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COURT OF APPEALS

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STATE OF WASHINGTON

BY mm

NO. 34118-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DOUGLAS MICHAEL SILVA,

Appellant.

BRIEF OF APPELLANT

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pm 5/24/04

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant his right to confrontation under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment when it refused to allow the defense to impeach a state's witness with a prior inconsistent statement.

2. The trial court erred when it entered a supplemental order requiring the defendant to pay time loss as a part of restitution because the state failed to prove a causal relationship between the offense the defendant committed and the alleged lost wages.

3. The trial court acted in excess of its authority when it ordered the defendant to pay a DNA processing fee.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant the right to confrontation under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment if it refuses to allow the defense to impeach a state's witness with a prior inconsistent statement on a relevant issue before the court?

2. Does a trial court err when it enters a judgment requiring a defendant to pay time loss as a part of restitution when the state fails to prove a causal relationship between the offense the defendant committed and the alleged lost wages?

3. Does a trial court act in excess of its authority if it orders a defendant to pay a DNA processing fee as part of legal-financial obligations when the legislature has not authorized the imposition of that fee?

STATEMENT OF THE CASE

By information filed January 18, 2005, the Clark County Prosecutor charged defendant Douglas Michael Silva with one count of second degree assault under RCW 9A.36.021(1)(a). CP 1. Specifically, the state alleged that the defendant “intentionally assaulted . . . Daniel Nustad, and thereby did recklessly inflict substantial bodily harm . . .” *Id.* On June 21, 2005, the defendant entered a *Newton* plea to an amended charge of fourth degree assault. CP 21, 22-27; RP 1-14¹. Following the plea, the court sentenced the defendant to 365 day in jail with 303 days suspended for 24 months on a number of conditions. CP 30, 33-36. The court also imposed the following legal-financial obligations:

\$500.00	Victim’s Assessment, RCW 7.68.035
\$110.00	Criminal Filing Fee (Court Costs)
\$700.00	Appointed Attorney Fees
\$500.00	Fine. RCW 9A.20.021
\$100.00	Other Costs for: biological collection fee

CP 31-32.

On October 21, 2005, the court held a restitution hearing in the matter with the state calling one witness: Ken Ecker. CP 44. Mr. Ecker testified that on January 8, 2005, he was outside the Tendergrove Lounge in

¹The record in this case includes one continuously numbered verbatim report of the June 21, 2005 guilty plea and sentence, and the October 21, 2005 restitution hearing.

Vancouver when he saw the defendant “knee” a “younger person” in the knee. RP 18-20. He then saw the “younger person” fall in “excruciating pain.” RP 20. Mr. Ecker did not identify the “younger person” and during the restitution hearing the court refused to allow the defense to cross-examine Mr. Ecker with his prior statement to the police that he “didn’t see what happened.” *Id.*

During the restitution hearing the court admitted the following four documents into evidence with the agreement of the defense:

1. *Declaration of Gabriella Yarboro* - stating that she is a claim’s manager for the Washington State Crime Victims Compensation Program (CVCF) and that CVCF paid out \$36.08 in medical expenses and \$15,000.00 in time loss to Daniel G. Nustad “related to the incident of 01/08/05.” *Exhibit 1.*

2. *Southwest Washington Medical Center Admission Record (SWMC)* - stating that on 01/08/05 a person named “Daniel Nustad” was treated for a knee injury. The history section of this record indicates: “Kicked in the left medial knee - dislocated - reduced by EMS inadvertently.” *Exhibit 2, page 3.*

3. *SWMC Bill for Treatment* - stating that the bill for the services rendered to a Daniel Nustad on 01/08/05 was \$1,000.00. *Exhibit 3.*

4. *Postoperative Care Report for Daniel Nustad* - dated 01/08/05 stating that the “cause of injury” as “was kicked in knee by someone.” *Exhibit 4.*

See Exhibits 1-4.

After considering these documents as well as the testimony of Mr. Ecker, the court entered a “Supplemental Order Setting Restitution” requiring the

defendant to pay the following amounts to the clerk of the court: \$15,036.00 for the Crime Victims Compensation Fund and \$1,000.00 for Southwest Washington Medical Center. CP 46-47. The defendant thereafter filed timely notice of appeal. CP 48-49.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO CONFRONTATION UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT WHEN IT REFUSED TO ALLOW THE DEFENSE TO IMPEACH A STATE'S WITNESS WITH A PRIOR INCONSISTENT STATEMENT.

Under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, a defendant is entitled to confront the witnesses testifying against him or her. *State v. St. Pierre*, 111 Wn.2d 105, 111-12, 759 P.2d 383 (1988); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As used in the constitution, the word "confrontation" means more than mere physical confrontation. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Rather, it means the right to conduct a meaningful cross-examination of adverse witnesses. *State v. Foster*, 135 Wn.2d 441, 957 P.2d 712 (1998). The purpose of cross-examination is to test the perception, memory, and credibility of the witness. *State v. Parris*, 98 Wn.2d 140, 144, 654 P.2d 77 (1982). This process is critical to the effectiveness of the fact-finding process. *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Thus, the courts zealously guard this right. *State v. Kilgore*, 107 Wn.App. 160, 26 P.3d 308 (2001). However, the right to confrontation is not without limitation and there is no constitutional right to

confront a witness about irrelevant evidence. *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965).

For example, in *State v. Darden*, 145 Wn.2d 612, 41 P.3d 1189 (2002). *supra*, the defendant was charged with possession of a controlled substance with intent to deliver. During trial the state called a police officer who testified that he had stationed himself in a specific surveillance location and that from this position he saw the defendant participate in a number of suspected drug transactions on the street. He then identified the defendant to other officers who made the arrest. After the arrest, the police strip searched the defendant and uncovered a bundle of cocaine on the defendant's person. At trial the surveillance officer testified that he had observed the defendant for over an hour and had seen him give people bundles similar to the one uncovered during his arrest.

On cross-examination the defense asked the officer to identify his exact position in order to show that the officer could not have seen what he said he did. However, the state objected that this information was "secret." Based upon this claim, the trial court refused to order the officer to answer the defendant's questions concerning the officer's exact position. Following conviction the defendant appealed, arguing that the trial court's ruling had violated his right to confrontation under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment. In addressing these

arguments the court first noted that threshold for what is or is not relevant is very low. The court observed:

The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible. However, relevant evidence may be deemed inadmissible if the State can show a compelling interest to exclude prejudicial or inflammatory evidence.

State v. Darden, 145 Wn.2d at 621 (footnotes and citations omitted).

In addressing the issue of relevance, the court noted that the defendant's mere possession of a small amount of cocaine was not sufficient to support a conviction for possession with intent. Thus, the officer's claimed observations were critical in either sustaining or refuting a charge of possession with intent. As such, what the officer could or could not see from his particular vantage point was relevant in determining the credibility of the officer's claimed observations. The court held:

Here the fact of consequence was Sgt. Vandergiessen's ability to observe and identify Darden as the person who allegedly conducted three transactions. Since he was the only one of the three prosecution witnesses who saw the alleged transactions, he was a crucial witness. It was Sgt. Vandergiessen's observations that gave law enforcement probable cause to arrest Darden. It was his description of Darden that enabled the arrest team to separate Darden from the other person wearing the identical jacket at the bus shelter. Lastly, it was his testimony that enabled the prosecution to convict Darden of possession with the intent to deliver rather than the lesser offense of possession.

State v. Darden, 145 Wn.2d at 624.

Finding the evidence relevant, the court then addressed the issue of prejudice. Based upon the fact that the one officer's observation was the only

evidence of intent to deliver, the court found that the confrontation violation was not harmless. The court stated:

Nor was this error harmless or otherwise within the trial court's discretion. The State's entire case for possession with intent to deliver hinged on Sgt. Vandergiesse's testimony.

State v. Darden, 145 Wn.2d at 626.

In the case at bar the state had to prove a causal relationship between the defendant's offense and the victim's injuries. *See* Argument II. Thus, the issue arose whether or not the conduct that constituted the defendant's fourth degree assault was the cause of the knee injury of which the victim complained. At the restitution hearing, the defense denied that the defendant had kicked the victim in the knee. According to the exhibits, this kicking was the cause of the injury. The only witness the state called to establish the causal relationship was Mr. Ecker. According to the defense, Mr. Ecker had told the police at the time of the event that he had not observed the actual injury to the "younger kid." However, at the hearing, Mr. Ecker testified that the defendant "kneed" the "younger kid" in the "younger kid's" knee, and that this was the cause of the injury. Thus, cross-examining Mr. Ecker with his prior consistent was critical for the defense in its attempt to refute the claim of causality. Consequently, Mr. Ecker's prior consistent statement was highly relevant and the court's refusal to allow cross-examination on this point denied the defendant his right to confrontation under Washington

Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment just as in the *Darden* case.

In this case, as in *Darden*, the state cannot prove that the court's refusal to all full cross-examination on the issue of causality was harmless beyond a reasonable doubt, as the state must do in the fact of the violation of a constitutional right. *State v. Dahl*, 139 Wn.2d 678, 688, 990 P.2d 396 (1999). This conclusion flows from the fact that Mr. Ecker was the only witness to give any evidence from which the court could conclude that the defendant's actions were causally related to the injury claimed. Thus, as in *Darden*, this court should reverse the trial court's order based upon the violation of the defendant rights to confrontation under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

II. THE TRIAL COURT ERRED WHEN IT ENTERED A SUPPLEMENTAL ORDER REQUIRING THE DEFENDANT TO PAY TIME LOSS AS A PART OF RESTITUTION BECAUSE THE STATE FAILED TO PROVE A CAUSAL RELATIONSHIP BETWEEN THE OFFENSE THE DEFENDANT COMMITTED AND THE ALLEGED LOST WAGES.

Under both the sentencing reform act as well as under the general criminal code, restitution is allowed only for losses that are causally connected to a crime. *State v. Miszak*, 69 Wn.App. 426, 848 P.2d 1329 (1993). Restitution may not be imposed for acts merely "connected with"

the crime charged, and it may not be imposed for uncharged crimes unless the defendant enters into an express agreement to pay restitution in the case of uncharged crimes. *State v. Woods*, 90 Wn.App. 904, 953 P.2d 834 (1998).

For example, in *State v. Blanchfield*, 126 Wn.App. 235, 108 P.3d 173 (2005), the defendant appealed a restitution order following his conviction for fourth degree assault. Specifically, the defendant argued that the trial court's order that he pay for the victim's hotel and moving costs. The court had ordered these expenses as part of restitution because the victim stated that she decided to move because of the assault. However, the Court of Appeals reversed the trial court's order because it found no causal relationship between the crime and the injury alleged. The court held:

We agree with Blanchfield. In *Woods*, this court reversed a restitution order against a person convicted of possessing a stolen truck for belongings that had been in the truck when it was stolen. We held, "it cannot be said that 'but for' Woods's possession of the stolen vehicle in September, the owner would not have lost the personal property located in the vehicle when it was stolen in August." Here, Aymond had already planned to go to a hotel after her argument with Blanchfield began, and she did not go to the hotel until the next night, so her hotel stay was not causally connected to the assault. Nor did Aymond show that but for Blanchfield's assault, she would not have incurred the moving company expenses. Her decision to move was not causally connected to Blanchfield's assault, so her moving expenses could not be part of the restitution arising from the assault. Similarly, the loss of Aymond's belongings was not causally connected to Blanchfield's assault, so the value of those belongings could not be part of the restitution arising from the assault. Without the required causal connection, the trial court lacked the statutory authority to award restitution for those expenses and losses. Therefore, we vacate those expenses and losses from the restitution order.

State v. Blanchfield, 126 Wn.App. at 241.

Another example of the failure to prove a causal connection between the conduct that constituted the crime and the damages the victim suffered is found in *State v. Hahn*, 100 Wn.App. 391, 996 P.2d 1125 (2000), the defendants appealed from a restitution orders requiring them to pay the two victims medical bills. The defendant argued that the only evidence submitted on the amount of the bills came documents from DSHS which failed to prove a causal relationship between the two second degree assaults (to which the defendant pled) and the victims' injuries. In addressing these issues, the court first noted the requirement of a causal connection between the crime, the injury, and the alleged loss. The court stated:

But there must be a causal relationship between the victims' medical expenses and the crime committed. "A causal connection exists when, 'but for' the offense committed, the loss or damages would not have occurred."

Hahn, citing *State v. Bunner*, 86 Wn.App. 158, 160, 936 P.2d 419 (1997), contends that the DSHS records amounted to nothing more than a list of expenses that bear no relationship to the claimed damages. In Bunner, the trial court relied on a DSHS medical recovery report that itemized amounts the State had paid for the victim's treatment but did not indicate "why medical services were provided." The reviewing court held that the evidence was insufficient to establish a causal relationship between the expenses and the charged crime. Thus, it reversed the restitution order.

State v. Hahn, 100 Wn.App. at 399 (citations omitted).

Having reviewed the causality requirement, the court then went on the

address the issue of causality. After reviewing the evidence presented, the court reversed the order of restitution upon its finding that the state had failed to prove causality. The court held:

Although the record here contains evidence of the victims' substantial injuries, as in *Bunner*, there is no statement linking the charged amounts to any particular symptoms or treatments. Regarding Warner, the medical reports merely state the name of the service provider, the service date, date paid, billed amount and amount paid. Even if we infer a connection from the fact that nearly all the individually listed services were provided within five days of the crime, these services account for only \$3,921.52 of DSHS's total claim of \$24,662.37. Thus, \$20,740.85 remains unexplained.

Regarding Mohler, again the record merely identifies numerous medical services rendered either on the date of the crime or shortly thereafter. This circumstantial evidence, alone, is insufficient to allow the sentencing court to estimate losses by a preponderance of the evidence without speculation or conjecture.

State v. Hahn, 100 Wn.App. at 399 (citations and footnotes omitted).

The same lack of causal connection that occurred in *Hahn* also exists in the case at bar as relates to both the medical costs and particularly the time loss costs. In this case, the exhibits admitted into evidence only show that the defendant's visit to the emergency room cost him \$1,000.00 and that Crime Victims paid out \$1,500.00 for time loss. The exhibits fail to even address the requirement that the state show a causal connection between the crime and the loss. In fact, these exhibits tend to prove that the victim suffered a knee injury that occurred when he was "kicked." However, even according to Mr. Ecker's testimony, the defendant did not kick anyone. Thus, in the case at

bar, as in *Hahn*, the trial court erred when it entered an order of restitution that included costs not causally related to the defendant's crime.

III. THE TRIAL COURT ACTED IN EXCESS OF ITS AUTHORITY WHEN IT ORDERED THE DEFENDANT TO PAY A DNA PROCESSING FEE.

A trial court's authority to order restitution and court costs is statutory only. *State v. Hennings*, 129 Wn.2d 512, 519, 919 P.2d 580 (1996); *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). Under RCW 9.94A.750 the superior court does have authority to order restitution and other legal-financial obligations in felony cases. *Hennings*, 129 Wn.2d at 519. The authority to order restitution and other legal-financial obligations is found in RCW 9.92.060(2) and RCW 9.95.210(2), both of which allow the court to require the defendant "to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question ..." *State v. Soderholm*, 68 Wn.App. 363, 377, 842 P.2d 1039 (1993).

In the case at bar, the trial court's order on legal-financial obligations included a requirement that the defendant pay \$100.00 as a "biological collection fee." CP 32. The authority to gather DNA samples and require an offender to pay a fee related to collection of that DNA comes from RCW 43.43.7541, which states as follows:

Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after July 1, 2002, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030, payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. The clerk of the court shall transmit fees collected to the state treasurer for deposit in the state DNA data base account created under RCW 43.43.7532.

RCW 43.43.7541.

Under the plain language of this statute, the trial court's authority to impose a DNA collection fee is limited to those sentenced "imposed under chapter 9.94A. RCW, for a felony specified in RCW 43.43.754. . . ." In the case at bar, the defendant was convicted of a misdemeanor. Thus, the trial court did not have the authority to impose a \$100.00 DNA fee. Consequently, the trial court's imposition of such a fee exceeded the court's authority and was in error.

CONCLUSION

The state failed to prove a causal relationship between the defendant's crime and the defendant's injuries. As a result, the trial court erred when it entered an order of restitution and this court should vacate the order of restitution. In the alternative, the trial court's refusal to allow cross-examination of the state's witness at the restitution hearing denied the defendant his right to confrontation under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment. Consequently, the defendant is entitled to a new restitution hearing. Finally, the trial court's imposition of a DNA fee in this case exceeded the court's authority and the imposition of this fee was in error. As a result, this portion of the legal-financial obligations should be stricken.

DATED this 21st day of May, 2006.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

RCW 9.92.060 Suspending Sentences

(1) Whenever any person is convicted of any crime except murder, burglary in the first degree, arson in the first degree, robbery, rape of a child, or rape, the superior court may, in its discretion, at the time of imposing sentence upon such person, direct that such sentence be stayed and suspended

until otherwise ordered by the superior court, and that the sentenced person be placed under the charge of a community corrections officer employed by the department of corrections, or if the county elects to assume responsibility for the supervision of all superior court misdemeanor probationers a probation officer employed or contracted for by the county, upon such terms as the superior court may determine.

(2) As a condition to suspension of sentence, the superior court shall require the payment of the penalty assessment required by RCW 7.68.035. In addition, the superior court may require the convicted person to make such monetary payments, on such terms as the superior court deems appropriate under the circumstances, as are necessary: (a) To comply with any order of the court for the payment of family support; (b) to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question or when the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement; (c) to pay any fine imposed and not suspended and the court or other costs incurred in the prosecution of the case, including reimbursement of the state for costs of extradition if return to this state by extradition was required; and (d) to contribute to a county or interlocal drug fund.

(3) As a condition of the suspended sentence, the superior court may order the probationer to report to the secretary of corrections or such officer as the secretary may designate and as a condition of the probation to follow the instructions of the secretary. If the county legislative authority has elected to assume responsibility for the supervision of superior court misdemeanor probationers within its jurisdiction, the superior court misdemeanor probationer shall report to a probation officer employed or contracted for by the county. In cases where a superior court misdemeanor probationer is sentenced in one county, but resides within another county, there must be provisions for the probationer to report to the agency having supervision responsibility for the probationer's county of residence.

(4) If restitution to the victim has been ordered under subsection (2)(b) of this section and the superior court has ordered supervision, the officer supervising the probationer shall make a reasonable effort to ascertain whether restitution has been made as ordered. If the superior court has ordered supervision and restitution has not been made, the officer shall inform the prosecutor of that violation of the terms of the suspended sentence

not less than three months prior to the termination of the suspended sentence.

(5) The provisions of RCW 9.94A.501 apply to sentences imposed under this section.

RCW 9.95.210 Conditions of Probation

(1) In granting probation, the superior court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer.

(2) In the order granting probation and as a condition thereof, the superior court may in its discretion imprison the defendant in the county jail for a period not exceeding one year and may fine the defendant any sum not exceeding the statutory limit for the offense committed, and court costs. As a condition of probation, the superior court shall require the payment of the penalty assessment required by RCW 7.68.035. The superior court may also require the defendant to make such monetary payments, on such terms as it deems appropriate under the circumstances, as are necessary: (a) To comply with any order of the court for the payment of family support; (b) to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question or when the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement; (c) to pay such fine as may be imposed and court costs, including reimbursement of the state for costs of extradition if return to this state by extradition was required; (d) following consideration of the financial condition of the person subject to possible electronic monitoring, to pay for the costs of electronic monitoring if that monitoring was required by the court as a condition of release from custody or as a condition of probation; (e) to contribute to a county or interlocal drug fund; and (f) to make restitution to a public agency for the costs of an emergency response under RCW 38.52.430, and may require bonds for the faithful observance of any and all conditions imposed in the probation.

(3) The superior court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68

RCW. If the superior court does not order restitution and the victim of the crime has been determined to be entitled to benefits under the crime victims' compensation act, the department of labor and industries, as administrator of the crime victims' compensation program, may petition the superior court within one year of imposition of the sentence for entry of a restitution order. Upon receipt of a petition from the department of labor and industries, the superior court shall hold a restitution hearing and shall enter a restitution order.

(4) In granting probation, the superior court may order the probationer to report to the secretary of corrections or such officer as the secretary may designate and as a condition of the probation to follow the instructions of the secretary. If the county legislative authority has elected to assume responsibility for the supervision of superior court misdemeanor probationers within its jurisdiction, the superior court misdemeanor probationer shall report to a probation officer employed or contracted for by the county. In cases where a superior court misdemeanor probationer is sentenced in one county, but resides within another county, there must be provisions for the probationer to report to the agency having supervision responsibility for the probationer's county of residence.

(5) If the probationer has been ordered to make restitution and the superior court has ordered supervision, the officer supervising the probationer shall make a reasonable effort to ascertain whether restitution has been made. If the superior court has ordered supervision and restitution has not been made as ordered, the officer shall inform the prosecutor of that violation of the terms of probation not less than three months prior to the termination of the probation period. The secretary of corrections will promulgate rules and regulations for the conduct of the person during the term of probation. For defendants found guilty in district court, like functions as the secretary performs in regard to probation may be performed by probation officers employed for that purpose by the county legislative authority of the county wherein the court is located.

(6) The provisions of RCW 9.94A.501 apply to sentences imposed under this section.

RCW 43.43.7541

DNA identification system--Collection of biological samples--Fee

Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after July 1, 2002, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030, payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. The clerk of the court shall transmit fees collected to the state treasurer for deposit in the state DNA data base account created under RCW 43.43.7532.

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STATE OF WASHINGTON
BY Chm

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

6 STATE OF WASHINGTON,)
7 Respondent,)
8 vs.)
9 DOUGLAS MICHAEL SILVA,)
10 Appellant,)

**CLARK CO. NO.05-1-00113-5
APPEAL NO: 34118-2-II
AFFIDAVIT OF MAILING**

11 STATE OF WASHINGTON)
12 COUNTY OF CLARK) vs.

13 CATHY RUSSELL, being duly sworn on oath, states that on the 24TH day of MAY, 2006,
14 affiant deposited into the mails of the United States of America, a properly stamped envelope
15 directed to:

15 ARTHUR CURTIS
16 CLARK COUNTY PROSECUTING ATTORNEY
17 1200 FRANKLIN ST.
18 VANCOUVER, WA 98668

MR. DOUGLAS MICHAEL SILVA
12905 N.E. 73RD ST.
VANCOUVER, WAS 98682

17 and that said envelope contained the following:

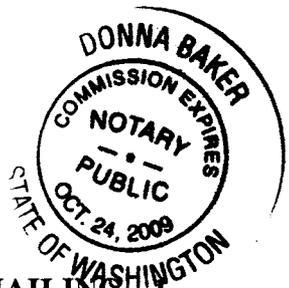
- 18 1. BRIEF OF APPELLANT
- 19 2. AFFIDAVIT OF MAILING

20 DATED this 24TH day of MAY, 2006.

Cathy Russell
CATHY RUSSELL

22 SUBSCRIBED AND SWORN to before me this 24th day of MAY, 2006.

Donna Baker
NOTARY PUBLIC in and for the
State of Washington,
Residing at: Kelso WA 98626
Commission expires: 10-24-09



AFFIDAVIT OF MAILING - I

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