

NO. 34892-6-II

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

STATE OF WASHINGTON,

Respondent,

vs.

JAMES ELLIOTT CUNNINGHAM,

Appellant.

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STATE OF WASHINGTON
BY _____
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BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

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- 3. THE TRIAL COURT ERRED IN REQUIRING AS A CONDITION OF COMMUNITY CUSTODY THAT CUNNINGHAM NOT BE IN A PLACE WHERE ALCOHOLIC BEVERAGES ARE SOLD BY THE DRINK OR ARE THE PRIMARY SALE ITEM. THE TRIAL COURT SPECIFICALLY FOUND THAT THIS WAS NOT AN ALCOHOL-RELATED OFFENSE AND STRUCK THE REQUIREMENT THAT CUNNINGHAM NOT USE OR POSSESS ALCOHOL.**

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¹ See RCW 69.50.435(1)(b)

PREVIOUSLY BEEN ORDERED TO PROVIDE AND PAY FOR A DNA SAMPLE.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. **WHETHER JAMES CUNNINGHAM WAS DENIED HIS FEDERAL AND STATE CONSTITUTIONAL RIGHT TO COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO OBJECT TO THE ADMISSION OF STATEMENTS MADE BY CUNNINGHAM TO OFFICER NEAL THAT WERE OTHERWISE INADMISSIBLE AGAINST CUNNINGHAM BECAUSE THE CORPUS DELICTI OF POSSESSION WITH INTENT TO DELIVER MARIJUANA HAD NOT BEEN PROVEN?**
2. **WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN AS A CONDITION OF COMMUNITY CUSTODY IT PROHIBITED CUNNINGHAM FROM BEING IN A PLACE WHERE ALCOHOL IS SOLD BY THE DRINK OR IS THE PRIMARY SALE ITEMS BUT APPROVED HIS POSSESSION AND USE OF ALCOHOL?**
3. **DID THE TRIAL EXCEED ITS STATUTORY AUTHORITY WHEN ALTHOUGH IT WAS AWARE THAT CUNNINGHAM WAS PREVIOUSLY ORDERED BY THE COWLITZ COUNTY SUPERIOR COURT UNDER A 2003 FELONY CAUSE TO PROVIDE A DNA SAMPLE AND PAY A DNA FEE, IT ORDERED CUNNINGHAM TO SUBMIT A SECOND DNA SAMPLE AND PAY A SECOND DNA FEE?**

III. STATEMENT OF THE CASE

(a) **Procedural History**. By a March 14, 2006, information filed by the Clark County Prosecutor Attorney, James Elliott Cunningham was charged with a single count of possession of marijuana with intent to deliver in violation of RCW 69.50.401(1).

CP 1. The information also charged Cunningham with having committed the crime within 1,000 feet of a school bus stop in violation of RCW 69.50.435(1)(b). CP 1.

Prior to trial, Cunningham filed a motion for a bill of particulars and a supporting memorandum of authorities. CP 2-7. The essence of the motion was to compel the State to establish how it would prove the "possession with intent" aspect of the charge absent Cunningham's statements. CP 2-7. The State characterized the motion as a request for a bill of particulars and a corpus delicti motion and filed a response attaching various police reports. CP 8-23. Cunningham was satisfied with this material. At a May 9 hearing, Cunningham withdrew his motion telling the court that the police reports provided with the State's pleadings resolved the issue. 1RP² 3-4. What the police reports added is that when Cunningham was found in possession of a large quantity of marihuana he also had \$200 cash on his person. 1RP 3-4.

The trial was heard by a jury on May 15-16. 2RP & 3RP³. Judge Robert Harris presided. Before taking trial testimony, the court held a CrR 3.5 hearing. 2RP 17-62. The State presented

² "1RP" refers to the first volume of verbatim report of proceedings.

³ "2RP" refers to the second volume of verbatim and report of proceedings for the first day of trial. "3RP" refers to the third volume of verbatim and report of proceedings for the second day of trial.

testimony from Vancouver Police Officer Neal Martin. 2RP 17-36. Cunningham testified after being advised of his 3.5 rights by the court. 2RP 36-55. The trial court held that Cunningham's statements to Neal were admissible at trial.⁴ 2RP 62-63.

At trial, the State presented testimony from four witnesses. (1) arresting Officer Martin; (2) Vancouver Police evidence technician and certified marijuana leaf technician Richard Young; (3) coordinator of Clark County's geographic information system Clifton McCarley; and (4) the operating manager for the Vancouver Schools Transportation Department Jenny Bullard. 2RP 72-200; 3RP212-225.

After the State rested, Cunningham moved for dismissal arguing that absent Cunningham's statements to Martin, there was no corpus delicti for the possession with intent charge. 3RP 225-29. Specifically, Cunningham's extra-judicial admissions of intent to deliver were not admissible absent independent proof sufficient to support a logical and reasonable inference that Cunningham was intending to deliver marijuana. 3RP 225-29. Cunningham had not objected to the admission of the statements when Officer Martin

⁴ To date, no Findings of Fact and Conclusions of Law in support of the trial court's 3.5 ruling have been entered.

testified. 2RP 89-95. The trial court denied the motion. 3RP 227-29.

Cunningham did not testify but he did present testimony from one witness, Joshua White. 3RP 231-37.

Cunningham did not object or take exception to any of the jury instructions. 3RP 241. The jury found Cunningham guilty as charged with possession of marijuana with intent to deliver. CP 48; 3RP 279-80. By a special verdict, the jury also found that Cunningham committed the crime within 1,000 feet of a school bus stop. CP 49; 3RP 279-80.

Sentencing occurred on May 24. 4RP⁵. The State presented a large packet of information comprised of certified copies of plea forms and judgment and sentences for Cunningham's prior convictions. 4RP 284; CP 68-282. All of the priors were from Cowlitz and Clark counties. CP 68-282. Cunningham agreed that his standard range exceeded nine points. 4RP 285. Cunningham's standard range was 12+-24 months for the substantive charge plus an additional 24 months for the school bus stop enhancement making his total range 36-48 months. 4RP 287; CP 52. Cunningham made a brief statement prior to the

⁵ "4RP" refers to the fourth volume of verbatim and the report of proceedings for the sentencing hearing.

imposition of his sentence. 4RP 286. The court imposed a 40 month sentence with 9-12 months of community custody. 4RP 287-88; CP 55. The court specifically noted that no alcohol was involved and struck the "no alcohol" condition from the list of possible community custody conditions on the judgment and sentence. 4RP 288; CP 57.

The State told the court that a \$100 DNA fee was required. 4RP 287. The court included the fee and the obligation to give a DNA sample on the judgment and sentence. CP 53, 54. Cunningham did not object. On the Cowlitz County judgment and sentence for 03-1-00646-4, which was included in the State's sentencing packet, the Cowlitz County Superior Court had already imposed on Cunningham a \$100 DNA fee and the obligation to give a DNA sample as a consequence of his felony conviction in that case. CP 72.

Cunningham filed a timely notice of appeal. CP 67.

(b) Factual History. On December 22, 2005, Vancouver Police Officer Neal Martin stopped a car driven by James Cunningham because it had a license plate out. 2RP 73, 79-80. The stop occurred at 32nd and Daniel Street in Vancouver. 2RP 80. Cunningham was the car's sole occupant. 2RP 82. A warrant

check revealed that Cunningham had both a Clark County district court and superior court warrant. 2RP 81.

Martin arrested Cunningham on the warrants and searched Cunningham's person and the car incident to the arrest. 2RP 82-85. On Cunningham's person, Martin found a marijuana pipe and a wallet. 2RP 82. The wallet contained some cash but Martin did not count it; he also did not seize the wallet. 2RP 82-83. On the front passenger floorboard, Martin found 214.1 grams of marijuana packed together in a gallon-sized Zip-Loc bag. 2RP 84-85, 155-57, 169. Martin, who had previous experience as a drug investigation detective, found nothing else in the car indicative of drug dealing: no scales, no pay-and-owe sheets, no cell phone, no currency (worth counting or seizing apparently, 2RP 145-46), and no packaging material. 2RP 74-75, 118-123. Martin speculated that the amount of marijuana was likely more than a user amount and more consistent with possession for sale. 2RP 139-41.

After being advised of and waiving his Miranda rights, Cunningham told Martin that the approximate one-half pound of marijuana had been fronted to him and he owed that person \$1,800. 2RP 90-91. Cunningham said that he sells marijuana in half-ounces and that he planned to sell most of the marijuana although

some was for his personal use. 2RP 92-93. He made about \$200 per month selling marijuana. 2RP 93. Cunningham added that he had a set of scales at his house and some packaging material consisting of sandwich baggies. 2RP 94.

Martin called Cunningham's girlfriend and arranged to go to the house and pick up the scales. 2RP 95-98. The girlfriend brought a set of digital scales out of the house and gave them to Martin. 2RP 99. Cunningham's witness, Joshua White, testified that the scales actually belonged to him. 3RP 231.

Vancouver School District Transportation Manager Jenny Bullard testified about how school bus stops were recorded and the records maintained. 2RP 212-14. A person interested in locating school bus stops could contact the school district or a specific school or check the stops via the internet. 2RP 212-14. She was aware that there was an elementary school bus stop at the corner of 30th and Daniels. 2RP 216-17. That stop was in existence in December 2005 and was current as of the date of trial. 2RP 216-17. Clifton McCarley, coordinator of the geographic information system (GIS) for the Clark County Auditor's Office, explained the mapping software used by the county. Using the software, he created a map at the request of the State. 2RP 180-81. Using

concentric circles, he measured the distance between the corner of 32nd and Daniels Street and 30th and Daniels Street. He estimated it at approximately 550 feet. 2RP 184.

IV. ARGUMENT

I. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE USE OF JAMES CUNNINGHAM'S STATEMENTS TO OFFICER MARTIN PRIOR TO THE ESTABLISHMENT OF A CORPUS DELICTI EFFECTIVELY DENIED CUNNINGHAM HIS RIGHT TO COUNSEL UNDER THE FEDERAL AND STATE CONSTITUTIONS.

The Washington State and United States Constitutions guarantee a criminal defendant the right to effective assistance of counsel. Const. Art. I, Sec. 22; U.S. Const. Amend. VI. To prove that counsel was ineffective by constitutional standards, the defendant must show: (1) that his counsel's performance was deficient, defined as falling below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McKinnon, 110 Wn. App. 1, 5, 38 P.3d 1015 (2001). Matters that go to trial strategy or tactics do not show deficient performance. State v. Hendrickson, 129

Wn.2d 61, 77-78, 917 P.2d 563 (1996). Courts engage in a strong presumption that counsel's representation was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

"Corpus delicti" literally means "body of the crime." State v. Aten, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). The corpus delicti of the crime charged refers to the objective proof or substantial fact that a crime has been committed. State v. Solomon, 73 Wn. App. 724, 727, 870 P.2d 1019, review denied, 124 Wn.2d 1028 (1994). In general, proof of the corpus delicti is established by two elements: (1) an injury or loss and (2) someone's criminal act as the cause thereof. Bremerton v. Corbett, 106 Wn.2d 569, 573-74, 723 P.2d 1135 (1986). Corpus delicti can be proved by either direct or circumstantial evidence. Aten, 130 Wn.2d 640.

Washington law provides that a confession or admission may support a conviction only when the State produces independent evidence sufficient to establish the corpus delicti of the crime charged. State v. Smith, 115 Wn.2d 775, 780-81, 801 P.2d 975 (1990). There must be independent proof of the existence of every element of the crime charged before the admission of a defendant's extra-judicial statement. State v. Ashurst, 45 Wn. App. 48, 51, 723 P.2d 1189 (1986).

The confession of a person charged with the commission of a crime is not sufficient to establish the corpus delicti, but if there is independent proof thereof, such confession may then be considered in connection therewith and the corpus delicti established by a combination of the independent proof and the confession.

The independent evidence need not be of such a character as would establish the corpus delicti beyond a reasonable doubt, or even by a preponderance of the proof. It is sufficient if it prima facie establishes the corpus delicti.

State v. Meyer, 37 Wn.2d 759, 763-64, 226 P.2d 204 (1951).

“Prima facie” in this context means there is “evidence of sufficient circumstances which would support a logical and reasonable inference” of the facts sought to be proved. Aten, 130 Wn.2d at 656. The evidence need not be enough to support a conviction or send the case to the jury. Id. But, as the rule indicates, if no such evidence exists, the defendant’s confession or admission cannot be used to establish the corpus delicti and prove the defendant’s guilt at trial. Id. The rule arose from a judicial distrust of confessions, coupled with the view that a confession admitted at trial would probably be accepted uncritically by a jury, thus making it extremely difficult for a defendant to challenge. Id. This distrust stems from the possibility that the confession may have been misreported or misconstrued, elicited by force or coercion, based upon mistaken perception of the facts or law, or

falsely given by a mentally disturbed individual. *Id.* at 657. The corpus delicti rule protects defendants from unjust convictions based upon confessions alone that may be of questionable reliability. *Id.* at 656-57. The reviewing court must assume the truth of the State's evidence and draw all reasonable inferences in favor of the State. Solomon, 73 Wn. App. at 727.

In State v. Cobelli, 56 Wn. App. 921, 788 P.2d 1081 (1989), the court reversed the trial court's determination of guilt on a possession with intent to deliver marijuana charge due to lack of a corpus delicti. There, Redmond police were conducting undercover surveillance where items taken in vehicle prowls were being exchanged for marijuana. The officers saw Cobelli, a juvenile, arrive in a convenience store parking lot, carry on a short conversation with a cluster of people and then move to do the same with various other clusters of people. The officers did not see anything other than conversation. The officers noted that the area was a high drug area and noted that Cobelli's activity was indicative of the sale and purchase of drugs. The suspect in the vehicle prowls arrived in the area and was arrested. The suspect saw Cobelli walking away from the area and told an officer that Cobelli had been dealing marijuana in the convenience store parking lot.

Cobelli was contacted and searched. The police recovered several baggies of individually packaged marijuana totaling 1.4 grams and an unspecified amount of money. Cobelli admitted the earlier sale of two baggies of marijuana for \$10 each.

On review, the court found the evidence of a corpus delicti lacking on the intent to deliver. Absent was an exchange or a significant amount of drugs or money. Moreover, there was no evidence that the 1.4 grams of marijuana was associated with the intent. See also State v. Davis, 79 Wn. App. 591, 904 P.2d 306 (1995) (possession of a bread sack with six individually wrapped baggies of marijuana, two baggies of marijuana seed, a film canister containing marijuana, a baggie with marijuana residue in it, a box of sandwich baggies, a pipe used for smoking marijuana, a number of knives, and police testimony that it was not customary for people who simply use to have that quantity of marijuana with that packaging not sufficient to support an inference of intent to deliver); State v. Kovac, 50 Wn. App. 117, 747 P.2d 484 (1987) (in challenge to sufficiency of the evidence defendant's possession of 8 grams of marijuana in seven baggies insufficient to justify inference of intent to deliver); State v. Johnson, 61 Wn. App. 539, 811 P.2d 687 (1991) (conviction for possession of cocaine with

intent to deliver reversed and remanded for resentencing on lesser charge of possession of seven bindles of cocaine); and State v. Liles, 11 Wn. App 166, 521 P.2d 973 (conviction for possession of heroin with intent to deliver reversed when evidence showed mere possession of a baggie containing 6.88 grams of heroin). In those decisions in which an intent to deliver has been inferred from possession of a large quantity of a controlled substance, some additional factor has been present. State v. Meija, 111 Wn.2d 892, 766 P.2d 454 (1989) (presence of 1 ½ pounds of cocaine combined with informant's tip and controlled buy supported intent to deliver inference; State v. Llamas-Villa, 67 Wn. App. 448, 836 P.2d 239 (1992) (possession of cocaine coupled with officer's observations of deals supported inference of intent; State v. Lane, 56 Wn. App. 286, 786 P.2d 277 (1989) (1 ounce of cocaine, together with large amounts of cash and scales, supported an intent to deliver); State v. Simpson, 22 Wn. App. 572, 590 P.2d 1276 (1979) (possession of uncut heroin, lactose for cutting and balloons for packaging supported an intent to deliver.)

Under our facts, there was insufficient proof of intent to deliver. When Martin stopped Cunningham, Cunningham possessed an unknown amount of money in a wallet and a half

pound of marijuana stuffed into a gallon-sized Zip-Loc bag. Other than the amount of marijuana, there was none of the other indicia of drug dealing Martin would expect: no packaging, no scales, no pay-and-owe sheets, no cell phone, no large sum of currency. While Neal did explain typical marijuana use and surmised that a half-pound is likely greater than that for personal use, that is still not enough. Caution should be exercised against the use of police officer opinion testimony when used to inflate a “naked possession” to a possession with intent. State v. Brown, 68 Wn. App. 480, 485, 843 P.2d 1098 (1993). Convictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession. Id.

Here, defense counsel should have objected to the admission of Cunningham’s damaging statements to Martin. There was simply a lack of evidence of Cunningham’s intent to deliver the marijuana. Had counsel objected, Cunningham’s statements should have been excluded due to the lack of a corpus delicti for the intent to deliver. Had the statements been excluded, Cunningham could only have been convicted of felony possession of marijuana. Failing to bring a legitimate motion to exclude otherwise inadmissible evidence is never a legitimate trial tactic.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN AS A CONDITION OF COMMUNITY CUSTODY IT ORDERED THAT CUNNINGHAM NOT BE IN A PLACE WHERE ALCOHOLIC BEVERAGES ARE SOLD BY THE DRINK OR ARE THE PRIMARY SALE ITEM.

Community custody may be imposed on a conviction for possession of marijuana with intent to deliver. RCW 9.94A.545 and 69.50.401(1). Approved conditions of community custody are found in multiple sections of RCW 9.94A. See RCW 9.94A.545, 9.94A.700(4) and (5), 9.94A.715, 9.94A.720. Many of the conditions appear in list form under RCW 9.94A.700(4) and (5) as follows:

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;

(c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(a) The offender shall remain within, or outside of, a specified geographical boundary;

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) The offender shall participate in crime-related treatment or counseling services;

(d) The offender shall not consume alcohol; or

(e) The offender shall comply with any crime-related prohibitions.

No causal link need be established between the condition imposed and the crime committed so long as the condition relates to the circumstances of the crime. State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). 'Circumstances' is defined as 'an accompanying or accessory fact.' Black's Law Dictionary 259 (8th ed. 2004).

In addition, the court can also order an offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of re-offending, or the safety of the community, and to obey all laws. RCW 9.94A.715(2)(a) and (b).

Finally, under RCW 9.94A.720(b), the offender shall report as directed to the community corrections officer, remain within prescribed geographic boundaries, notify the community corrections officer of any change of address or employment, and pay supervision costs.

James Cunningham was found guilty of possession of marijuana with intent to deliver. There was no mention of alcohol at Cunningham's trial. At sentencing, the trial court specifically noted that alcohol was not involved and struck the proposed condition that Cunningham not use or possess alcohol. 4RP 288; CP 57. Yet, the trial court held, as a condition of Cunningham's community custody, that he could not be in a place where alcohol is served by the drink or sold as the primary sale items. CP 57. While Cunningham did not object at sentencing to this condition, he is objecting to it on appeal. Objections to community custody conditions can be raised for the first time on appeal. State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003); State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), review denied, 143 Wn.2d 1003 (2001) ("sentences imposed without statutory authority can be addressed for the first time on appeal").

Imposition of crime-related prohibitions are reviewed for an abuse of discretion and will only be reversed if the decision is manifestly unreasonable or based on untenable grounds. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Here, the trial court acknowledged that alcohol was not a factor in the case, approved possession or use of alcohol, but disapproved of Cunningham buying alcohol in a liquor store or going to a restaurant if alcohol is sold there by the drink. As such, the imposed conditions are erroneous. The trial court abused its discretion when imposing them.

III. THE TRIAL COURT IMPROPERLY ORDERED JAMES CUNINGHAM TO SUBMIT A SECOND DNA SAMPLE AND PAY A SECOND DNA FEE.

In Washington the establishment of penalties for crimes is solely a legislative function. State v. Thorne, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). As such, the power of the legislature to set the type, amount, and terms of criminal punishment is plenary and only confined by constitutional constraints. Id. Thus, a trial court may only impose those terms and conditions of punishment that the legislature authorizes. State v. Mulcare, 189 Wash. 625, 628, 66 P.2d 360 (1937). In Cunningham's case, the trial court exceeded

its statutory authority when it ordered him to submit a second DNA sample and pay a second DNA fee.

Under RCW 43.43.754, the trial court is authorized to require a defendant convicted of a felony to give a DNA sample for identification analysis. Under RCW 43.43.7541, the trial court has authority to impose a fee for the collection of the biological sample.

Subsection (1) of RCW 43.43.754 states:

(1) Every adult or juvenile individual convicted of a felony, stalking under RCW 9A.46.110, harassment under RCW 9A.46.020, communicating with a minor for immoral purposes under RCW 9.68A.090, or adjudicated guilty of an equivalent juvenile offense must have a biological sample collected for purposes of DNA identification analysis . . .

Under this statute the question arises whether or not the phrase “convicted of a felony” means “every time a person is convicted of a felony” even if a biological sample and fee have previously been collected as part of another judgment and sentence. Since the statute does not use the phrase “every time a defendant is convicted of a felony” it is susceptible to two equally reasonable interpretations: first, that the process should be repeated with every judgment and sentence, and second, that the process should only be performed once.

The court's primary duty when interpreting any statute is to discern and implement the intent of the legislature. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Under RCW 43.43.753 the legislature has stated its intent as regards the collection of biological samples of DNA. This purpose is to create a forensic DNA database of all offenders which can be checked against DNA samples taken as evidence in crime scenes, thereby aiding in the identification of the perpetrators of new crimes. The reason such a database is effective is that each person's DNA is unique and once obtained functions like fingerprints do in aiding to identify the perpetrators of crimes and exclude innocent persons. State v. Gentry, 125 Wn.2d 570, 888 P.2d 1105 (1995).

In addition, part of the theory behind DNA analysis is that DNA does not change over time. Once a sample is taken, analyzed and the results placed in a database, there is no need to take a new sample if the defendant is convicted of a new felony. Interpreting RCW 43.43.754 to require the taking of a new sample for each subsequent felony conviction does not further the purpose of DNA testing. In fact, requiring a new sample and subsequent testing for each new felony sentence has a detrimental effect upon the creation of a state database because it wastes scarce state

resources in the analysis of duplicate samples. Consequently, the interpretation of RCW 43.43.754 that best implements the intent of the legislature is the one that limits its application to the collection of a single DNA sample.

In our case, Cunningham's criminal history includes a Cowlitz County conviction for possession of methamphetamine under cause number 03-1-00646-4. CP 69-77. As the Cowlitz County judgment and sentence reflects, the sentencing court ordered Cunningham to submit a biological sample and pay a \$100 DNA fee. CP 72. Consequently the State of Washington has presumptively already gathered Cunningham's DNA sample and placed the results of the test in the state data bank. As a result, there is neither a need nor authority for gathering a second sample and imposing a second fee. Thus, the trial court in this case erred when it imposed a second DNA test and fee.

V. CONCLUSION

James Cunningham's conviction for possession of marijuana with intent to deliver should be reversed and his case remanded for entry of a finding of guilt for felony possession of over 40 grams of marijuana. The school bus stop enhancement cannot stand because felony possession of marijuana is not a crime that can be

enhanced under RCW 69.50.435. Cunningham should be resentenced under his applicable standard range of 12+-24 months.

The court found that alcohol was not a factor in Cunningham's crime. As such, it was error for the trial court to prohibit Cunningham, as a crime-related prohibition, from being in a place where alcohol is sold by the drink or as a primary sale item. On remand, the erroneous condition should be stricken.

Finally, the trial court erred when it order Cunningham to provide and pay for the taking of a second DNA sample. On remand, the requirement for a DNA sample and fee should be stricken.

Respectfully submitted this 26th day of December, 2006.



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**VI. APPENDIX OF STATUTES AND CONSTITUTIONAL
PROVISIONS**

**WASHINGTON STATE CONSTITUTION
ARTICLE I, SECTION 22
RIGHTS OF THE ACCUSED.**

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 or 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. [AMENDMENT 10, 1921 p 79 Section 1. Approved November, 1922.]

UNITED STATES CONSTITUTION, AMENDMENT VI

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 defence.

RCW 9.94A.545

Community custody.

(1) Except as provided in RCW 9.94A.650 and in subsection (2) of this section, on all sentences of confinement for one year or less, in which the offender is convicted of a sex offense, a violent offense, a crime against a person under RCW 9.94A.411, or felony violation of chapter 69.50 or 69.52 RCW or an attempt, conspiracy, or solicitation to commit such a crime, the court may impose up to one year of community custody, subject to conditions and sanctions as authorized in RCW 9.94A.715 and 9.94A.720. An offender shall be on community custody as of the date of sentencing. However, during the time for which the offender is in total or partial confinement pursuant to the sentence or a violation of the sentence, the period of community custody shall toll.

(2) If the offender is guilty of failure to register under RCW 9A.44.130(10)(a), the court shall impose a term of community custody under RCW 9.94A.715.

RCW 9.94A.700

Community placement.

When a court sentences an offender to a term of total confinement in the custody of the department for any of the offenses specified in this section, the court shall also sentence the offender to a term of community placement as provided in this section. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community placement imposed under this section.

(1) The court shall order a one-year term of community placement for the following:

(a) A sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990; or

(b) An offense committed on or after July 1, 1988, but before July 25, 1999, that is:

(i) Assault in the second degree;

(ii) Assault of a child in the second degree;

(iii) A crime against persons where it is determined in accordance with RCW 9.94A.602 that the offender or an accomplice was armed with a deadly weapon at the time of commission; or

(iv) A felony offense under chapter 69.50 or 69.52 RCW not sentenced under RCW 9.94A.660.

(2) The court shall sentence the offender to a term of community placement of two years or up to the period of earned release awarded pursuant to RCW 9.94A.728, whichever is longer, for:

(a) An offense categorized as a sex offense committed on or after July 1, 1990, but before June 6, 1996, including those sex offenses also included in other offense categories;

(b) A serious violent offense other than a sex offense committed on or after July 1, 1990, but before July 1, 2000; or

(c) A vehicular homicide or vehicular assault committed on or after July 1, 1990, but before July 1, 2000.

(3) The community placement ordered under this section shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release. When the court sentences an offender to the statutory maximum sentence then the community placement portion of the sentence shall consist entirely of the community custody to which the offender may become eligible. Any period of community custody actually served shall be credited against the community placement portion of the sentence.

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;

(c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(a) The offender shall remain within, or outside of, a specified geographical boundary;

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) The offender shall participate in crime-related treatment or counseling services;

(d) The offender shall not consume alcohol; or

(e) The offender shall comply with any crime-related prohibitions.

(6) An offender convicted of a felony sex offense against a minor victim after June 6, 1996, shall comply with any terms and

conditions of community placement imposed by the department relating to contact between the sex offender and a minor victim or a child of similar age or circumstance as a previous victim.

(7) Prior to or during community placement, upon recommendation of the department, the sentencing court may remove or modify any conditions of community placement so as not to be more restrictive.

RCW 9.94A.715

Community custody for specified offenders — Conditions.

(1) When a court sentences a person to the custody of the department for a sex offense not sentenced under RCW 9.94A.712, a violent offense, any crime against persons under RCW 9.94A.411(2), or a felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000, or when a court sentences a person to a term of confinement of one year or less for a violation of RCW 9A.44.130(10)(a) committed on or after June 7, 2006, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728 (1) and (2); or (c) with regard to offenders sentenced under RCW 9.94A.660, upon failure to complete or administrative termination from the special drug offender sentencing alternative program. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community custody imposed under this section.

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the

offense, the offender's risk of re-offending, or the safety of the community, and the department shall enforce such conditions pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender's risk of re-offense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws. The department may impose electronic monitoring as a condition of community custody for an offender sentenced to a term of community custody under this section pursuant to a conviction for a sex offense. Within the resources made available by the department for this purpose, the department shall carry out any electronic monitoring imposed under this section using the most appropriate technology given the individual circumstances of the offender. As used in this section, "electronic monitoring" means the monitoring of an offender using an electronic offender tracking system including, but not limited to, a system using radio frequency or active or passive global positioning system technology.

(c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

(3) If an offender violates conditions imposed by the court or the department pursuant to this section during community custody, the department may transfer the offender to a more restrictive confinement status and impose other available sanctions as provided in RCW 9.94A.737 and 9.94A.740.

(4) Except for terms of community custody under RCW 9.94A.670, the department shall discharge the offender from

community custody on a date determined by the department, which the department may modify, based on risk and performance of the offender, within the range or at the end of the period of earned release, whichever is later.

(5) At any time prior to the completion or termination of a sex offender's term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions imposed pursuant to this section for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody. If a violation of a condition extended under this subsection occurs after the expiration of the offender's term of community custody, it shall be deemed a violation of the sentence for the purposes of RCW 9.94A.631 and may be punishable as contempt of court as provided for in RCW 7.21.040. If the court extends a condition beyond the expiration of the term of community custody, the department is not responsible for supervision of the offender's compliance with the condition.

(6) Within the funds available for community custody, the department shall determine conditions and duration of community custody on the basis of risk to community safety, and shall supervise offenders during community custody on the basis of risk to community safety and conditions imposed by the court. The secretary shall adopt rules to implement the provisions of this subsection.

(7) By the close of the next business day after receiving notice of a condition imposed or modified by the department, an offender may request an administrative review under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not reasonably related to any of the following: (a) The crime of conviction; (b) the offender's risk of re-offending; or (c) the safety of the community.

RCW 9.94A.720

Supervision of offenders.

(1)(a) Except as provided in RCW 9.94A.501, all offenders sentenced to terms involving community supervision, community restitution, community placement, or community custody shall be under the supervision of the department and shall follow explicitly the instructions and conditions of the department. The department may require an offender to perform affirmative acts it deems appropriate to monitor compliance with the conditions of the sentence imposed. The department may only supervise the offender's compliance with payment of legal financial obligations during any period in which the department is authorized to supervise the offender in the community under RCW 9.94A.501.

(b) The instructions shall include, at a minimum, reporting as directed to a community corrections officer, remaining within prescribed geographical boundaries, notifying the community corrections officer of any change in the offender's address or employment, and paying the supervision fee assessment.

(c) For offenders sentenced to terms involving community custody for crimes committed on or after June 6, 1996, the department may include, in addition to the instructions in (b) of this subsection, any appropriate conditions of supervision, including but not limited to, prohibiting the offender from having contact with any other specified individuals or specific class of individuals.

(d) For offenders sentenced to terms of community custody for crimes committed on or after July 1, 2000, the department may impose conditions as specified in RCW 9.94A.715.

The conditions authorized under (c) of this subsection may be imposed by the department prior to or during an offender's community custody term. If a violation of conditions imposed by the court or the department pursuant to RCW 9.94A.710 occurs during community custody, it shall be deemed a violation of community placement for the purposes of RCW 9.94A.740 and shall authorize the department to transfer an offender to a more restrictive

confinement status as provided in RCW 9.94A.737. At any time prior to the completion of an offender's term of community custody, the department may recommend to the court that any or all of the conditions imposed by the court or the department pursuant to RCW 9.94A.710 or 9.94A.715 be continued beyond the expiration of the offender's term of community custody as authorized in RCW 9.94A.715 (3) or (5).

The department may require offenders to pay for special services rendered on or after July 25, 1993, including electronic monitoring, day reporting, and telephone reporting, dependent upon the offender's ability to pay. The department may pay for these services for offenders who are not able to pay.

(2) No offender sentenced to terms involving community supervision, community restitution, community custody, or community placement under the supervision of the department may own, use, or possess firearms or ammunition. Offenders who own, use, or are found to be in actual or constructive possession of firearms or ammunition shall be subject to the violation process and sanctions under RCW 9.94A.634, 9.94A.737, and 9.94A.740. "Constructive possession" as used in this subsection means the power and intent to control the firearm or ammunition. "Firearm" as used in this subsection has the same definition as in RCW 9.41.010.

RCW 43.43.753

Findings — DNA identification system — DNA data base — DNA data bank.

The legislature finds that recent developments in molecular biology and genetics have important applications for forensic science. It has been scientifically established that there is a unique pattern to the chemical structure of the deoxyribonucleic acid (DNA) contained in each cell of the human body. The process for identifying this pattern is called "DNA identification."

The legislature further finds that DNA data bases are important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts. It is the policy of this state to assist federal, state,

and local criminal justice and law enforcement agencies in both the identification and detection of individuals in criminal investigations and the identification and location of missing and unidentified persons. Therefore, it is in the best interest of the state to establish a DNA data base and DNA data bank containing DNA samples submitted by persons convicted of felony offenses and DNA samples necessary for the identification of missing persons and unidentified human remains.

The legislature further finds that the DNA identification system used by the federal bureau of investigation and the Washington state patrol has no ability to predict genetic disease or predisposal to illness. Nonetheless, the legislature intends that biological samples collected under RCW 43.43.754, and DNA identification data obtained from the samples, be used only for purposes related to criminal investigation, identification of human remains or missing persons, or improving the operation of the system authorized under RCW 43.43.752 through 43.43.758.

RCW 43.43.754

DNA identification system — Biological samples — Collection, use, testing — Scope and application of section.

(1) Every adult or juvenile individual convicted of a felony, stalking under RCW 9A.46.110, harassment under RCW 9A.46.020, communicating with a minor for immoral purposes under RCW 9.68A.090, or adjudicated guilty of an equivalent juvenile offense must have a biological sample collected for purposes of DNA identification analysis in the following manner:

(a) For persons convicted of such offenses or adjudicated guilty of an equivalent juvenile offense who do not serve a term of confinement in a department of corrections facility, and do serve a term of confinement in a city or county jail facility, the city or county shall be responsible for obtaining the biological samples either as part of the intake process into the city or county jail or detention facility for those persons convicted on or after July 1, 2002, or within a reasonable time after July 1, 2002, for those persons

incarcerated before July 1, 2002, who have not yet had a biological sample collected, beginning with those persons who will be released the soonest.

(b) For persons convicted of such offenses or adjudicated guilty of an equivalent juvenile offense who do not serve a term of confinement in a department of corrections facility, and do not serve a term of confinement in a city or county jail facility, the local police department or sheriff's office is responsible for obtaining the biological samples after sentencing on or after July 1, 2002.

(c) For persons convicted of such offenses or adjudicated guilty of an equivalent juvenile offense, who are serving or who are to serve a term of confinement in a department of corrections facility or a department of social and health services facility, the facility holding the person shall be responsible for obtaining the biological samples either as part of the intake process into such facility for those persons convicted on or after July 1, 2002, or within a reasonable time after July 1, 2002, for those persons incarcerated before July 1, 2002, who have not yet had a biological sample collected, beginning with those persons who will be released the soonest.

(2) Any biological sample taken pursuant to RCW 43.43.752 through 43.43.758 may be retained by the forensic laboratory services bureau, and shall be used solely for the purpose of providing DNA or other tests for identification analysis and prosecution of a criminal offense or for the identification of human remains or missing persons. Nothing in this section prohibits the submission of results derived from the biological samples to the federal bureau of investigation combined DNA index system.

(3) The director of the forensic laboratory services bureau of the Washington state patrol shall perform testing on all biological samples collected under subsection (1) of this section, to the extent allowed by funding available for this purpose. The director shall give priority to testing on samples collected from those adults or juveniles convicted of a felony or adjudicated guilty of an equivalent juvenile offense that is defined as a sex offense or a violent offense in RCW 9.94A.030.

(4) This section applies to all adults who are convicted of a sex or violent offense after July 1, 1990; and to all adults who were convicted of a sex or violent offense on or prior to July 1, 1990, and who are still incarcerated on or after July 25, 1999. This section applies to all juveniles who are adjudicated guilty of a sex or violent offense after July 1, 1994; and to all juveniles who were adjudicated guilty of a sex or violent offense on or prior to July 1, 1994, and who are still incarcerated on or after July 25, 1999. This section applies to all adults and juveniles who are convicted of a felony other than a sex or violent offense, stalking under RCW 9A.46.110, harassment under RCW 9A.46.020, or communicating with a minor for immoral purposes under RCW 9.68A.090, or adjudicated guilty of an equivalent juvenile offense, on or after July 1, 2002; and to all adults and juveniles who were convicted or adjudicated guilty of such an offense before July 1, 2002, and are still incarcerated on or after July 1, 2002.

(5) This section creates no rights in a third person. No cause of action may be brought based upon the non-collection or non-analysis or the delayed collection or analysis of a biological sample authorized to be taken under RCW 43.43.752 through 43.43.758.

(6) The detention, arrest, or conviction of a person based upon a data base match or data base information is not invalidated if it is determined that the sample was obtained or placed in the data base by mistake, or if the conviction or juvenile adjudication that resulted in the collection of the biological sample was subsequently vacated or otherwise altered in any future proceeding including but not limited to post-trial or post-fact-finding motions, appeals, or collateral attacks.

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.

RCW 69.50.401

Prohibited acts: A — Penalties.

(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;

(b) Amphetamine, including its salts, isomers, and salts of isomers, or methamphetamine, including its salts, isomers, and salts of isomers, 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. Three thousand dollars of the fine may not be suspended. As collected, the first

three thousand dollars of the fine must be deposited with the law enforcement agency having responsibility for cleanup of laboratories, sites, or substances used in the manufacture of the methamphetamine, including its salts, isomers, and salts of isomers. The fine moneys deposited with that law enforcement agency must be used for such clean-up cost;

(c) Any other controlled substance classified in Schedule I, II, or III, is guilty of a class C felony punishable according to chapter 9A.20 RCW;

(d) A substance classified in Schedule IV, except flunitrazepam, including its salts, isomers, and salts of isomers, is guilty of a class C felony punishable according to chapter 9A.20 RCW; or

(e) A substance classified in Schedule V, is guilty of a class C felony punishable according to chapter 9A.20 RCW.

RCW 69.50.435

Violations committed in or on certain public places or facilities — Additional penalty — Defenses — Construction — Definitions.

(1) Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marijuana to a person:

(a) In a school;

(b) On a school bus;

(c) Within one thousand feet of a school bus route stop designated by the school district;

(d) Within one thousand feet of the perimeter of the school grounds;

- (e) In a public park;
- (f) In a public housing project designated by a local governing authority as a drug-free zone;
- (g) On a public transit vehicle;
- (h) In a public transit stop shelter;
- (i) At a civic center designated as a drug-free zone by the local governing authority; or
- (j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand foot perimeter

may be punished by a fine of up to twice the fine otherwise authorized by this chapter, but not including twice the fine authorized by RCW 69.50.406, or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter, but not including twice the imprisonment authorized by RCW 69.50.406, or by both such fine and imprisonment. The provisions of this section shall not operate to more than double the fine or imprisonment otherwise authorized by this chapter for an offense.

(2) It is not a defense to a prosecution for a violation of this section that the person was unaware that the prohibited conduct took place while in a school or school bus or within one thousand feet of the school or school bus route stop, in a public park, in a public housing project designated by a local governing authority as a drug-free zone, on a public transit vehicle, in a public transit stop shelter, at a civic center designated as a drug-free zone by the local governing authority, or within one thousand feet of the perimeter of a facility designated under subsection (1)(i) of this section, if the local governing authority specifically designates the one thousand foot perimeter.

(3) It is not a defense to a prosecution for a violation of this section or any other prosecution under this chapter that persons under the age of eighteen were not present in the school, the school bus, the public park, the public housing project designated

by a local governing authority as a drug-free zone, or the public transit vehicle, or at the school bus route stop, the public transit vehicle stop shelter, at a civic center designated as a drug-free zone by the local governing authority, or within one thousand feet of the perimeter of a facility designated under subsection (1)(i) of this section, if the local governing authority specifically designates the one thousand foot perimeter at the time of the offense or that school was not in session.

(4) It is an affirmative defense to a prosecution for a violation of this section that the prohibited conduct took place entirely within a private residence, that no person under eighteen years of age or younger was present in such private residence at any time during the commission of the offense, and that the prohibited conduct did not involve delivering, manufacturing, selling, or possessing with the intent to manufacture, sell, or deliver any controlled substance in RCW 69.50.401 for profit. The affirmative defense established in this section shall be proved by the defendant by a preponderance of the evidence. This section shall not be construed to establish an affirmative defense with respect to a prosecution for an offense defined in any other section of this chapter.

(5) In a prosecution under this section, a map produced or reproduced by any municipality, school district, county, transit authority engineer, or public housing authority for the purpose of depicting the location and boundaries of the area on or within one thousand feet of any property used for a school, school bus route stop, public park, public housing project designated by a local governing authority as a drug-free zone, public transit vehicle stop shelter, or a civic center designated as a drug-free zone by a local governing authority, or a true copy of such a map, shall under proper authentication, be admissible and shall constitute prima facie evidence of the location and boundaries of those areas if the governing body of the municipality, school district, county, or transit authority has adopted a resolution or ordinance approving the map as the official location and record of the location and boundaries of the area on or within one thousand feet of the school, school bus route stop, public park, public housing project designated by a local governing authority as a drug-free zone, public transit vehicle stop shelter, or civic center designated as a drug-free zone by a local governing authority. Any map approved under this section or a true

copy of the map shall be filed with the clerk of the municipality or county, and shall be maintained as an official record of the municipality or county. This section shall not be construed as precluding the prosecution from introducing or relying upon any other evidence or testimony to establish any element of the offense. This section shall not be construed as precluding the use or admissibility of any map or diagram other than the one which has been approved by the governing body of a municipality, school district, county, transit authority, or public housing authority if the map or diagram is otherwise admissible under court rule.

(6) As used in this section the following terms have the meanings indicated unless the context clearly requires otherwise:

(a) "School" has the meaning under RCW 28A.150.010 or 28A.150.020. The term "school" also includes a private school approved under RCW 28A.195.010;

(b) "School bus" means a school bus as defined by the superintendent of public instruction by rule which is owned and operated by any school district and all school buses which are privately owned and operated under contract or otherwise with any school district in the state for the transportation of students. The term does not include buses operated by common carriers in the urban transportation of students such as transportation of students through a municipal transportation system;

(c) "School bus route stop" means a school bus stop as designated by a school district;

(d) "Public park" means land, including any facilities or improvements on the land, that is operated as a park by the state or a local government;

(e) "Public transit vehicle" means any motor vehicle, street car, train, trolley vehicle, or any other device, vessel, or vehicle which is owned or operated by a transit authority and which is used for the purpose of carrying passengers on a regular schedule;

(f) "Transit authority" means a city, county, or state transportation system, transportation authority, public transportation

benefit area, public transit authority, or metropolitan municipal corporation within the state that operates public transit vehicles;

(g) "Stop shelter" means a passenger shelter designated by a transit authority;

(h) "Civic center" means a publicly owned or publicly operated place or facility used for recreational, educational, or cultural activities;

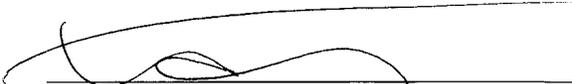
(i) "Public housing project" means the same as "housing project" as defined in RCW 35.82.020.

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And that said envelope contained the following:

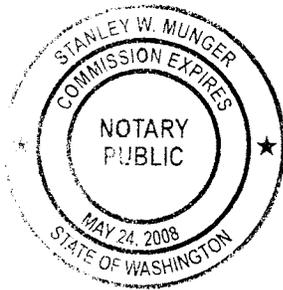
- (1) APPELLANT'S BRIEF
- (2) AFFIDAVIT OF MAILING

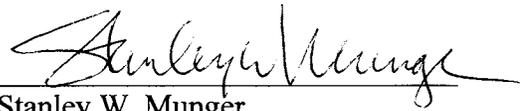
Dated this 26th day of December 2006



LISA E. TABBUT, WSBA #21344
Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 26th day of December 2006.





Stanley W. Munger
Notary Public in and for the
State of Washington
Residing at: Longview, WA 98632
My commission expires: 05/24/08

AFFIDAVIT OF MAILING - 2 -

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