation to say what if this law to be  
16 enforced it is not enough that the person has a DOL record to show it is  
17 time to pay the tickets, they must choose to drive, so it's the act of driving  
18 with unpaid tickets that is what is being punished. So we are not picking  
19 up, hopefully, we are not picking up the person who is simply unable to  
20 pay the ticket and does nothing else, who is a passenger in the car. It's a  
21 fairly straight forward change and I would urge its adoption.

1 MR. CHAIRMAN: Any questions for Judge McBeth?

2 UNIDENTIFIED SPEAKER: What is the difference between  
3 driving "a person who drives" and "is driving"?

4 JUDGE MCBETH: Well, I don't think there is any difference at  
5 all, but some judges do, so we picked them out to make it absolutely clear.  
6 I think it is nick picking, but that's alright.

7 UNIDENTIFIED SPEAKER: Under physical control or  
8 something, what's the difference?

9 JUDGE MCBETH: I am sorry. . .

10 Unidentified Speaker: Under physical control or something  
11 (inaudible) . . .

12 JUDGE MCBETH: The person who could be a driver and not be  
13 presently driving. And there are some judges who feel that it applies  
14 across the board.

15 MR. CHAIRMAN: It's like smokes and is smoking, whether it's  
16 something you put in your mouth .

17 JUDGE MCBETH: It's a difference of no significance, but we  
18 want to make clear and we want to make sure that you understand that  
19 what we are doing and the effect of that is to take out the simple non-  
20 payment as a criminal offense and it becomes the driving which is the  
21 offense.

1 JUDGE RAYNE: Mr. Chairman, members of the Committee, I  
2 am Ron Rayne, a judge of the Bremerton Municipal Court, a member of  
3 the Board of Governors of the District of the Municipal Court, Judges  
4 Association, and a member of our Legislative Committee. A couple of  
5 other changes in the bill deal with particular offenses because the penalty  
6 prescribed did not seem to relate to the seriousness of the offense. In  
7 particular, the charge of no-valid operator's license which is a lesser  
8 offense than driving while suspended, carries a higher monetary penalty.  
9 Likewise, the charges of hit-and-run driving, depending on whether it  
10 involves an attended or unattended vehicle, carry different penalties. Hit-  
11 and-run driving involving an attended vehicle is deemed a much more  
12 serious offense including revocation of license and yet the maximum fine  
13 is \$500.00, it is called a gross misdemeanor but we limit the fine to  
14 \$500.00; whereas a hit-and-run driving involving an unattended vehicle or  
15 damage to property only carries a potential maximum of \$1,000.00. This  
16 bill would make it clear that if we called something a gross misdemeanor  
17 (coughing and inaudible) . . . misdemeanors and likewise with a  
18 misdemeanor offense.

19 UNIDENTIFIED SPEAKER: And I guess just a follow up. It  
20 eliminates the possibility that a lesser offense can carry a greater penalty  
21 than a greater offense itself.

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MR. CHAIRMAN: Any questions for either of the judges? Thank  
you very much for your testimony.

\*\*\*\*\*

I, Lay-Hoon Austin, declared under penalty of perjury under the  
laws of the State of Washington that the foregoing is true and correct  
transcript of the digitally-recorded public hearing on SB 6608 held before  
the Senate Committee on Law & Justice in executive session on the 23rd  
day of January, 1990.

Signed at Belfair, Washington this <sup>12<sup>th</sup></sup> ~~30<sup>th</sup>~~ day of <sup>November</sup> ~~October~~, 2014.

Lay-Hoon Austin  
Lay-Hoon Austin

APPENDIX B

Senate Committee on Law & Justice, SSB 6608, Synopsis as Enacted,  
June 7, 1990

Senate Committee on Law & Justice, SSB 5060, Synopsis as Enacted, July  
27, 1997



FINAL BILL REPORT

SSB 6608

C 210 L 90

BY Senate Committee on Law & Justice (originally sponsored by Senators Nelson, McMullen, Patrick, Smitherman and Madsen)

Pertaining to enforcement of traffic violations.

—Senate Committee on Law & Justice

House Committee on Judiciary

SYNOPSIS AS ENACTED

BACKGROUND:

A statute establishes criminal penalties for failure to respond to a criminal traffic citation and for failure to appear following a notice of traffic infractions. This statute contains ambiguous and inconsistent language.

It is a gross misdemeanor to commit the crime of hit and run--attended vehicle. Ordinarily, the maximum penalty for a gross misdemeanor is one year in jail and a \$5,000 fine. The maximum sentence for this hit and run crime is not more than one year of confinement and a fine of not more than \$500. The lesser included offense of hit and run--unattended vehicle, on the other hand, carries a maximum sentence of not more than 90 days in jail and a fine of not more than \$1,000.

When a person's driver's license has been canceled, revoked or suspended by the Department of Licensing (DOL), a notice is sent to the driver by DOL requiring the person immediately to return his or her driver's license to DOL. Failure to do so is a misdemeanor, carrying a penalty of 90 days in jail, and a fine of \$1,000.

Driving while license suspended (DWLS) and driving while license revoked (DWLR) are classified as gross misdemeanor charges. However, the maximum fine for these crimes is \$500. In comparison, the lesser included offense of driving without a valid operator's license carries a maximum sentence of not more than 90 days in jail and a fine of not more than \$1,000.

When a DWLR charge arises out of an incident that also produces a DWI charge, a mandatory minimum sentence of 30 days must be

imposed upon conviction. Currently, a DWI/DWLS combination carries a mandatory minimum sentence of 90 days in jail.

**SUMMARY:**

Existing law is clarified to ensure that failure to appear or failure to respond to two or more notices of a traffic infraction within a five-year period constitutes a gross misdemeanor.

The penalty for hit and run--attended vehicle is increased to be consistent with other gross misdemeanor charges which provide for a penalty of not more than one year in jail and a fine of not more than \$5,000.

It is a traffic infraction to display or possess a cancelled, revoked or suspended driver's license or identicaid.

Penalties for DWLS and DWLR are increased to be consistent with a standard gross misdemeanor charge (not more than one year of confinement and a fine of not more than \$5,000). The mandatory minimum sentence for DWLR is increased to 90 days of confinement when a person is convicted of both DWI and DWLR arising out of the same incident.

**VOTES ON FINAL PASSAGE:**

Senate	46	0
House	92	4

**EFFECTIVE:** June 7, 1990

# FINAL BILL REPORT

## SSB 5060

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C 66 L 97

Synopsis as Enacted

**Brief Description:** Clarifying driving statutes.

**Sponsors:** Senate Committee on Law & Justice (originally sponsored by Senators Haugen and Roach).

**Senate Committee on Law & Justice**

**House Committee on Law & Justice**

**Background:** In 1996 the Legislature passed SB 6204, which created two degrees of negligent driving, one a crime and the other a traffic infraction. The two degrees are distinguished as two subsections of the same RCW section. This has occasionally resulted in confusion and unnecessary expense when a police officer has cited someone for negligent driving by the RCW section, but without distinguishing the subsection. In some cases the correct subsection is provided, but court personnel misidentify the charge due to the similarity of the numbers. In some cases people who have been charged with a traffic infraction have had public defenders appointed at local government expense.

SB 6204 also amended the driving without a valid license law to create two types of violations. Under some circumstances driving without a valid license is a traffic infraction, but under other circumstances it is a crime. Both of these possible charges, the crime and the traffic infraction, are under the same subsection of the same RCW section. The fact that both the criminal charge and the traffic infraction are listed in the same subsection has created even more confusion than in the negligent driving statute in which the crime and the traffic infraction are at least provided with different subsection numbers. The same problems have arisen with regard to charges of driving without a valid license as were mentioned above in regard to negligent driving.

Providing separate RCW sections for these crimes and infractions is strictly a technical change to current law which will end the confusion for courts and police. It will also save time and money.

**Summary:** Negligent driving in the first degree is made a separate RCW section.

The misdemeanor of driving without a valid license is made a separate RCW section.

The traffic infraction of driving without a valid license is made a separate RCW section.

References to these sections elsewhere in the RCW are corrected.

**Votes on Final Passage:**

Senate	48	0
House	97	0

**Effective:** July 27, 1997

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

STATE OF WASHINGTON  
  
Plaintiff/Respondent,  
  
vs.  
  
APRIL HANCOCK,  
  
Defendant/Appellant.

**Case No. 46149-8-II**  
Superior Court Case No. 12-1-  
00520-6  
District Court Case No. 2Z327384

**CERTIFICATE OF SERVICE**


**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that a true and correct copy of **Appellant's Brief** in the above entitled case was sent, via email and USPS.

April Hancock  
11 E. Sea Vista Ct.  
Grapeview, WA 98546

ajhancock1967@gmail.com

**DATED** this 20<sup>th</sup> day of November, 2014.

  
Eugene C. Austin, WSBA # 31129