

Original

NO. 35768-2-II  
Clark County No. 05-1-02777-1

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**RYAN DOUGLAS GARMAN**

**Appellant.**

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**BRIEF OF APPELLANT**

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ANNE CRUSER/WSBA #27944  
Attorney for Appellant

P. O. Box 1670  
Kalama, WA 98625  
360 - 673-4941

PM 9/7/07

Cruser

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**A. ASSIGNMENTS OF ERROR**

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**BEYOND THE STATUTORY MAXIMUM OF 120  
MONTHS.**

**C. STATEMENT OF FACTS**

The Clark County Prosecuting Attorney charged Ryan Garman by Amended Information with one count of Possession of Marijuana with the Intent to Deliver (Count I); one count of Manufacturing of Marijuana (Count II); and one count of Possession of Stolen Property in the Third Degree (Count III). CP 32-33. Count I and Count II were alleged to have been committed within 1000 feet of a school bus route, and were alleged to have been committed by Mr. Garman while he was armed with a firearm. CP 32.

Mr. Garman filed a pre-trial motion to suppress evidence and to require the State to disclose the identity of the paid confidential informant. CP 3-10. Alternatively, Mr. Garman asked the court to conduct an in-camera hearing to determine whether the paid informant had information relevant or helpful to the defense or information that was essential to a fair determination of the defendant's guilt or innocence. CP 8, 10. Defense counsel argued that he believed, based on the assertion in the affidavit for the search warrant that the confidential informant was a paid informant, that perhaps an agency relationship existed between the informant and the police. CP 28, I RP 4-17.

Defense counsel also argued that his client believed a woman by the name of Marta Gibson was the paid informant and that if she was, the assertion in the affidavit that she was an invited guest was false. CP 9. The State argued that the statement in the affidavit that “The informant’s motivation for supplying this information is for monetary gain” did not actually mean what it said, that the CI was not a paid informant, and that defense counsel was “mischaracterizing,” “misreading,” and “misinterpreting” the words in the affidavit. I RP 21.

The court denied the motion to suppress, denied the motion to disclose the identity of the informant, and refused to hold an in-camera hearing before denying the request. I RP 31. The Court entered findings of fact and conclusions of law on the motion. CP 106-108. Pertaining to the issue of disclosure of the identity of the confidential informant, the court entered the following findings of fact and conclusions of law:

Finding of Fact #6: “The informants [sic] motivation for supplying this information was ‘monetary gain.’” CP 107.

Finding of Fact #7: “The police had been contacted by the informant within a 72 hour period of the issuing of the search warrant.” CP 107.

Conclusion of Law #2: “The affidavit states the informant contacted the police. This is sufficient evidence the informant is not on

the payroll of the police. The fact, the affidavit states he is motivated by 'monetary gain' does not in and of itself establish the informant was an agent of the police." CP 107.

Conclusion of Law #6: "There is insufficient evidence the informant is acting as a police agent. The affidavit the informant is doing the activity for monetary gain is insufficient because of the inference he could contact the police on his own with information and they pay him as distinguished from the police having him on the payroll and asking him to find drug houses." CP 108.

Conclusion of Law #7: "Defendant's Motion for Disclosure of Informant or an In-camera Review is denied at this time." CP 108.

Mr. Garman assigns error to conclusions of law two, six, and seven.

Trial commenced on Counts I and II on November 15<sup>th</sup>, 2006. V RP. Officer Boyles of the Camas Police Department testified about the search warrant he served on Mr. Garman's residence in December 2005. V RP 160. He testified that he spoke to Mr. Garman and Mr. Garman admitted that he had marijuana stored in a Dewalt tool case in the family room, which came from a marijuana grow that he stumbled upon while riding dirt bikes in the mountains. V RP 177. Mr. Garman indicated he took all twelve plants he found and brought them back with him. V RP

178. Mr. Garman was also questioned about some hashish that was found in the kitchen, which he allegedly replied he made himself. V RP 178. Mr. Garman denied that he ever sold marijuana but stated he has two or three friends that come over regularly and that he shares marijuana with them. V RP 178. He testified the warrant team found 1173.4 grams of marijuana, 26.7 grams of hashish, and five firearms. V RP 178.

Officer Ryan Davis was part of the warrant team as well. He testified about the items he found during the search: Some drug paraphernalia in the master bedroom closet; a marijuana pipe in a Samsonite case within a dresser drawer in the garage; a .22 caliber Marlin rifle located behind the seat in a car in the driveway; a .32 caliber pistol with magazines in a case on the top drawer of a dresser in the garage; a marijuana joint in the pickup truck in the driveway; a small scale inside of a pouch in the master bedroom closet. VI-A RP 285-309. When the officers made entry into the home Mr. Garman was naked in his bathroom taking a bath. VI-A RP 310.

Officer Smith was the evidence processor for this warrant. VI-A RP 339. He testified that a bag of marijuana was found in the Dewalt case in the living room, a bag of marijuana was found in a cardboard box in the garage, a bag was found in a blue cooler in the garage, a bag was found in an old coffee pot in the garage, and another bag was found in a red trash

can in the garage. VI-A RP 384, 388, 389, 390, 392, 393. Smith testified that a Remington 12-gauge shotgun was found in Mr. Garman's family room; a Marlin .22 rifle was found on the east side of the garage near an entrance door to the house. VI-A RP 396-97. A plastic container with a red top containing hashish was found in the kitchen. VI-A RP 402. An ammo box was found on the garage floor. VI-A RP 352, 410.

Specifically regarding the guns, an unloaded Remington 12 gauge shotgun, admitted as Exhibit 1, was found in the living room; an unloaded Marlin .22 rifle, admitted as exhibit 2, was found in the garage near the entry way to the house; an unloaded Marlin .22 rifle, admitted as exhibit 3, was found in the car in the driveway behind the seat; a dismantled and unloaded Rossi shotgun, admitted as exhibit 5, was found on top of the television in the family room, and a .32 pistol was found in the garage on top of a dresser, with a loaded magazine inside the gun but without a round in the chamber. VI-A RP 285-86, 306-308, 311-312, 321-25, 327-33, 344-47, 394-401.

The officers did not find a grow operation of any kind, nor did they find any equipment that might be used to manufacture hashish. VI-A RP 412.

The jury returned verdicts of guilty on both counts I and II. CP 84, 85. As to Count I, the jury returned special verdicts finding that the

offense was committed within 1000 feet of a school bus route and that Mr. Garman was armed with a firearm. CP 86, 87. As to Count II, the jury returned special verdicts finding that the offense was committed within 1000 feet of a school bus route but that Mr. Garman was not armed with a firearm during the commission of the offense. CP 88, 89.

Mr. Garman had no prior felony criminal history and his presumptive sentencing range on both Counts I and II was zero to six months. CP 91, IX RP 609-612. As to Count I, the jury's finding that the offense was committed within 1000 feet of a school bus stop route added 24 months to this range, and it also made the offense, which is a Class C felony, subject to doubling of the maximum penalty under RCW 69.50.435 (1) (c). IX RP 609-612. At the same time, the jury's finding that the offense in Count I was committed while Mr. Garman was armed with a firearm changed the offense from a seriousness level I to a seriousness level III, changing the presumptive sentencing range, without enhancements, from zero to six months to 51 to 68 months. CP 92, IX RP 609-612. Last, because the maximum penalty for this offense had been doubled from 5 years and \$10,000 to 10 years and \$20,000, the firearm enhancement doubled from 18 months to 36 months. CP 92, IX RP 609-612. So Mr. Garman, with no prior felony offenses, was now facing a standard range from 111 months to 120 months. CP 92.

As to Count II, Mr. Garman's sentencing range, with the school bus stop route enhancement, was 24 to 30 months. CP 92. Mr. Garman was sentenced to 111 months on Count I, as well as 9 to 12 months of community custody. CP 95-96. The top of the community custody range, 12 months, causes Mr. Garman's sentence on Count I to exceed the statutory maximum penalty for this offense by three months.

**D. ARGUMENT**

**I. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE JURY'S FINDING THAT MR. GARMAN WAS ARMED WITH A FIREARM DURING THE COMMISSION OF THE OFFENSE IN COUNT I.**

Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88

Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Thereoff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Enhancements not supported by sufficient evidence must be stricken. *State v. Valdobinos*, 122 Wn.2d 270, 282-84, 858 P.2d 199 (1993). In this case, the Court should strike the firearm enhancement because there was insufficient evidence to support it.

Mr. Garman was accused of being armed with any one of five firearms while committing the offense in Count I. Four of these guns were unloaded, and at least one of these four unloaded guns was actually dismantled. The ammunition was tucked away in a metal ammunition can on the floor of the garage. The only loaded gun was a pistol found in the garage on top of a dresser, yet there was no round in the chamber.

The State argued in its closing argument that Mr. Garman was armed with these guns, while naked in the bathtub and nowhere near them, because two of the guns were found in the garage near a large amount of the marijuana and Mr. Garman was, thus, protecting his stash by leaving the guns near it. When one pictures the lengths Mr. Garman would have had to go to in order to arm himself in the face of marauding drug dealers looking to steal his stash while naked in the bathtub, the prosecutor's

argument would be amusing but for the fact that it compelled a verdict which netted Mr. Garman ten years in prison for marijuana offenses without any prior criminal history.<sup>1</sup>

First, he would have had to get out of the tub and presumably dry off somewhat to avoid breaking his neck slipping on the floor; next, he would have presumably gone looking for the nearest gun but the only non-dismantled gun inside the house was an unloaded shotgun for which he would have had to go to the garage and rummage through an ammunition can (which contained a plethora of different types of ammunition) looking for the correct shells, loaded the gun and taken aim. Alternatively, the State would say that he could streak directly to the garage and go for the pistol, but he would still need to chamber a round before anything could be done with it.

The Supreme Court has stated that the question of whether one is armed with a firearm is a mixed question of law and fact. *State v. Schelin*, 147 Wn.2d 562, 565, 55 P.3d 632, *State v. Mills*, 80 Wn.App. 231, 234-35, 907 P.2d 316 (1995). Because enhancing the punishment for those

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<sup>1</sup> It is interesting to note that these “protecting the stash” arguments are aimed at protecting would-be home invading drug thieves from the threat of deadly force in response to their attempted thievery. In every other context in Washington, a would-be burglar assumes the risk of deadly force when he enters the home of another with the intent to steal. “Protecting the stash” arguments give burglars who invade homes for the purpose of stealing drugs, rather than VCRs, a special protection under the law. One must wonder if the legislature intended special protections for this class of burglar.

convicted of drug offenses while merely possessing firearms would create obvious equal protection problems, the Supreme Court has held that the firearms must be easily accessible and readily available for either offensive or defensive purposes, and there must be a nexus between the defendant and the gun, as well as between the gun and the crime. *State v. Valdobinos* at 282; *State v. Schelin*, 147 Wn.2d 562, 55 P.3d 632 (2002).

To prove someone is armed with a firearm for an offense, there must be proof of more than just the presence of a gun in a home where there is illegal activity, especially if the gun is unloaded. *State v. Johnson*, 94 Wn.App. 882, 895-96, 974 P.2d 855 (1999, *review denied*, 139 Wn.2d 1028 (2000)). And a person is not “armed” for a drug offense simply because a weapon is found in a house where drugs were found, even if the drugs were found next to the gun in a bag under the bed, where the gun was unloaded. *Valdobinos* at 282; *State v. Call*, 75 Wn.App. 866, 869, 880 P.2d 571 (1994). The Supreme Court has repeatedly warned against upholding imposition of a firearm enhancement where there is insufficient evidence of any relationship between a gun and a crime. *State v. Willis*, 153 Wn.2d 366, 372, 103 P.3d 1218 (2005); *State v. Gurske*, 155 Wn.2d 134, 118 P.3d 333 (2005).

Thus, where a defendant had a marijuana grow operation in his home, he was not deemed armed for purposes of that operation simply

because one loaded and two unloaded guns were found in the house. *Call* at 867-69. The defendant clearly had “constructive possession” of the guns, because there were papers indicating his dominion and control over the area in which they were found. However, the guns were not “readily available and easily accessible” for use in the crime when two of them were unloaded and in a dresser drawer and the unloaded one was in a toolbox at the foot of the bed. Despite the fact that the marijuana was clearly being manufactured in the home, the Court held, the defendant was not “armed” for the purposes of the manufacturing. *Call* at 867. As Justice Sanders summarized in his *Schelin* dissent, the *Call* case stands for the proposition that the “State must show more than *potential* to use a firearm to justify a deadly weapon sentence enhancement.” *Schelin* at 583 (Sanders, J., dissenting); *Call* at 868-69.

In his dissent in the recent case of *State v. O’Neal*, Justice Sanders reiterated the following principles:

“Simply constructively possessing a weapon on the premises sometime during the entire period of illegal activity is not enough to establish a nexus between the crime and the weapon.” Otherwise, “courts run the risk of punishing a defendant under the deadly weapon enhancement for having a weapon unrelated to the crime.” “If an assault with a beer bottle occurs in a kitchen, a defendant is not necessarily ‘armed’ with a deadly weapon because knives are kept in the kitchen.” And a defendant who manufactures drugs in a building is not necessarily “armed” with a deadly weapon merely because there are firearms in the building.

*State v. O'Neal*, 159 Wn.2d 500, 508, 150 P.3d 1121 (2007) (Sanders, J. dissenting). Applying these principles to Mr. Garman's case, it is clear that he was in "constructive possession" of the firearms in question. However, no firearm was readily accessible to him or readily available for offensive or defensive purposes. He was naked in the bathtub with only two guns in the house with him, one of which was unloaded and the other of which was both unloaded and dismantled. There were two guns in the garage, one of which was unloaded and the other of which had a magazine in the gun but no round in the chamber. The ammunition for the unloaded guns was thrown all together in a metal can on the garage floor. This was hardly a sophisticated example of a dealer protecting his "stash." If Mr. Garman was attempting to protect his stash, his efforts at doing so were laughable and one would think he would, first and foremost, load his guns and, second, keep a loaded gun somewhere near his person.

The evidence is insufficient to sustain the jury's finding that Mr. Garman was loaded with a firearm during the commission of Count I and the enhancement should be stricken.

**II. THE TRIAL COURT ERRED FAILING TO HOLD AN IN-CAMERA HEARING ON WHETHER THE IDENTITY OF THE INFORMANT SHOULD BE DISCLOSED.**

The “informer’s privilege,” as it is usually called, is actually the State’s privilege to withhold from disclosure the identity of persons who furnish information of violations of law to law enforcement officers. *Rovario v. United States*, 353 U.S. 53, 59, 77 S.Ct. 623 (1957); *State v. Casal*, 103 Wn.2d 812, 699 P.2d 1234 (1985). The privilege is codified in Washington by statute, RCW 5.60.060 (5), and by court rule. CrR 4.7 (f) (2) provides that “[d]isclosure of an informant’s identity shall not be required where the informant’s identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant.” *State v. Thetford*, 109 Wn.2d 392, 395-96, 745 P.2d 496 (1987).

The privilege is not absolute, however. The court must balance the public interest in the free flow of information for law enforcement purposes against the accused’s right to prepare his or her defense. *Rovario* at 62. If disclosure of an informer’s identity “is relevant and helpful to the defense...or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure.” *Rovario* at 60-61; *State v. Petrina*, 73 Wn.App. 779, 871 P.2d 637 (1994); *State v. Harris*, 91 Wn.2d 145, 151, 588 P.2d 720 (1978). Failure to compel disclosure under these circumstances will deprive the defendant of a fair trial. *Harris* at 149; *Thetford* at 396.

In *State v. Cleppe*, 96 Wn.2d 373, 381, 635 P.2d 435 (1981), prior to trial, Cleppe moved for disclosure of the identities of an informant. A separate hearing was held before a judge other than the one who presided at Cleppe's trial. Since constructive possession would be a vital issue at trial, Cleppe sought the informant's identity with a view to obtaining testimony that would bear on the issue of ownership of the drugs. The basis for this request was the probable cause affidavit, according to which informant B claimed to have observed within the last 24 hours in the 19<sup>th</sup> Avenue house Cleppe's girlfriend use heroin, and heard her state that additional heroin belonged to her and that "they" had cocaine for sale. There was evidence that the 19<sup>th</sup> Avenue house was occupied by more than one person, both Cleppe and his girlfriend. There was also evidence that Cleppe rented the house to his girlfriend and that he lived elsewhere. *Cleppe* at 382.

The Supreme Court held that Cleppe's case was appropriate for an in-camera hearing. Informant B told the affiant he had (1) been in the 19<sup>th</sup> Avenue house, (2) observed Cleppe's girlfriend use heroin, (3) observed an additional quantity of heroin which the girlfriend said belonged to her, and (4) she had said "they" had cocaine for sale. The Court reversed the Court of Appeals and remanded for a hearing, holding that should the in-camera hearing reveal that the informant's testimony "would be relevant

or helpful to Cleppe's defense and is required for a fair trial" then a new trial would be ordered on the affected counts. *Cleppe* at 383. This hearing was necessary because:

Informant B may have been able to testify regarding whether the nature of the girlfriend's possession of the drugs was exclusive. His testimony could possibly aid in negating the State's case of constructive possession by Cleppe. Therefore, Cleppe has made a showing of relevancy, and such disclosure as he seeks may be necessary for a fair trial, necessitating a *Rovario* type hearing in his case.

*Cleppe* at 382-83.

Here, knowing the identity of the informant would have relevant to the question of whether the informant was acting as an agent of the police. That, in turn, would bear upon the question of the lawfulness of his/her entry into Mr. Garman's house. The affidavit clearly states that the informant was acting as an informant for the purpose of "monetary gain." When defense counsel interpreted this statement in the only reasonable way that it could be interpreted, which is that the informant was a paid informant, the prosecutor accused defense counsel of misreading, misinterpreting, and *mischaracterizing* the affidavit. These accusations were both strong and absurd. The affidavit stated that the informant was acting in the interest of monetary gain, and the prosecutor's argument to the court was dismissive and disingenuous.

In the very least, the court should have held an in camera hearing to determine the extent to which the informant was a paid informant acting at the behest of the police department, and whether that relationship rose to the level of an agency relationship. Division I of the Court of Appeals noted the difficulty with the circularity of a test which requires an initial showing that the informant may have evidence that would be relevant to a defendant's innocence when the informant remains unknown to the defendant. *State v. Frederick*, 45 Wn.App. 916, 920, 729 P.2d 56 (1986).

The Court stated:

[T]he court should consider the difficulty of explaining in a vacuum why the testimony is crucial and resolve doubt in favor of holding the hearing.

*Frederick* at 920, citing *Cleppe* at 382.

The court erred in concluding, as a matter of law, that the fact that the informant contacted the police defeated any suggestion that the informant was an agent of the police. (Conclusion of Law #2). The court also erred in concluding, as a matter of law, that an agency relationship can only be found where it is established that the informant is on the "payroll" of the police. (Conclusion of Law #2). Mr. Garman is entitled to know for certain whether the informant was acting as an agent of the Camas Police Department so that he can fully develop any issue which might require suppression of the evidence against him. This Court should

remand this case for an in camera hearing to determine whether the paid informant was acting as an agent of the police.

**III. MR. GARMAN'S JUDGMENT AND SENTENCE MUST BE AMENDED TO SPECIFY THAT IN NO EVENT CAN HE BE ORDERED TO REMAIN ON COMMUNITY CUSTODY BEYOND THE STATUTORY MAXIMUM OF 120 MONTHS.**

Mr. Garman was sentenced to 111 months on count I, and was also given a community custody term of 9 to 12 months on count I. CP 95, 96. The maximum term of community custody, when combined with the sentence of 111 months, therefore exceeds the statutory maximum penalty of 120 months by three months. *State v. Sloan*, 121 Wn.App. 220, 221, 87 P.3d 1214 (2004). In *Sloan*, Division I addressed the problem presented where a defendant is sentenced to a term of community custody which, if served in the manner specified by the judgment and sentence, would exceed the statutory maximum penalty. The court noted that because of the possibility of earned early release credits, it cannot be known until a defendant is released how much time remains available for community custody.

In acknowledging, albeit reluctantly, that some community corrections officers might interpret a judgment and sentence literally and not appreciate that an offender cannot be subjected to the conditions of community custody beyond the statutory maximum that an offender can

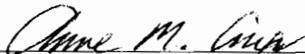
be incarcerated for a crime, the court fashioned the following rule: “To avoid confusion, therefore, when a court imposes community custody that could theoretically exceed the statutory maximum sentence for that offense, the court should set forth the maximum sentence and state that the total of incarceration and community custody cannot exceed that maximum.” *Sloan* at 223-24.

Mr. Garman contends, and expects the State will concede, that no such clarifying statement appears anywhere on Mr. Garman’s judgment and sentence. CP 95-108. To avoid the inevitable filing of a PRP (should this court affirm Mr. Garman’s conviction and sentence), Mr. Garman’s judgment and sentence should be amended to include language directing the Department of Corrections to release Mr. Miller from community custody at the expiration of 120 months.

**E. CONCLUSION**

The firearm enhancement on count I should be stricken. This case should be remanded for an in-camera hearing to determine whether the identity of the informant should be disclosed, and should be remanded so that the Judgment and Sentence can be amended to clarify the correct expiration of the term of community custody.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of September, 2007.

  
ANNE M. CRUSER, WSBA #27944  
Attorney for Mr. Garman

## APPENDIX

### 9.94A.602. Deadly weapon special verdict -- Definition

In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

### § 9.94A.533. Adjustments to standard sentences

(1) The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.

(2) For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the standard sentence range is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by seventy-five percent.

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of

confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Eighteen months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, all firearm enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(4);

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum

sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(4) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the deadly weapon enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a deadly weapon enhancement. If the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any deadly weapon enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Two years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) One year for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Six months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced under (a), (b), and/or (c) of this subsection for any deadly weapon enhancements and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (3)(a), (b), and/or (c) of this section, or both, all deadly weapon enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all deadly weapon enhancements under this section are mandatory, shall be served in

total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(4);

(f) The deadly weapon enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a deadly weapon enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(5) The following additional times shall be added to the standard sentence range if the offender or an accomplice committed the offense while in a county jail or state correctional facility and the offender is being sentenced for one of the crimes listed in this subsection. If the offender or an accomplice committed one of the crimes listed in this subsection while in a county jail or state correctional facility, and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section:

(a) Eighteen months for offenses committed under RCW 69.50.401(2) (a) or (b) or 69.50.410;

(b) Fifteen months for offenses committed under RCW 69.50.401(2) (c), (d), or (e);

(c) Twelve months for offenses committed under RCW 69.50.4013.

For the purposes of this subsection, all of the real property of a state correctional facility or county jail shall be deemed to be part of that facility or county jail.

(6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or

9.94A.605. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

(7) An additional two years shall be added to the standard sentence range for vehicular homicide committed while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502 for each prior offense as defined in RCW 46.61.5055.

(8) (a) The following additional times shall be added to the standard sentence range for felony crimes committed on or after July 1, 2006, if the offense was committed with sexual motivation, as that term is defined in RCW 9.94A.030. If the offender is being sentenced for more than one offense, the sexual motivation enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to a sexual motivation enhancement. If the offender committed the offense with sexual motivation and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(i) Two years for any felony defined under the law as a class A felony or with a statutory maximum sentence of at least twenty years, or both;

(ii) Eighteen months for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both;

(iii) One year for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both;

(iv) If the offender is being sentenced for any sexual motivation enhancements under (i), (ii), and/or (iii) of this subsection and the offender has previously been sentenced for any sexual motivation enhancements on or after July 1, 2006, under (i), (ii), and/or (iii) of this subsection, all sexual motivation enhancements under this subsection shall be twice the amount of the enhancement listed;

(b) Notwithstanding any other provision of law, all sexual motivation enhancements under this subsection are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other sexual motivation enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence

under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(4);

(c) The sexual motivation enhancements in this subsection apply to all felony crimes;

(d) If the standard sentence range under this subsection exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a sexual motivation enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced;

(e) The portion of the total confinement sentence which the offender must serve under this subsection shall be calculated before any earned early release time is credited to the offender;

(f) Nothing in this subsection prevents a sentencing court from imposing a sentence outside the standard sentence range pursuant to RCW 9.94A.535.

#### § 9.41.010. Terms defined

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Firearm" means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.

(2) "Pistol" means any firearm with a barrel less than sixteen inches in length, or is designed to be held and fired by the use of a single hand.

(3) "Rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned, made or remade, and intended to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

(4) "Short-barreled rifle" means a rifle having one or more barrels less than sixteen inches in length and any weapon made from a rifle by any means of modification if such modified weapon has an overall length of less than twenty-six inches.

(5) "Shotgun" means a weapon with one or more barrels, designed

or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned, made or remade, and intended to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

(6) "Short-barreled shotgun" means a shotgun having one or more barrels less than eighteen inches in length and any weapon made from a shotgun by any means of modification if such modified weapon has an overall length of less than twenty-six inches.

(7) "Machine gun" means any firearm known as a machine gun, mechanical rifle, submachine gun, or any other mechanism or instrument not requiring that the trigger be pressed for each shot and having a reservoir clip, disc, drum, belt, or other separable mechanical device for storing, carrying, or supplying ammunition which can be loaded into the firearm, mechanism, or instrument, and fired therefrom at the rate of five or more shots per second.

(8) "Antique firearm" means a firearm or replica of a firearm not designed or redesigned for using rim fire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898, including any matchlock, flintlock, percussion cap, or similar type of ignition system and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.

(9) "Loaded" means:

- (a) There is a cartridge in the chamber of the firearm;
- (b) Cartridges are in a clip that is locked in place in the firearm;
- (c) There is a cartridge in the cylinder of the firearm, if the firearm is a revolver;
- (d) There is a cartridge in the tube or magazine that is inserted in the action; or
- (e) There is a ball in the barrel and the firearm is capped or primed if the firearm is a muzzle loader.

(10) "Dealer" means a person engaged in the business of selling firearms at wholesale or retail who has, or is required to have, a federal firearms license under 18 U.S.C. Sec. 923(a). A person who does not have, and is not required to have, a federal firearms license

under 18 U.S.C. Sec. 923(a), is not a dealer if that person makes only occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or sells all or part of his or her personal collection of firearms.

(11) "Crime of violence" means:

(a) Any of the following felonies, as now existing or hereafter amended: Any felony defined under any law as a class A felony or an attempt to commit a class A felony, criminal solicitation of or criminal conspiracy to commit a class A felony, manslaughter in the first degree, manslaughter in the second degree, indecent liberties if committed by forcible compulsion, kidnapping in the second degree, arson in the second degree, assault in the second degree, assault of a child in the second degree, extortion in the first degree, burglary in the second degree, residential burglary, and robbery in the second degree;

(b) Any conviction for a felony offense in effect at any time prior to June 6, 1996, which is comparable to a felony classified as a crime of violence in (a) of this subsection; and

(c) Any federal or out-of-state conviction for an offense comparable to a felony classified as a crime of violence under (a) or (b) of this subsection.

(12) "Serious offense" means any of the following felonies or a felony attempt to commit any of the following felonies, as now existing or hereafter amended:

(a) Any crime of violence;

(b) Any felony violation of the uniform controlled substances act, chapter 69.50 RCW, that is classified as a class B felony or that has a maximum term of imprisonment of at least ten years;

(c) Child molestation in the second degree;

(d) Incest when committed against a child under age fourteen;

(e) Indecent liberties;

(f) Leading organized crime;

(g) Promoting prostitution in the first degree;

(h) Rape in the third degree;

(i) Drive-by shooting;

(j) Sexual exploitation;

(k) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner;

(l) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;

(m) Any other class B felony offense with a finding of sexual motivation, as "sexual motivation" is defined under RCW 9.94A.030;

(n) Any other felony with a deadly weapon verdict under RCW 9.94A.602; or

(o) Any felony offense in effect at any time prior to June 6, 1996, that is comparable to a serious offense, or any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a serious offense.

(13) "Law enforcement officer" includes a general authority Washington peace officer as defined in RCW 10.93.020, or a specially commissioned Washington peace officer as defined in RCW 10.93.020. "Law enforcement officer" also includes a limited authority Washington peace officer as defined in RCW 10.93.020 if such officer is duly authorized by his or her employer to carry a concealed pistol.

(14) "Felony" means any felony offense under the laws of this state or any federal or out-of-state offense comparable to a felony offense under the laws of this state.

(15) "Sell" refers to the actual approval of the delivery of a firearm in consideration of payment or promise of payment of a certain price in money.

(16) "Barrel length" means the distance from the bolt face of a closed action down the length of the axis of the bore to the crown of the muzzle, or in the case of a barrel with attachments to the end of any legal device permanently attached to the end of the muzzle.

(17) "Family or household member" means "family" or "household

member" as used in RCW 10.99.020.

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

STATE OF WASHINGTON, ) Court of Appeals No. 35768-2-II  
Respondent, ) Clark County No. 05-1-02777-1  
vs. ) AFFIDAVIT OF MAILING  
RYAN D. GARMAN, )  
Appellant. )

ANNE M. CRUSER, being sworn on oath, states that on the 7<sup>th</sup> day of September 2007, affiant placed a properly stamped envelope in the mails of the United States addressed to:

Arthur Curtis  
Clark County Prosecuting Attorney  
P.O. Box 5000  
Vancouver, WA 98666-5000

AND

David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

AND

Ryan D. Garman

**Anne M. Cruser**  
*Attorney at Law*  
P.O. Box 1670  
Kalama, WA 98625  
Telephone (360) 673-4941  
Facsimile (360) 673-4942  
anne-cruser@kalama.com

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DOC #302112  
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P.O. Box 2049  
Airway Heights, WA 99001

and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) RAP 10.10 (TO MR. GARMAN)
- (3) AFFIDAVIT OF MAILING

Dated this 7<sup>th</sup> day of September 2007,

  
 ANNE M. CRUSER, WSBA #27944  
 Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: September 7<sup>th</sup>, 2007, Kalama, WA

Signature: Anne M. Cruser