

64134-4

64134-4

No. 64134-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

BRUCE HUMMEL,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHATCOM COUNTY

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APPELLANT'S REPLY BRIEF

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NANCY P. COLLINS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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A. ARGUMENT.

1. THE PROSECUTION MISREPRESENTS AND  
EVADES THE CORE ISSUES PRESENTED  
BY THE LACK OF CORPUS DELECTI

a. The corpus delicti doctrine required the State to produce independent evidence of the elements of the crime charged. The corpus delicti rule establishes that a confession is insufficient evidence to sustain a conviction as a matter of law unless independent proof shows that a crime occurred. State v. Aten, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). “[T]he State must still prove every element of the crime charged by evidence independent of the defendant’s statement.” State v. Dow, 168 Wn.2d 243, 254, 227 P.3d 1278 (2010).

The prosecution asserts that “no Washington case” requires independent evidence of the elements of premeditated murder. Response Brief at 30. It cites State v. Vangerpen, 71 Wn.App. 94, 100, 856 P.2d 1106 (1993), aff’d, 125 Wn.2d 782 (1995), but without elaboration. In Vangerpen, this Court concluded, “Washington cases have strongly suggested that there must be corroborating evidence of every element of a crime to establish the corpus delicti.” 71 Wn.App. at 100. Dow makes plain the requirement of proof of each element. Dow, 168 Wn.2d at 254.

Hummel was convicted of first degree premeditated murder. The only evidence of “premeditation” the prosecution notes in its brief is that Hummel had a motive.<sup>1</sup> Response Brief at 30. Motive is but one characteristic relevant to premeditation. See State v. Pirtle, 127 Wn.2d 628, 644-45, 904 P.2d 245 (1995). It is not sufficient. The “mere opportunity to deliberate is not sufficient to support a finding of premeditation.” Id. at 644. Premeditation may be inferred from multiple factors, such as the method of killing, evidence of planning, and gathering and garnishing of a weapon, in addition to a motive. Id. at 644-45.

Here, there is no independent evidence showing how or when Alice Hummel died. There is no independent proof of her death or of the method of killing, no evidence of planning, and no indication of a weapon. Speculation that because Hummel had some motive, he must have deliberately killed Alice in a premeditated fashion, is not independent evidence. It is guesswork that is insufficient to establish the corpus delicti.

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<sup>1</sup> The prosecution cites two motives, but one is completely unsupported by any evidence. Response, at 30. It alleges Hummel had motive to conceal his financial gain. There is no evidence whatsoever that Hummel took any of Alice Hummel’s money without permission before her October 1990 disappearance. The claim of financial crime as a motive to kill Alice is baseless.

b. There are other reasonably available alternatives to Alice's death in October 1990 by premeditated murder. The prosecution claims that without any other alternative to premeditated killing, this is the only possible explanation. But prosecution relies on a false painting of the facts.

The prosecution repeatedly mentions Alice's purse and wallet, as if it would be impossible for her to have left the house without them. Yet Shanalyn testified that Alice "loved purses, so she had a lot of purses." 1RP 45. She had different purses for different outfits. 2RP 78. A purse collector such as Alice would have changed purses and wallets from time to time and may have had a wallet she preferred to use for trips or more professional accessories she used for job interviews.

Alice was looking for a job, and the fact that she had an interview was not unexpected. 1RP 43; 3RP 301. Bruce and Alice had a long history of taking jobs in distant places. 2RP 89-91; 2RP 104 (Sharinda: "it wasn't necessarily a surprise to me that she would take a job out of state, just because we often worked in Alaska or other places"). Alice's son Sean knew that "she was talking to people in California about a job." 2RP 235. She had done some interviews over the telephone already. 2RP 236.

Shanalyn had no idea if the wallet she saw in the house after Alice left contained Alice's credit cards and identification, contrary to the prosecution's assertion. 1RP 46; 2RP 77-78. Shanalyn said, "I did not look inside the wallet." 2RP 78. She had no idea if her mother's credit cards and identification remained in that wallet. Id. Shanalyn also did not know which medications Alice had left behind or whether she took some with her. 2RP 78.

Alice was not "mousey" and liked to go out. 2RP 80, 95. She enjoyed shopping. 2RP 80. She would regularly go to a hotel, alone, for "a break," and spend time on her own. 2RP 85. The prosecution's claim that Alice would not have left the home expected absent having been killed is incorrect. Response Br. at 3.

Alice had health problems and took medications. But she "always seemed normal" according to Shanalyn, and even though she had medical issues, they did not incapacitate her. 1RP 30. Her medical issues did not leave her housebound.

Hummel remodeled part of the house before Alice left, not afterward. 1RP 33. The purpose of the remodel was to create the office that Alice used. 2RP 96, 98-99. In fact, after Alice left, the family moved and sold the home; it did not remodel the home. 1RP 52. The pages the prosecution cites for its assertion that

Hummel remodeled the home after Alice left do not support this claim. Response Br. at 11.

Although Alice and Bruce Hummel bickered, there was never any physical violence. 2RP 76. According to Shanalyn, Bruce bickered more often with or about other people than with Alice. 1RP 35. Bruce's behavior was "the same as it always was" after Alice left. 1RP 37. The house was also the same as always after Alice left. 1RP 44.

The elephant in the room unmentioned in the prosecution's response brief is that no one reported Alice missing for about 13 years. Hummel's children were capable of independent thought. In 1990, the oldest child Sharinda had gone to college, gotten married, and was living on her own. 2RP 94, 103. If she believed Alice's disappearance was susceptible to no other logical explanation than her having been intentionally murdered, she would have told someone or done something.

The older son was a senior in high school and similarly independent and capable as an almost-adult. 2RP 235. Family dynamics seemed normal to him in 1990. 2RP 230. He thought the house was more peaceful without his mother, even though he did not wish her gone. 2RP 241. Even Shanalyn, the youngest,

could have reported her disappearance to a friend or teacher if she thought it would not have occurred for any legitimate reason. In fact, the family members did not think it was so impossible that Alice left their household. The oldest daughter preferred to speak to her father on the telephone and did not get along with her mother. 2RP 104. The son liked the peacefulness of the house. 2RP 241. Contrary to the prosecution's depiction of events, Alice's unexpected disappearance from the household is not susceptible to only one inference and cannot alone prove that she died as a result of a premeditated murder. Suspicion does not constitute independent evidence. There is no independent evidence of the elements of the crime necessary to establish the corpus delicti.

2. THE PROSECUTION'S CONFRONTATION  
CLAUSE ANALYSIS FOCUSES ON THE  
WRONG WITNESS

a. The confrontation clause is not satisfied by calling a witness who cannot report on the source of the information. The fact that a witness testified does not settle a confrontation clause violation. A witness testified in Crawford v. Washington, 541 U.S. 36, 40, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004), but it was the police officer repeating statements that someone else made. Here too,

police officers testified about information that they received from another source. The trial court admitted the evidence in Crawford because it bore guarantees of trustworthiness, just as the prosecution asserts here, but “amorphous notions of ‘reliability’” are not what that confrontation clause commands. Id. at 61.

The Sixth Amendment’s Confrontation Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. 6. In the context of confrontation, the word “the” dictates that the witnesses required to satisfy the confrontation clause are the particular creators of that evidence.

For example, in a case involving whether a person’s driver’s license is suspended, the necessary witness is the person who maintains the records. State v. Jasper, \_ Wn.App. \_\_, 2010 WL 5392937, \*5 (2010). The confrontation clause requires live testimony from a person who not only reports the results of a search, but who also can explain how license records are kept, organized, and searched. Id. The “results of the record search” are factual assertions, and a witness must be able to explain how the results of the search came to be. Id.

Subjecting someone else to cross-examination is not a substitute for questioning of the source of the information. Sir Walter Raleigh, whose case shaped our confrontation clause, was “perfectly free to confront those who read Cobham’s confession in court.” Crawford, 541 U.S. at 51. Here, the police repeated information learned from an array of official records to conclude that there is no record Alice Hummel was alive and worked or lived in the United States after 1990. Hummel could question witnesses about the results of their searches but not about how those results were generated, an outcome similar to that in Jasper.

A police detective specializing in “criminal intelligence” who had been trained in using the Accurant database explained he relied on this database, and paid money to use it, for the purpose of locating missing people. 4RP 475-76. He used the “full search engine,” “advanced” people search, and the “real time people search,” searching through “everything that was available.” 4RP 477-78. He did an all-state business record search, vehicle registrations, water craft registrations, and professional license searches. 4RP 478-81. Based on all the searches he conducted, he did not find records confirming Alice Hummel’s existence since October 1990. 4RP 483. The reason the police consulted these

records was to “prove or disprove” whether Alice was alive and living elsewhere. 4RP 477.

Alton Terry, the retired Seattle police major and “certified fraud examiner” used databases he relied on in his official capacity, but conceded he had no idea about the accuracy or safeguards used by the records keepers. 3RP 264-67, 274.

Steve Lappenbush, the “solution consultant” who sells LEXIS NEXIS programs to police agencies told the jury that his company collects billions of records for its database, which he believes is from “all over the country,” gives “best access” to police, and periodically updates all information. 4RP 454-55. But Lappenbush played no role in verification or collection of information. 4RP 456.

Lappenbush said, “I don’t handle verification.” 4RP 456. He had “no idea” if all states report the same information. 4RP 469. He had “no information” about the reliability of records. 4RP 469. He agreed that the data is “only as good as it is provided” but he did not know any more about how it is provided. 4RP 471.

The prosecution’s argument focusing on the lack of sworn affidavit misses the point. Hummel could not confront the witnesses regarding the root of the information used to prove Alice

Hummel was not alive. The live witnesses gave testimony repeating information learned from another source. Hummel was not given the opportunity to question a witness, under oath, about how these records exist, are maintained, verified, organized, or collected. These government-generated searches conducted by police officers carried markings reliability as would impress the jury, but without the confrontation required by the Sixth Amendment to test the information.

b. The error is not harmless beyond a reasonable doubt. If it is possible that the jury relied on testimonial evidence elicited without confrontation, the violation of the confrontation clause is not harmless. United States v. Alvarado-Valdez, 521 F.3d 337, 342 (5<sup>th</sup> Cir. 2008).

The prosecution claims that the evidence's admission was harmless because Alice's death was not contested. This claim is simply wrong. Hummel presented an experienced investigator who explained how a person could change her identity and not be detected in a record search. 6RP 663-67. This witness also explained that a person could easily cross the border to Canada, or Mexico, without identification. 6RP 667. Hummel argued to the

jury that the State needed to prove “what did happen,” not just what did not happen, and they had failed to do so. 6RP 783, 785.

The prosecution relied, at length, during the trial and in its closing argument on the lack of records proving Alice’s existence. The police used their “resources,” “checked databases,” and “could find no trace” of Alice, thus showing she must be dead. 6RP 764. The lack of official records verifying Alice lived in another place was a central tenet in the prosecution’s theory of the case, and the admission of evidence from numerous witnesses about their search of official records, without offering testimony from any witnesses who could explain how those records are collected or maintained, most certainly “contributed to the verdict obtained.” Its admission absent necessary confrontation is not harmless beyond a reasonable doubt.

3. THE COURT’S REFUSAL TO INSTRUCT THE JURY THAT THE JAILHOUSE INFORMANT’S TESTIMONY MUST BE WEIGHED WITH CAUTION DENIED HUMMEL HIS RIGHT TO A PROPERLY INSTRUCTED JURY

It is the court’s role to ensure the jury accurately understands the law. State v. Borsheim, 140 Wn.App. 357, 366, 165 P.3d 417 (2007) (“jury instructions “must more than adequately convey the law. They must make the relevant legal standard

manifestly apparent to the average juror.” (internal citations omitted)). When an informant has received a direct benefit in exchange for testifying and his testimony implicating the accused is the significant evidence of guilt, the failure to give specific instructions addressing the credibility of the informant may be plain error, requiring reversal even where the accused did not seek the instruction. See United States v. Garcia, 528 F.2d 580, 588 (5<sup>th</sup> Cir. 1976). Deficiencies in a trial that affect the fairness, integrity, or public perception of judicial proceedings violate the fundamental fairness at the root of due process of law. United States v. Collins, 472 F.2d 1017, 1018 (5<sup>th</sup> Cir. 1972).

Numerous studies, and case law, support the dangerous effects of testimony from a jailhouse informant.<sup>2</sup> Such informants have little to lose – they do not even need to implicate themselves in wrong-doing – and a lot to gain, in reduced charges and lesser sentences, such as the State’s informant received in the instant case. The risk of improper conviction secured by jailhouse informant testimony is particularly great because of the

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<sup>2</sup> See Center on Wrongful Convictions, The Snitch System, available at: <http://www.innocenceproject.org/docs/SnitchSystemBooklet.pdf> (“snitch’ cases account for 45.9%” of death row exonerations since the 1973).

persuasiveness with which jurors receive such allegations, notwithstanding the informant's questionable trustworthiness.

When an accomplice testifies for the prosecution, Washington law mandates an instruction that tells jurors to treat such testimony with great caution. State v. Badda, 63 Wn.2d 176, 181, 385 P.2d 859 (1963). It is reversible error for a trial court to refuse this instruction and ineffective assistance of counsel for a lawyer not to request it. State v. Harris, 102 Wn.2d 148, 153-55, 685 P.2d 584 (1984), overruled on other grounds, State v. Brown, 111 Wn.2d 124 (1988). The same logic applies even more emphatically when a jailhouse informant testifies against an accused person in exchange for leniency.

The ability to argue to the jury that the informant had a motive to lie is inadequate. As our Supreme Court recognizes, "lawyers have a hard enough time convincing jurors of facts without also having to convince them what the applicable law is." In re Detention of Pouncy, 168 Wn.2d 382, 392, 229 P.3d 678 (2010). And, "[a] jury should not have to obtain its instruction on the law from arguments of counsel." State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995).

The United States Supreme Court labeled “careful instructions” to the jury about the particular credibility concerns posed by informants to be “customary.” Banks v. Dretke, 540 U.S. 668, 701-02, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004); see also On Lee v. United States, 343 U.S. 747, 757, 72 S.Ct. 967, 96 L.Ed.2d 1270 (1952) (defendant “entitled” to have informant credibility issues “submitted to the jury with careful instructions”).

The general instruction telling the jurors to decide the weight each witness is not an adequate substitute for the specific cautionary instruction. See United States v. Luck, 611 F.3d 183, 187 (4<sup>th</sup> Cir. 2010) (“informant instruction is necessary because a general witness credibility instruction is not sufficiently cautionary for informants because of special concerns about the incentive that they have to fabricate information for their own benefit.”).

The pattern instruction regarding accomplice testimony, WPIC 6.05, provides:

The testimony of an accomplice, given on behalf of the plaintiff, **should be subjected to careful examination** in the light of other evidence in the case, and **should be acted upon with great caution**. You **should not find the defendant guilty upon such testimony alone** unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

11 Washington Practice: Washington Pattern Jury Instructions: Criminal § 6.05 (3<sup>rd</sup> ed. 2008) (emphasis added). Hummel requested this instruction, substituting “informant” for “accomplice.” This clear mandatory language is far different from permitting the jury to consider the witness’s ability to observe or bias the witness may have shown. CP 46.

When an accomplice testifies, the court must caution the jury against relying on such testimony when the defense requests an instruction. Harris, 102 Wn.2d at 155. The lack of pattern jury instruction for informant credibility does not absolve the court of its role to fashion appropriate instructions for each case. Given the lack of independent evidence of how or when the crime occurred, Cargill’s testimony was critical to the State’s case and the jury should have been warned to treat it particularly carefully given the documented studies on how influence and how tainted such testimony may be.

The prosecution’s case depended on the informant’s testimony. Jailhouse informant Donald Cargill was the only witness who offered a scenario of how Alice Hummel could have died that fit within the State’s theory, because there was no forensic evidence supporting any other mechanism of death. Cargill’s

theory carried great persuasive weight due to the lack of other plausible explanations for how Alice died. But Cargill's theory was corroborated only by innocuous facts. The prosecution belabors the point that Cargill said Hummel talked with his eyes closed and Hummel's daughter also described him doing this. But there was no dispute that Hummel and Cargill shared a jail cell and would presumably speak to one another. The issue is not whether Cargill ever had the chance to speak to Hummel and learn things about him, but whether Cargill was highly motivated to get himself out of a bad jam where he faced a very serious prison sentence and learned enough about Hummel's case to concoct a story.

To guard against the jury giving undue weight to Cargill's story, and because the jurors might not know of the many studies and case law documenting the importance of treating jailhouse informant testimony with great caution, the jury should receive such an instruction from the court. The documented dangers of relying on informant testimony are not fully understood by plain common sense. This is precisely the reason why court's refusal to provide an appropriate instruction failed to make the legal standard manifestly apparent to the average juror and denied Hummel his right to a fair trial.



4. THE COURT'S BELATED BONE-CLUB  
ANALYSIS DOES NOT CURE THE  
IMPROPER COURTROOM CLOSURE

a. Hummel did not invite the error. The prosecution's invited error argument rests on language in the jury questionnaire, but it was not a request that the court to close the courtroom and deny Hummel or the public their rights to open court proceedings.

The jury questionnaire provided that if the answers to any questions were so sensitive and the potential juror "would like to discuss it privately, please indicate the number of the question." CP 549. Nowhere in the questionnaire did the defense promise that all related questions would occur in a closed courtroom. The questionnaire simply asked the jurors to identify a desire to answer some questions privately.

This scenario is a far cry from State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009). In Momah, the court closed the courtroom and spoke with each individual juror privately "after consultation with the defense and the prosecution" and after soliciting input on the structure of juror voir dire from Momah. Id. at 151. It was a very unusual case, involving heavy publicity and shared concerns about juror impartiality. Id. at 145-46.

Here, the jury questionnaire did not offer an in-chambers meeting with the judge. It only told jurors to note whether they wished to discuss information in private. Hummel did not invite the court to violate the right to open court proceedings by asking jurors to specify whether they preferred a more private setting for answering certain questions. The more logical and less restrictive approach would be to question the jurors in open court, but excuse the rest of the jury pool so the other jurors would not hear the information about which the prospective juror desired privacy. Only if this type of closure would be inadequate should the court have held proceedings without any possibility of public access.

The State also faults Hummel for failing to object when the court insisted upon questioning the jurors in chambers. Before the prospective jurors came into the courtroom, the judge told the parties that it would conduct a Bone-Club analysis before speaking with jurors in private. Then, the court simply adjourned into chambers without conducting the mandatory pre-closure analysis.<sup>3</sup>

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<sup>3</sup> It does not appear that waiting until the day after the courtroom closure to conduct the Bone-Club analysis was an unintentional oversight. There are at least two other cases pending in this Court where a Whatcom County judge did the exact same thing. COA 64100-0-I and COA 64026-7-I. The purposefully belated Bone-Club analysis seems to be the rule, not the exception.

b. After-the-fact rationalization does not comply with Bone-Club. The trial court “must ensure” that the “five [Bone-Club] criteria are satisfied” before closing court proceedings. State v. Strode, 167 Wn.2d 222, 227, P.3d 310 (2009); see also State v. Easterling, 157 Wn.2d 167, 175, 137 P.3d 825 (2006) (court may not close the courtroom without “first, applying and weighing five requirements as set forth in Bone-Club and, second, entering specific findings justifying the closure order.”); State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) (“We hold the five criteria a trial court must obey to protect the public's right of access before granting a motion to close are likewise mandated to protect a defendant's right to public trial.”) (emphasis added). Bone-Club allows the trial court to close the courtroom only after it has explained on the record and weighed the specific issues that require privacy, it is not a formality as the prosecution asserts.

The *post hoc* justification of a closure that already occurred undermines the purpose of the findings, which are required so that the court sets both a strict justification for the closure and the narrowest framework for the closure. Strode, 167 Wn.2d at 231. The court’s after-the-fact assurance that it conducted a proper, private inquiry of jurors did not guarantee the closure would be as

narrow as possible or the least restrictive means available before the court closed the hearings. Id.

Even without a specific request, the trial court has an independent duty to protect both the defendant's right to a public trial and the public's right to open access to the courtroom. Presley v. Georgia, \_\_ U.S. \_\_, 130 S.Ct. 721, 725, 175 L.Ed.2d 675 (2010). The court improperly closed the courtroom without first engaging in the required analysis.

It was only the day after the court and parties spent several hours speaking with potential jurors in private that the court acknowledged that Bone-Club required a particular analysis before conducting closed proceedings. The day after the courtroom closure, the court discussed the mandatory Bone-Club factors.

The prosecution paints this belated discussion as making a "formal" record. However, the mandate of Bone-Club is unambiguous. The court must consider, on the record, the need for the closure and the reason why no less restrictive alternative suffices. This record must be made before the closure.

c. The final questioning of an additional juror did not comply with Bone-Club. The day after questioning numerous jurors in chambers, the defense noted that one additional juror had

indicated she wanted private questioning. The court then brought this additional juror into chambers for private voir dire, and noted that its recently-stated Bone-Club analysis would apply.

But this time the court neglected to ask whether anyone present objected. 8/11/09RP 109-10. While Hummel's attorneys may have raised the idea of privately questioning this final juror, they did not suggest that the court should not ask if anyone objected. They did not assert that in-chambers questioning was necessary. They did not advocate the need to close the court proceedings in order to protect Hummel's fair trial rights. While Hummel's attorneys complied with the procedure in in-chambers questioning offered and instituted by the court, they did not invite the court to disregard the public's interest in open court proceedings. This error requires reversal. Easterling, 157 Wn.2d at 179-80.

5. THE ILLEGAL SENTENCE SHOULD BE CORRECTED

The prosecution implicitly concedes that the federal offense of wire fraud is not comparable to a Washington felony. It does not attempt to defend the federal offense's comparability when confronted with evidence of its lack of legal comparability in

Appellant's Opening Brief. It also agrees that under the statute in effect in 1990, a federal offense could not be included in an offender score calculation unless it was comparable.

Instead of attempting any comparability analysis, the prosecution only argues that Hummel waived a comparability objection by not expressly raising this objection at the sentencing hearing. It asserts that Hummel's silence regarding comparability is construed as acknowledgement under "RCW 9.94A.530(2)(2008)." Response Br. at 57.

The prosecution improperly relies on a 2008 sentencing statute. As the State concedes, the law in effect in 1990, at the time of the offense, controls. Response Br. at 55; RCW 9.94A.345.

In 1990, former RCW 9.94A.360(2) provided that in "determining any sentence, the trial court may use no more information than is . . . admitted, acknowledged, or proved in a trial or at the time of sentencing." The 2008 statute on which the State relies contains the additional phrase that further defined acknowledgement as "not objecting to criminal history presented at the time of sentencing." RCW 9.94A.530(2)(2008). Thus, although the prosecution admits that the law in effect in 1990 controls, it simultaneously asks this Court to rely on a 2008 sentencing

statute. It makes no argument as to why this Court should rely on the changed law.

In any event, our Supreme Court thoroughly discussed the applicable law in State v. Ford, 137 Wn.2d 472, 482-84, 973 P.2d452 (1999). Ford involves the same statutory language as that which controls Hummel's sentence, RCW 9.94A.360. In Ford, the Court rejected the very definition of "acknowledge" put forward by the prosecution. It held that "a defendant does not 'acknowledge' the State's position regarding classification [of an out-of-state conviction] absent an affirmative agreement beyond merely failing to object." Id. at 483.

The court in Ford further held that evaluating the comparability and classification of an out-of-state conviction is a mandatory step at sentence.

If the evidence of prior out-of-state convictions is sufficient to support classification under comparable Washington law, that evidence should be presented to the court for consideration. If the evidence is insufficient or incomplete, the State should not be making assertions regarding classification which it cannot substantiate.

Id. at 482.

This is not a case where Hummel "affirmatively acknowledged" his offender score or "expressly conceded"

comparability, as in State v. Ross, 152 Wn.2d 220, 225-26, 230, 95 P.3d 1225 (2004). Hummel objected to the calculation of his offender score. CP 33-42. He never conceded comparability. He argued against including the federal offenses in his offender score, making a same criminal conduct argument. CP 33-42. No one addressed legal comparability.

The comparability question in the case at bar rests on a purely legal comparison of the elements of the offenses. See Opening Brief, at 51-53. The prosecution posits no scenario under which the federal offense is comparable to a Washington offense, and it made no such argument below. It appears that the parties and the court ignored the basic legal question of comparability, presumably unaware that the 1990 statute required comparability.

As the court held in Ford, this legal step is mandatory unless there was an affirmative acknowledgment of comparability, which did not occur in the case at bar. The remedy is not to ignore the error, as the prosecution asserts. Rather, the remedy is to correct this legal flaw at a new sentencing hearing. Ford, 137 Wn.2d at 483.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Hummel respectfully requests this Court remand his case for further proceedings.

DATED this 9<sup>th</sup> day of February 2011.

Respectfully submitted,



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NANCY P. COLLINS (28806)  
Washington Appellate Project (91052)  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

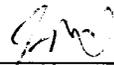
STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 64134-4-I
	)	
BRUCE HUMMEL,	)	
	)	
APPELLANT.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7<sup>TH</sup> DAY OF FEBRUARY, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| <input checked="" type="checkbox"/> | BRUCE HUMMEL<br>334240<br>CLALLAM BAY CORRECTIONS CENTER<br>1830 EAGLE CREST WAY<br>CLALLAM BAY, WA 98326                      | <input checked="" type="checkbox"/><br><input type="checkbox"/><br><input type="checkbox"/> | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2011.

X \_\_\_\_\_ 

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