

No. 65875-1-I

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

STATE OF WASHINGTON, Respondent,

v.

HECTOR FIGUEROA-OLGUIN, Appellant.

BRIEF OF RESPONDENT

**DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #22007**

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether defendant's convictions for possession of cocaine with intent to deliver and possession of hydrocodone with intent to deliver violate double jeopardy where the convictions are not the same in law or fact because the offenses require proof of the specific controlled substance possessed.
2. Whether remand is necessary where findings of fact and conclusions of law have been entered and there is no prejudice to defendant.

C. FACTS

1. Procedural Facts.

Appellant Hector Figueroa-Olguin was charged on April 21, 2010 with one count of Unlawful Possession of a Controlled Substance with Intent to Deliver, To-Wit: Hydrocodone and one count of Unlawful Possession of Controlled Substance with Intent to Deliver, To-Wit: Cocaine, both in violation of RCW 69.50.401(2)(A), class B felonies. CP 44-45. He filed a motion to suppress under CrR 3.6. CP 29-41. A hearing was held and the motion was denied. RP 46-50; Supp CP __, Sub Nom 41. Figueroa-Olguin waived his right to a jury trial and was found guilty of the charges at a bench trial on stipulated facts. CP 27-28; Supp CP __, Sub

Nom. 42; RP 51, 53, 56-57. On an offender score of 1, facing a standard range of 12-20 months, he was sentenced to 12 months and a day on both counts, to run concurrently. CP 18, 21; RP 59.

2. Substantive Facts.

For purposes of this appeal, the State accepts Appellant's Substantive Statement of Facts with the following additions/corrections:

After Bartok got a white food sack from the taco truck, she returned to her car with the sack and then placed a white sack with something in it on the roof of her car while she appeared to wait for someone. RP 6. The court's findings with respect to the CrR 3.6 hearing and the stipulated bench trial are attached in Appendix A.

D. ARGUMENT

1. Figueroa-Olguin's convictions for possession with intent to deliver cocaine and possession with intent to deliver hydrocodone do not violate double jeopardy because they are not the same in fact or law.

Figueroa-Olguin asserts that his convictions for both possession with intent to deliver cocaine and possession with intent to deliver hydrocodone violate double jeopardy under a unit of prosecution analysis.¹

¹ Figueroa-Olguin did not assert a violation of double jeopardy below, and while the general rule is that appellate courts will not review issues asserted for the first time on appeal, allegations of violation of double jeopardy provisions regarding multiple

The unit of prosecution analysis is not the appropriate method for determining whether Figueroa-Olguin’s convictions violate double jeopardy because the two offenses are not multiple convictions for the same offense: the two offenses require proof of an element, the specific drug, that the other does not. Under the Blockburger² “same evidence” test, the convictions do not violate double jeopardy because the offenses are not the same in fact or in law. Moreover, even under a unit of prosecution analysis, the legislature clearly intended that the unit of prosecution be for *each* drug possessed, particularly in light of the context of the Uniform Control Substances Act (UCSA).

The federal and state provisions regarding double jeopardy provide the same protections. State v. Kelley, 168 Wn.2d 72, 76, 226 P.3d 773 (2010). Double jeopardy prohibits, among other things, multiple punishments for the same offense. *Id.* The legislature, however, has the authority to impose cumulative punishment for the same conduct. *Id.* at 77. “If the legislature intends to impose multiple punishments, their imposition does not violate the double jeopardy clause.” *Id.* Double

punishments have generally been permitted to be raised for the first time on appeal as allegations of manifest error of constitutional magnitude. State v. Bobic, 140 Wn.2d 250, 996 P.2d 610 (2000).

² Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

jeopardy is only implicated when the court exceeds its legislative authority by imposing multiple punishments where multiple punishments have not been authorized. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). An appellate court's role is "limited to assuring that the trial court did not exceed its legislative authority" by imposing multiple punishments for the same offense where the legislative branch has not authorized multiple punishments. *Id.* at 776.

The Supreme Court has set forth a three part test for determining whether multiple punishments were intended by the Legislature. The first step reviews the precise language of the statutes themselves to determine whether the legislature expressly permits multiple punishments. Calle, 125 Wn.2d at 776. Second, in absence of clear legislative intent as to whether the legislature intended to impose multiple punishments, the court applies the Blockburger test to determine whether each of the charged statutory provisions requires proof of a fact the other does not. *Id.* If they do, then a strong presumption exists that the legislature intended multiple punishments. *Id.* at 780. This presumption can only be overcome where a defendant can show that there is "clear evidence" that the legislature did not intend the crimes to be punished separately--the third part of the test. *Id.* at 778-79.

A unit of prosecution analysis is only appropriate where a defendant is accused of multiple violations of the same statutory provision, whereas the “same evidence” test is appropriate where the defendant is accused of violations of multiple statutory provisions. In re Personal Restraint of Davis, 142 Wn.2d 165, 171-72, 12 P.3d 603 (2000); *see also*, State v. Adel, 136 Wn.2d 629, 633, 965 P.2d 1072 (1998) (same evidence test not applicable where defendant charged with violating one statute multiple times because such convictions will always be the same in law, but not in fact). A unit of prosecution analysis is appropriate if, for instance, the State charges a defendant with multiple counts of possession with intent to deliver cocaine.

Under the UCSA, the legislature provides different penalties based on the type of controlled substance involved and the characteristics of those substances. Controlled substances are set forth in different schedules. RCW 69.50.204, .206, .208, .210, .212. The controlled substances that fall within each of the schedules is reviewed on an annual basis in accord with the factors set forth for each of the schedules. RCW 69.50.213; RCW 69.50.203, .205, .207, .209, .211. Furthermore, the UCSA provides for different penalties depending upon type of controlled substance involved. *See, e.g.*, RCW 69.50.401(2)(a), (2)(c). In passing the

UCSA, the legislature intended the criminal and penalty provisions to be dependent upon the nature of the specific controlled substance.

In State v. O'Neal, 126 Wn. App. 395, 109 P.3d 429 (2005), *aff'd on other grounds*, 159 Wn.2d 500 (2007), the defendant asserted that his convictions for manufacturing methamphetamine and manufacturing marijuana violated double jeopardy under a unit of prosecution analysis. The court rejected the unit of prosecution analysis and applied the "same evidence" rule. *Id.* at 416-17. Under the former version of RCW 69.50.401 at issue in O'Neal³ the statute stated:

Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

The specific subsections set forth the penalties for the violations depending upon the nature of the controlled substance manufactured or delivered. Under the same evidence rule, the court held that the violations of RCW 69.50.401 for manufacturing methamphetamine and manufacturing marijuana were not the same in fact or law. *Id.* at 417.

Under O'Neal, the proper analysis of the same statute at issue here is the

³ The former version does not differ substantively than the current version. The statute was renumbered in 2003 and clarified which violations were considered class B versus class C felonies. Chapter 53 Laws of Washington 2003 §331.

“same evidence” test, and under that test the offenses are not the same in fact or law.

a. Blockburger “same evidence” test

The "same evidence" or "Blockburger" test asks whether the offenses are the same "in law" and "in fact." Calle, 125 Wn.2d at 777. Offenses are the same "in fact" when they arise from the same act. *Id.* at 777-78. Offenses are the same "in law" when proof of one offense would always prove the other offense. *Id.* at 777. If each offense, as charged and convicted, includes an element not included in the other, the offenses are considered different and multiple convictions can stand. *Id.* at 777.

The version of RCW 69.50.401 under which Figueroa-Olguin was convicted provides:

- (1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.
- (2) Any person who violates this section with respect to:
 - (a) A controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam, including its salts, isomers, and salts of isomers, classified in Schedule IV, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and

not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine;

RCW 69.50.401. The specific identity of the controlled substance is an essential element of the offense that the State must prove beyond a reasonable doubt. State v. Goodman, 150 Wn.2d 774, 787, 83 P.3d 410 (2004). It is not sufficient, under Apprendi⁴, merely to prove that the substance is a controlled one. *Id.*

Therefore, the specific identity of the controlled substance was an element of each of the offenses Figueroa-Olguin was charged with and the proper analysis is the “same evidence” test. As the specific nature of the controlled substance is an element and a fact the State must prove in each of the offenses, his convictions for possession with intent to deliver cocaine and possession with intent to deliver hydrocodone do not violate double jeopardy. *See, United States v. Vargas-Castillo*, 329 F.3d 715, 719-722 (9th Cir. 2003), *cert. denied*, 540 U.S. 998 (2003) (defendant’s charges for violating the same federal statutory provision regarding possessing a controlled substance with intent to distribute with respect to marijuana and cocaine did not violate double jeopardy under the Blockburger test where

⁴ Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

the government had to prove the specific substance the defendant possessed).⁵

Figueroa-Olguin asserts that cases involving an issue of “same criminal conduct” under RCW 9.94A.589 are instructive. However, the analysis for determining whether two offenses encompass the same criminal conduct is a separate and distinct analysis from double jeopardy.

A double jeopardy violation claim is distinct from a “same criminal conduct” claim and requires a separate analysis. The double jeopardy violation focuses on the allowable unit of prosecution and involves the charging and trial stages. The “same criminal conduct” claim involves the sentencing phase and focuses instead on the defendant's criminal intent, whether the crimes were committed at the same time and at the same place, and whether they involved the same victim.

State v. French, 157 Wn. 2d 593, 611-12, 141 P.3d 54 (2006). The cases cited by Figueroa-Olguin in this respect⁶ are inapposite.

b. unit of prosecution analysis

Even under a unit of prosecution analysis the offenses do not offend double jeopardy because the legislature intended the unit of prosecution to be for each controlled substance possessed with intent to deliver. While a unit of prosecution issue “is one of constitutional

⁵ The court noted in that case that a number of circuits had already addressed whether charging separate counts for different controlled substances violated double jeopardy and had held that it did not. Vargas-Castillo, 329 F.3d at 720.

⁶ State v. Rodriguez, 61 Wn. App. 812, 812 P.2d 868 (1991); State v. Garza-Villarreal, 123 Wn.2d 42, 864 P.2d 1378 (1993).

magnitude on double jeopardy grounds, the issue ultimately revolves around a question of statutory interpretation and legislative intent.” State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). In order to determine legislative intent, the court first looks to the statute's plain meaning. State v. Ose, 156 Wn. 2d 140, 144, 124 P.3d 635 (2005). If the legislature’s intent is not clear from the plain language of the statute, under the “rule of lenity” any ambiguity is “ ‘resolved against turning a single transaction into multiple offenses.’ ” *Id.* “Even where the Legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one ‘unit of prosecution’ is present.” In re Davis, 142 Wn.2d at 176.

Figuroa-Olguin makes the same argument that the defendant in Ose did, that the use of the indefinite article “a” is ambiguous and should be construed as meaning “any” under the rule of lenity. Generally, if statutes are clear on their face, the courts give effect to the plain meaning of the language. State v. Chapman, 140 Wn.2d 436, 450, 998 P.2d 282 (2000) *cert. denied*, 531 U.S. 984 (2000). “Words in a statute are given their ordinary and common meaning absent a contrary statutory definition. ... Courts may resort ‘to dictionaries to ascertain the common meaning of statutory language.’” Budget Rent A Car Corp. v. State, Dept. of

Licensing, 144 Wn.2d 889, 899, 31 P.3d 1174 (2001) (citations omitted).

The outcome of a plain language analysis may be corroborated by validating the absence of an absurd result. Tingey v. Haisch, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007); *see also*, State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (reading of statute that results in absurd result must be avoided because legislature would not intend an absurd result).

Contrary to Figueroa-Olguin's contention, courts "have consistently interpreted the legislature's use of the word "a" in criminal statutes as authorizing punishment for each individual instance of criminal conduct, even if multiple instances of such conduct occurred simultaneously." Ose, 156 Wn.2d at 147; *see, e.g.*, State v. Graham, 153 Wn.2d 400, 406-08, 103 P.3d 1238 (2005) (unit of prosecution for reckless endangerment was for each person endangered where statute stated that the risk of death or physical injury created was to "another" person); State v. DeSantiago, 149 Wn.2d 402, 68 P.3d 1065 (2003) (a sentence enhancement is to be imposed for each weapon involved where statute regarding deadly weapons provided for an enhancement where defendant was armed with "a" firearm or "a" deadly weapon.); State v. Westling, 145 Wn.2d 607, 611-12, 40 P.3d 669 (2002) (where legislature used words "a

fire” unit of prosecution under arson statute was for each fire defendant caused).

In Ose, the court determined that the legislature’s use of the indefinite article “a” before “stolen access device” indicated its intent that the unit of prosecution for possession of stolen access device be for each access device defendant unlawfully had in his or her possession. Ose, 156 Wn.2d at 148. In doing so, it noted that the defendant had attempted to create ambiguity in the statute by relying on an older dictionary definition of the word “a” in arguing that “a” meant “any” and therefore the legislature meant any number of stolen access devices. *Id.* at 146. The court noted that the current dictionary definition did not permit such an interpretation, and that “a” is used to precede only singular nouns unless there is a plural modifier interposed, *e.g.* a few good men. *Id.* at 146. It also indicated that while “a” can sometimes refer to “any,” it can mean ‘any one’ but not ‘any number.’” *Id.* at 147.

Moreover, in the context of proscribing penalties for violations of the statute depending upon the type of controlled substance, the penalty provisions reference “the drug.” For example, in setting forth a greater penalty for a Schedule I or II drugs that are narcotics the statute provides:

A controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam, including its salts, isomers,

and salts of isomers, classified in Schedule IV, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of *the drug*, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of *the drug*, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine;

RCW 69.60.404(2)(a). If the unit of prosecution were any controlled substance as Figueroa-Olguin contends, the reference to “the drug” and delineating the penalty based on the amount of “the drug” wouldn’t make sense. The legislature intended that defendants who manufacture, deliver or possess with intent to deliver greater quantities of a particular drug to receive a higher penalty than those with a lesser quantity. It did not intend under this subsection to increase penalties for those who, for example, possessed with intent to deliver one kilogram of marijuana and one kilogram of cocaine.

Even under a unit of prosecution analysis, the legislature clearly indicated its intent that each controlled substance possessed was a separate violation of the statute. *Cf.* Vargas-Castillo, 329 F.3d at 721-22 (use of the word “a” in “a controlled substance” indicated congressional intent for each controlled substance to be the unit of prosecution).

2. Vacation and remand is not warranted where late findings of fact and conclusions of law have been entered and there is no prejudice.

Figueroa-Olguin argues that remand is appropriate if the findings of fact and conclusions of law regarding the CrR 3.6 hearing and stipulated bench trial have not been entered. Findings and conclusions for both were entered on Feb. 22, 2011, about a month after Figueroa-Olguin filed his brief and are attached as Appendix A. The State concedes that findings and conclusions were not timely entered. However, as the findings and conclusions have been entered and Figueroa-Olguin was not prejudiced by the delay, remand is not necessary. *See, State v. Tagas*, 121 Wn. App. 872, 875-76, 90 P.3d 1088 (2004) (reversal of conviction not warranted due to late entry of findings where no prejudice to defendant from the delay and findings weren't tailored to meet issues in appellate brief⁷); *State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998) (prejudice will not be inferred from a delay in entry of findings).

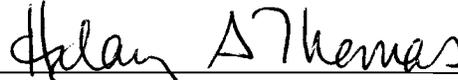
E. CONCLUSION

For the reasons set forth above, the State respectfully requests that this court affirm Figueroa-Olguin's convictions for unlawful possession of

⁷ The deputy filed an affidavit stating that he did not know the content of the appellate brief prior to entry of the findings and conclusions. Supp. CP ___, Sub. Nom. 40.

cocaine with intent to deliver and unlawful possession of hydrocodone
with intent to deliver.

Respectfully submitted this 24th day of May, 2011.

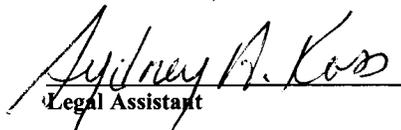


HILARY A. THOMAS, WSBA No. 22007
Appellate Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, DAVID KOCH, addressed as follows:

NIELSEN, BROMAN & KOCH
1908 E. Madison Street
Seattle, WA 98122

 05/24/2011
Legal Assistant Date

APPENDIX A

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Ms. Bartok was selling drugs from her apartment at Old Mill Village in Bellingham.

2. A short time prior to April 16, 2010 a drug deal had been set up by the informant. Ms. Bartok said she was waiting for her supplier to complete the deal. She was observed meeting with an individual driving a white pickup. After meeting with this person she returned to the informant and completed the transaction. Detective Hanger followed the pickup to a motel on Samish Way in Bellingham. At that location, the detective was able to get a good view of defendant's facial features. He was observed meeting with people known to be involved in illegal drug trafficking.

3. The informant related that Ms. Bartok received her drugs from a supplier driving a white pickup named Hector and living in the Everson area on East Pole Road. Due to the informant's extensive track record the court finds that this informant is reliable and that the court and law enforcement may rely upon information that he has provided.

4. Detective Hanger observed Ms. Bartok driving her 1979 Oldsmobile northbound on Hannegan at Bakerview on April 16, 2010. The detective was advised that Ms. Bartok had been stopped recently driving that vehicle and found to have a suspended driver's license. He was further advised that her license remained suspended.

5. Detective Hanger followed Ms. Bartok to the strip mall at the corner of Hannegan and East Pole. She was observed parking, exiting her vehicle, and going to a taco truck where she purchased some food. She carried the food in a

1 sack back to her car where she sat inside and put the food on the roof. She later
3 went to the store.

5 6. A short time thereafter, a white pickup pulled up to gas pumps at the store from
7 East Pole Road. This was the same white pickup Detective Hanger had
9 followed on the earlier occasion.. Ms. Bartok started her vehicle and drove in a
11 around the perimeter of the parking lot briefly before parking between the gas
13 pumps and sidewalk near the white truck. Defendant exited his pickup and
15 began pumping gas. Detective Hanger recognized this individual as the person
17 he seen at the motel on Samish Way.

19 7. She got inside the pickup carrying the sack of food. She remained inside about
21 five minutes. When she got out she was not carrying the sack. She got back in
23 her own vehicle. Detective Hanger videotaped the events that occurred n the
25 parking lot.

27 8. The videotape depicts what is appears even to the layman's eye of the court to be
29 a drug deal. The circular manner in which Ms. Bartok drove around the
31 parking lot before parking near defendant, the absence of any greeting being
33 exchanged between Ms. Bartok and defendant, and her getting into his vehicle
35 without invitation or conversation are some of the facts supporting the court's
37 analysis.

39 9. The white pickup left shortly thereafter east bound on East Pole Road. Detective
41 Hanger had summoned regular patrol deputies to stop the defendant. Deputy
43 Gervol effectuated this stop on East Pole Road. Defendant signed a voluntary
45 consent to search form. A prescription bottle was found inside containing

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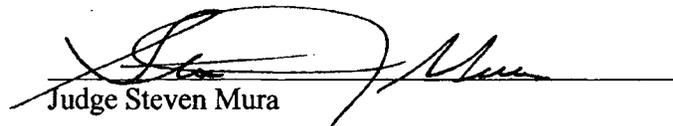
about fifty pills subsequently analyzed to be hydrocodone. Cocaine was also located upon defendant's person when he was arrested.

From the foregoing Findings of Fact, the court makes the following:

II. CONCLUSIONS OF LAW

1. Given the quantum of information available to Detective Hanger from the informant, his observations of the earlier drug deal and what he observed in the parking lot on april16, 2010, he had sufficient facts to form a reasonable suspicion of criminal activity on the part of defendant to justify his request to Deputy Gervol that defendant's vehicle be stopped. Indeed the court would have issued a search warrant for a search of defendant's vehicle based upon the facts of which the court is aware.
2. Defendant's Motion to Suppress based upon a lack of reasonable suspicion to justify the stop of his vehicle is hereby dismissed.

DATED this 22 day of February, 2011.



Judge Steven Mura

Presented by:



CRAIG D. CHAMBERS, WSBA #11771
Deputy Prosecuting Attorney

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Notice of a Presentation Waived:



Richard Pettersen
Attorney for Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: SUPPRESSION

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY**

THE STATE OF WASHINGTON,

Plaintiff.

vs.

HECTOR FIGUERO-OLGUIN,

Defendant.

)
) **No.: 10-1-00476-1**
)
)
) **FINIDINGS OF FACT AND**
) **CONCLUSIONS OF LAW RE: GUILT OF**
) **CHARGE**
)
)

This matter having come regularly on August 9, 2010 and the court having considered the twenty-nine pages of police reports filed herein the court makes the following:

I. FINDINGS OF FACT

1. Deputy Gervol of the Whatcom County Sheriff's Office effectuated a stop of a white Dodge pickup truck, A78117Y on East Pole Road in Whatcom County on April 16, 2010 at the request of drug detectives. The driver of this vehicle was defendant, Hector Figuero-Olguin.
2. Defendant voluntarily granted consent to the deputy to the search of his vehicle in writing and verbally. Deputy Gervol located a red prescription bottle with no label in open view. Inside this bottle were over forty pills identified as

FINIDIGS OF AND CONCLUSIONS OF LAW RE: GUILT OF CHARGE
1

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1 Hydrocodone. Also, \$250 in currency and a small amount of marijuana were
3 found in the truck. Defendant acknowledged ownership of each of these items.

5 3. Defendant was arrested and advise of his *miranda* rights. Defendant confirmed
7 he understood these rights and responded to questions posed thereafter.

9 Defendant admitted he had additional amounts of currency on his person, as
11 well as, cocaine.

13 4. Defendant was searched and additional \$1300 was found on his person. Over 11
15 grams of suspected cocaine were found on defendant's person in his pockets
17 and waistband. Detectives spoke with defendant. He admitted that he had just
19 sold a quarter ounce of cocaine for \$250.00 to the woman at the store.

21 Defendant stated he sells drugs because he does not have a job and needs to pay
23 the rent.

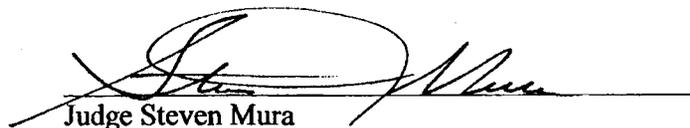
25 5. The suspected cocaine and hydrocodone was chemically analyzed at the
27 Washington State Patrol Crime Laboratory and determined to be hydrocodone
29 and cocaine.

31 From the foregoing Findings of Fact the court makes the following:

33 II. CONCLUSIONS OF LAW

35 1. Defendant is guilty beyond reasonable doubt of the crimes of Unlawful Possession of
37 Cocaine and Hydrocodone with the Intent to Deliver as charged in counts 1 and 2 of the
39 Information.

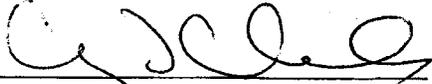
41 DATED this 22 day of February, 2011.

43
45 
Judge Steven Mura

47 FINIDIGS OF AND CONCLUSIONS OF LAW RE: GUILT OF CHARGE

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Presented by:



CRAIG D. CHAMBERS, WSBA #11771
Deputy Prosecuting Attorney

Copy Received:


Attorney for Defendant #37458

FINIDIGS OF AND CONCLUSIONS OF LAW RE: GUILT OF CHARGE

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