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DIVISION II

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STATE OF WASHINGTON
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No. 38133-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jacob Yaden, Jr.

Appellant.

Clallam County Superior Court Cause No. 04-1-00348-1

The Honorable Judges George L. Wood, S. Brooke Taylor, Kenneth

Williams, and Commissioner Brian Coughenour

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Yaden was denied his right to a speedy trial under CrR 3.3.
2. The trial court erred by refusing to dismiss the case pursuant to CrR 3.3(h).
3. Mr. Yaden was denied his constitutional right to a speedy trial under Wash. Const. Article I, Section 22.
4. Mr. Yaden was denied his constitutional right to a speedy trial under the Sixth Amendment.
5. The trial court violated Mr. Yaden's constitutional right to a speedy trial by appointing an attorney who was unable or unwilling to prepare for trial over the course of three years.
6. Mr. Yaden was denied his constitutional right to the effective assistance of counsel under the Sixth Amendment.
7. Defense counsel was ineffective for proposing an erroneous instruction that shifted the burden of proof.
8. The trial court erred by giving Instruction No. 13, which reads as follows:

A person is not guilty of possession of a substance if the possession is unwitting. Possession of a substance is unwitting if a person did not know that the substance was in his possession. The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly.

Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

Instruction No. 13, Supp. CP

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. CrR 3.3 requires the court to bring an out-of-custody defendant to trial within 90 days of the "commencement date" or within 30 days of an "excluded period," whichever is later. The trial court did not hold trial as scheduled, and forgot to set a new trial date.

Did the failure to bring Mr. Yaden to trial within his speedy trial period require dismissal under CrR 3.3(h)?

2. The state and federal constitutions guarantee an accused person the right to a speedy trial. Mr. Yaden's trial was unreasonably delayed by the government's appointment of a defense attorney who was unable or unwilling to prepare for trial in more than three years, by the subsequent transfer of his case to other attorneys, and by the court's failure to set a new trial date after his last hearing. Did the government violate Mr. Yaden's constitutional right to trial under the Sixth Amendment and Wash. Const. Article I, Section 22?

3. To obtain a conviction, the state was required to prove that Mr. Yaden possessed pseudoephedrine with the intent to manufacture methamphetamine. Defense counsel erroneously proposed an instruction requiring Mr. Yaden to prove unwitting possession by a preponderance of the evidence. Was Mr. Yaden denied his Sixth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The state charged Jacob Yaden, Jr. with Possession of Pseudoephedrine with Intent to Manufacture Methamphetamine on August 17, 2004. Information, Supp. CP. Mr. Yaden appeared in court that same day and the court appointed a public defender to represent him. The assigned attorney was Ralph Anderson. RP (8/27/04) 3. Mr. Yaden posted bail and was released from jail. RP (8/17/04) 5. On August 27, 2004, with Mr. Yaden present, trial was scheduled for October 13, 2004. RP (8/27/04) 5.

Over the course of the next three years, Mr. Anderson requested numerous continuances. On September 17, 2004, he asked that the trial date be reset, and it was. RP (9/17/04) Clerk's Minutes.¹ Appearing December 13, 2004, Mr. Anderson again moved to reset the trial date. The parties agreed that they would not actually expect to go to trial on the reset date. RP (12/13/04) 5-6. The court reset the date to February 14, 2005 and calculated a new speedy trial expiration date. RP (12/13/04) 3-7.

¹ The Verbatim Report of Proceedings in this case includes several hearings for which no recording was made and no transcript is available. For those dates, the Clerk's Minutes have been provided by the Court Reporter. They are designated "RP (date) Clerk's Minutes." In addition, there were many continuances that were not ordered by Appellant, which may or may not have been done on the record. For those dates, the Clerk's Minutes have been designated in the Appellant's Supplemental Designation of Clerk's Papers.

On February 14, 2005, Mr. Anderson told the court that he intended to file a suppression motion, and that the case would need to be reset. RP (2/14/05) 5-6. The court reset the trial date to May 16, 2005, and calculated a new speedy trial expiration date. Mr. Yaden agreed to the new date and expiration date. RP (2/14/05) 8.

On April 14, 2005, the parties appeared for a status hearing, which was reset for two weeks at Mr. Anderson's request. RP (4/14/05) 9-10. At that next hearing, another attorney from Mr. Anderson's office asked that the case be reset for one week, and it was. RP (4/28/05) 13. When the parties appeared in court on May 5, 2005, Mr. Anderson told the court he would file a suppression motion and asked that all dates be reset. RP (5/5/05) 16-18. The court reset the trial date to July 25, 2005. RP (5/5/05) 16-18.

At a status hearing June 2, 2005, Mr. Anderson requested and received a two-week set over. RP (6/2/05) 21. On June 16, 2005, the case was reset another week. RP (6/16/05) 2. On June 23, 2005, Mr. Anderson requested the status hearing be reset until July 7, 2005. The court reset the hearing. Clerk's Minutes 6/23/05, Supp. CP.

On July 7, 2005, Mr. Anderson told the court that he would file a suppression motion and asked that the trial be reset. RP (7/7/05) Clerk's

Minutes. According to the clerk's minutes, the court did this "by agreement." RP (7/7/05) Clerk's Minutes.

On July 28, 2005, another attorney from Mr. Anderson's office covered the hearing in Mr. Anderson's absence. The court noted that the case had already gone past its scheduled trial date, and that the deadline for Mr. Anderson to file his suppression motion had passed. RP (7/28/05) 2. Mr. Yaden told the court that he did not wish to waive "anything." RP (7/28/05) 2. The court noted that Mr. Anderson was ill and reset the status hearing, but did not set a new trial date. RP (7/28/05) 3.

At a hearing on August 4, 2005, Mr. Anderson again requested the case be reset, and a new trial date was set for November 28, 2005. RP (8/4/05) Clerk's Minutes. On August 18, 2005, the status hearing was reset by agreement. RP (8/18/05) Clerk's Minutes. On September 1, 2005, Mr. Anderson told the court that he would be filing a suppression motion, and the status hearing was reset. Clerk's Minutes 9/1/05, Supp. CP. The same occurred on September 15, 2005. Clerk's Minutes 9/15/05, Supp. CP.

At the trial date of November 28, 2005, Mr. Yaden appeared late and the trial date was reset to February 6, 2006. Clerk's Minutes 11/28/05, Supp. CP. At the trial date of February 6, 2006, trial was reset to April 19, 2006, with Mr. Yaden appearing by phone. Clerk's Minutes

2/6/06, Supp. CP. At the trial date of April 19, 2006, the trial date was reset to July 17, 2006. Clerk's Minutes 4/19/06, Supp. CP. On May 4, 2006, Mr. Anderson told the court he would file a suppression motion and the status hearing was reset. Clerk's Minutes 5/4/06, Supp. CP.

Another attorney from Mr. Anderson's office assisted Mr. Yaden at the status hearing held on May 18, 2006, and provided the court with the citation to the case that Mr. Anderson would rely on for his suppression motion. RP (5/18/06) 25. The court set a review hearing on June 15, 2006, but neither Mr. Anderson nor Mr. Yaden appeared, and the hearing was stricken. The case was set for another hearing the following week. Clerk's Minutes 6/15/06, Supp. CP. At that time, the parties set a suppression hearing for July 13, 2006, even though Mr. Anderson had yet to file a suppression motion. Clerk's Minutes 6/22/06, Supp. CP.

On July 13, 2006, Mr. Anderson requested that the hearing be continued as he had just received the 911 recording and the state's brief. The court set the trial date to September 18, 2006, and the suppression hearing for August 17, 2006. Clerk's Minutes 7/13/06, Supp. CP. On August 17, 2006, the court reset the hearing to September 14, 2006. Clerk's Minutes 8/17/06, Supp. CP. On that date, the court reset the hearing to October 12, 2006. Clerk's Minutes 9/14/06, Supp. CP. On October 12, the court reset the hearing to November 9, 2006, with a new

trial date of December 11, 2006. Clerk's Minutes 10/12/06, Supp. CP. On November 9, the court struck the hearing without resetting it. Clerk's Minutes 11/9/06, Supp. CP.

In court on December 11, 2006, a new trial date of February 20, 2007 was set, with the suppression hearing to be noted up by Mr. Anderson. Clerk's Minutes 12/11/06, Supp. CP. At that trial date, another attorney from Mr. Anderson's office told the court that there might be a suppression hearing on the case, and a new trial date was set. Clerk's Minutes 2/20/07, Supp. CP. On March 29, 2007, the court set a suppression hearing for April 19, 2007. Clerk's Minutes, 3/29/07, Supp. CP. At the April 19 hearing, the court reset the hearing to the morning of trial at Mr. Anderson's request. Clerk's Minutes 4/19/07, Supp. CP.

At the reset hearing on May 2, 2007, Mr. Anderson told the court that he was prepared to write a brief on the suppression issue but had not yet done so, and the suppression hearing was reset. Clerk's Minutes 5/2/07, Supp. CP. On May 11, 2007, the trial was reset to June 1, 2007. Clerk's Minutes 5/11/07, Supp. CP. At a hearing on May 25, 2007, the court set a new trial date of July 11, 2007, and a suppression hearing for June 28, 2007. Clerk's Minutes 5/25/07, Supp. CP. At a hearing on June 28, 2007, the court reset the trial date to September 25, 2007 and set a

suppression hearing for September 13, 2007. Clerk's Minutes 6/28/07, Supp. CP.

On September 13, 2007, another attorney from Mr. Anderson's office asked the court to reset the suppression hearing, and the court assented. The court struck the trial date but did not set a new one. Clerk's Minutes 9/13/07, Supp. CP.

On September 25, 2007, Mr. Yaden was in custody in a different county and did not appear in court. The court issued a warrant. Clerk's Minutes 9/25/07, Supp. CP. Mr. Yaden quashed the warrant on October 4, 2007, and the court set a trial date of November 20, 2007. Apparently, the court had issued a Memorandum Opinion regarding suppression issues on May 17, 2007. Memorandum Opinion filed 5/17/07, Supp. CP. When the court pointed this out at the October 4 hearing, neither attorney was previously aware of the court's ruling.² Clerk's Minutes 10/4/07, Supp. CP. At the hearing on November 1, 2007, Mr. Anderson told the court he had just received the court's Memorandum Opinion, and the suppression hearing was to be reset. Clerk's Minutes 11/1/07, Supp. CP.

² This Memorandum Opinion reflected that the court heard arguments on the suppression issue on May 10, 2007. According to court records, no hearing took place on that date. Nor is there any indication that the court heard argument on the suppression issue on any other date prior to issuance of the Memorandum Opinion.

On November 20, 2007, another attorney appeared with Mr. Yaden. He had taken over the case from Mr. Anderson, and asked that the trial and suppression hearing be reset. The court did not set a new trial date at that time. Clerk's Minutes 11/20/07, Supp. CP. At the next hearing, on November 30, 2007, the court set a new suppression hearing date, and a trial date of February 12, 2008. Clerk's Minutes 11/30/07, Supp. CP.

On January 17, 2008, the court reset the suppression hearing, but did not set a new trial date. Clerk's Minutes 1/17/08, Supp. CP. Mr. Yaden appeared for the suppression hearing with yet another attorney from the public defender's office³ on February 7, 2008. RP (2/7/08) 29-30. Mr. Yaden was upset that he had not yet had time to meet with his new attorney, and asked that the hearing be reset. RP (2/7/08) 29-30. The court denied his request, and started the suppression hearing. RP (2/7/08) 30, 32. The hearing was completed on February 21, 2008. RP (2/21/08) 5-19. On April 2, 2008, the court issued a written opinion denying the request to suppress. Memorandum Opinion filed 4/2/08, Supp. CP.

³ This was the third attorney assigned to the case, although other attorneys had appeared to cover hearings for Mr. Anderson.

The case was not called for trial on its scheduled February 12 trial date, and the court did not set a new trial date. The next time the case in court was May 2, 2008, on the prosecutor's motion to set a trial date. Mr. Yaden moved to dismiss the case for violation of his right to a speedy trial. RP (5/2/08) 88. The court didn't rule on the motion, but asked the parties if they could start the trial that day. The defense moved to exclude witnesses, and the motion was granted. The court then scheduled the remainder of the trial for May 27, 2008. RP (5/2/08) 89-98.

The defense filed a Motion to Dismiss for violation of the speedy trial rule, and the state responded. Motion to Dismiss filed 5/7/08, Opposition to Defense Motion filed 5/12/08, Supp. CP. On May 22, 2008, the prosecution indicated that one of its witnesses would not be available for trial as set, and the court reset the trial to June 30, 2008. Clerk's Minutes 5/22/08, Supp. CP. At a hearing on June 12, 2008, the court denied Mr. Yaden's motion to dismiss for violation of the speedy trial rule. RP (6/12/08) 101-106. The court blamed the defense for allowing the case to languish for three years and noted that defense counsel had requested continuances without objection from the defendant. He pointed out that the defense had allowed the February 12 trial date to pass without objection, and held that the defendant had waived his right to a speedy

trial and should not benefit from the delays by obtaining a dismissal of the case.⁴ RP (6/12/08) 101-106.

Trial finally resumed on June 30, 2008. RP (6/30/08) 109. The state presented evidence that Mr. Yaden and his passenger Jason Wahl had gone to a QFC twice in one night and purchased pseudoephedrine and other products associated with the manufacture of methamphetamine. RP (7/1/08) 199-202, 206. A search of their vehicle yielded additional items associated with methamphetamine manufacture. RP (7/1/08) 254-257, 259-271. Mr. Yaden testified that Wahl had purchased the items, that he didn't know what Wahl had bought and put in the vehicle, and that he didn't know there was pseudoephedrine in the car. RP (7/2/08) 399-401, 414-417, 422, 425, 427-429. He explained that he needed Mr. Wahl's help to fix a friend's car, and had agreed to drive him on various shopping errands on the way. RP (7/2/08) 396-399.

The defense proposed and the court gave an instruction on unwitting possession:

⁴ The court noted that Mr. Yaden had missed court four times: June 15, 2006, September 14, 2006, March 29, 2007, and May 11, 2007. RP (6/12/08) 101-102. On June 15, 2006, neither Mr. Yaden nor any attorney representing him appeared in court and the court took no action. Clerk's Minutes 6/15/06, Supp. CP. On September 14, 2006, Mr. Yaden was not present but the court took no action, since his attorney knew his whereabouts. In fact, Mr. Yaden's presence had repeatedly been waived prior to this date. Clerk's Minutes 9/14/06, 6/22/06, Supp. CP. On both March 29, 2007 and May 11, 2007, Mr. Yaden's appearance was also apparently waived. Clerk's Minutes 3/29/07, 5/11/07, Supp. CP.

A person is not guilty of possession of a substance if the possession is unwitting. Possession of a substance is unwitting if a person did not know that the substance was in his possession. The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.
Instruction No. 13, Supp. CP.⁵

In closing, defense counsel argued that the items found in the car weren't tied to Mr. Yaden, and that Mr. Yaden didn't possess them since he didn't know what they were. RP (7/2/08) 494-498. He told jurors that Mr. Yaden could not be found guilty if he didn't know the items were there. RP (7/2/08) 508-509. In rebuttal, the state argued that Mr. Yaden bore the burden of proving unwitting possession, and that his story didn't make sense. RP (7/2/08) 516-520.

The next day, the jury returned a verdict of guilty. CP 5. Mr. Yaden was sentenced to 78 months in prison, and he timely appealed. CP 4, 5-16.

⁵ Although defense counsel did not file his proposed instructions in the court file, it is clear from the discussion about the instructions that defense counsel proposed the unwitting possession instruction. RP (7/2/08) 462-473.

ARGUMENT

I. MR. YADEN WAS DENIED HIS RIGHT TO A SPEEDY TRIAL UNDER CrR 3.3.

CrR 3.3 is captioned “Time for trial,” and sets out the speedy trial rule for criminal cases in Washington. Under CrR 3.3(h), “[a] charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice.” It is the responsibility of the court to ensure compliance with the rule. CrR 3.3(a)(1).

Under CrR 3.3(b), a person who is not in custody must be brought to trial within 90 days of the case’s “commencement date,” or within 30 days following the end of an “excluded period,” whichever is later. CrR 3.3(b)(2), CrR 3.3(b)(5). The initial commencement date is the date of arraignment. CrR 3.3(c)(1). A new commencement date is reset under the circumstances enumerated in CrR 3.3(c)(2).⁶

A person may lose the right to object to an untimely trial. This occurs only when the person fails to object after the trial court sets a trial date and notifies the person of that date. CrR 3.3(d).

⁶ These include (i) waiver of speedy trial, (ii) failure to appear, (iii) grant of a mistrial or new trial, (iv) certain appellate actions, (v) grant of a new trial following a collateral attack, (vi) change of venue, and (vii) disqualification of counsel. CrR 3.3(c)(2).

In this case, no written waiver of speedy trial was filed under CrR 3.3(c)(2)(i).⁷ On November 30th, the parties agreed to a continuance, and trial was reset to February 12, 2008. Clerk's Minutes 11/30/07, Supp. CP. Under CrR 3.3(b)(2) and (5), the expiration date was therefore March 13, 2008 (30 days beyond the "excluded period"). The court did not hold trial on the scheduled trial date (February 12th, 2008). RP (2/7/08) 29-84, RP (2/21/08) 5-19. Nor did the court set a new trial date until May 2, 2008, nearly two months after the time for trial had expired. Clerk's Minutes 2/14/08, Clerk's Minutes 5/2/08, Supp. CP. Because the court did not set a new trial date and notify the parties of the proposed date, Mr. Yaden did not lose his right to object under CrR 3.3(d).

Mr. Yaden's trial did not commence within his speedy trial period under CrR 3.3. His case should have been dismissed pursuant to CrR 3.3(h). Accordingly, his conviction must be reversed and his case dismissed with prejudice. CrR 3.3(h).

⁷ As of November 30th, Mr. Yaden had personally assented to many of the prior continuances. He also orally waived his right to a speedy trial at some of the hearings.

II. THE GOVERNMENT DENIED MR. YADEN HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL UNDER THE SIXTH AMENDMENT AND WASH. CONST. ARTICLE I, SECTION 22 BY APPOINTING AN ATTORNEY WHO WAS UNABLE OR UNWILLING TO PREPARE FOR TRIAL EVEN AFTER THREE YEARS.

The federal and state constitutions guarantee an accused person the right to a speedy trial.⁸ U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22. The constitutional right to a speedy trial “is as fundamental as any of the rights secured by the Sixth Amendment.” *Moore v. Arizona*, 414 U.S. 25, 27-28, 94 S. Ct. 188, 38 L. Ed. 2d 183 (1973) (quoting *Klopfers v. North Carolina*, 386 U.S. 213, 223, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967)).

An “unreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, including ‘oppressive pretrial incarceration,’ ‘anxiety and concern of the accused,’ and ‘the possibility that the [accused’s] defense will be impaired’ by dimming memories and loss of exculpatory evidence.” *Doggett v. United States*, 505 U.S. 647, 654 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992) (quoting *Barker v. Wingo*, 407 U.S. 514, 532, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972)); see also *Dillingham v. United States*, 423 U.S. 64, 96 S. Ct. 303,

⁸ The Sixth Amendment right is applicable in state court through action of the Fourteenth Amendment. *Klopfers v. North Carolina*, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967).

46 L. Ed. 2d 205 (1975). The constitutional right to speedy trial is violated when trial is delayed longer than is reasonable. *State v. Iniguez*, 143 Wn. App. 845, 856, 180 P.3d 855 (2008); *see also United States v. Mendoza*, 530 F.3d 758 (9th Cir. 2008).

In assessing a constitutional speedy trial violation, a reviewing court considers the length of any delay, the reason for the delay, whether the accused person asserted her or his right to a speedy trial, any prejudice caused by the delay, and any other relevant circumstances. *Iniguez*, at 855-856. A lengthy delay is presumed to cause prejudice, and this presumption intensifies over time. *Iniguez* at 856, 858-859; *Doggett*, *supra*.

In this case, the government violated Mr. Yaden's constitutional right to a speedy trial under the state and federal constitutions. First, Mr. Yaden's trial was delayed nearly four years from the date he appeared in court and was appointed an attorney. RP (8/17/04) 6, RP (6/30/08) 5.

Second, the lawyers appointed by the court to represent Mr. Yaden—especially Mr. Anderson—caused almost all of the delay.⁹

⁹ Out of the 52 hearings held in this case, the court issued only one bench warrant for a missed appearance. The warrant was quashed within a week. Clerk's Minutes 9/25/07 and 10/4/07, Supp. CP.

Additional delay was caused by the trial court's failure to set a new trial date following the February 2008 hearings.

Third, although Mr. Yaden did not assert his speedy trial right—and (in fact) personally assented to many of the continuances requested by his attorney, sometimes after reviewing his rights with the judge—this should not weigh heavily against him. If he had insisted on a speedy trial, he would have been forced to proceed with an attorney who was unprepared even after more than three years.¹⁰ In addition, at least some of the hearings were continued “off the record,” with no opportunity for him to address the court.

Fourth, Mr. Yaden was prejudiced by the delay. He was unable (when trial finally commenced) to locate Mr. Wahl, whom he expected to provide exculpatory testimony. RP (7/2/08) 456. He was also unable, during his testimony, to remember details relating to the day he was arrested. RP (7/3/08) 400, 403, 415, 439, 445, 447, 450, 454-455. In addition, the state's witnesses were unable to answer some of his attorney's questions on cross-examination, because of their own lack of memory. RP (7/1/08) 208, 219, 221, 248, 295.

¹⁰ At one point, when he appeared with his third public defender, Mr. Yaden told the court that he had agreed to give Mr. Anderson three years to allow Mr. Anderson to prepare for trial. RP (2/7/08) 31.

As an indigent person, Mr. Yaden did not have any choice over who would represent him. The government chose Mr. Anderson, who was either unwilling or unable to prepare for trial in over three years. This, combined with the additional delays caused by the transfer of the case within the public defender's office and the trial court's failure to set a trial date following the February 2008 hearings, prejudiced Mr. Yaden and violated his constitutional right to a speedy trial.

The right to a speedy trial "is one of the most basic rights preserved by our Constitution." *Klopper*, at 226. Because of his court-appointed attorney's dilatory conduct, Mr. Yaden was denied this most basic of rights. His conviction must be reversed, and his case dismissed with prejudice. *Iniguez, supra*.

III. MR. YADEN WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY PROPOSED AN ERRONEOUS INSTRUCTION THAT UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington

Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). It is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland*); see also *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). The reasonable competence standard requires defense counsel to be familiar with the relevant legal standards and instructions applicable to the representation. *See, e.g., State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978). Here, defense counsel erroneously gave Mr. Yaden the burden of proving his mental state by a preponderance of the evidence. Instruction No. 13, Supp. CP. This legal error fell below an objective standard of reasonableness and prejudiced Mr. Yaden. Accordingly, he was denied the effective assistance of counsel. *Reichenbach, supra*.

A. The state was required to prove that Mr. Yaden possessed pseudoephedrine with the intent to manufacture methamphetamine.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). An essential element of possession of pseudoephedrine with intent to manufacture is the intent to manufacture methamphetamine. RCW 69.50.440; *see also* CP 17 and Instructions Nos. 6 and 7, Supp. CP. The prosecution bore the burden of proving not only that Mr. Yaden possessed pseudoephedrine, but also that his possession

was specifically “with the intent to manufacture methamphetamine.”

Instruction No. 7, Supp. CP.

As the Supreme Court has put it,

It is impossible for a person to intend to manufacture or deliver a controlled substance without knowing what he or she is doing. By intending to manufacture or deliver a controlled substance, one necessarily knows what controlled substance one possesses as one who acts intentionally acts knowingly... Without knowledge of the controlled substance, one could not intend to manufacture or deliver that controlled substance. Therefore, there is no need for an additional mental element of guilty knowledge.

State v. Sims, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992). Thus a person whose possession is unwitting does not possess with the intent to manufacture or deliver. The state therefore bears the burden of proving knowing possession as part of its proof on intent. The defense is not required to prove unwitting possession. *Sims*.

B. Defense counsel proposed an erroneous instruction that unconstitutionally shifted the burden of proof and prejudiced Mr. Yaden.

Here, defense counsel erroneously proposed an instruction that required Mr. Yaden to prove by a preponderance of the evidence that his possession was unwitting.¹¹ Instruction No. 13, Supp. CP. A reasonable

¹¹ This unwitting possession instruction applies where the defendant is charged with simple possession, which does not include knowledge as an element. See, e.g., *City of Kennewick v. Day*, 142 Wn.2d 1, 11 P.3d 304 (2000).

attorney would not have proposed such an instruction. *See, e.g., State v. Carter*, 127 Wn. App. 713, 112 P.3d 561 (2005) (finding defense counsel ineffective for proposing an unwitting possession instruction in a UPF case). Accordingly, counsel's performance was deficient.

The unwitting possession instruction unconstitutionally shifted the burden of proof and prejudiced Mr. Yaden. First, the instruction was inconsistent with the "to convict" instruction, which required the state to prove that Mr. Yaden "possessed pseudoephedrine with the intent to manufacture methamphetamine." *Compare* Instruction No. 7 with Instruction No. 13, Supp. CP. The inconsistency resulted from a clear misstatement of the law regarding the burden of proof, and is therefore presumed prejudicial. *Carter*, at 718.

Second, the instruction undermined the very heart of Mr. Yaden's defense. In his testimony, Mr. Yaden told the jury that he didn't even know that the car contained pseudoephedrine. RP (7/2/08) 394-429. In closing, defense counsel repeatedly stressed Mr. Yaden's lack of knowledge. RP (7/2/08) 496, 498, 509. Mr. Yaden's testimony and his attorney's closing argument were directed at the state's burden to prove that any possession was with the intent to manufacture. The erroneous instruction unconstitutionally transferred the burden and required Mr. Yaden to prove his innocence.

Third, the prosecutor relied on the instruction in closing. Specifically, the prosecutor said “if the defendant wants to prove that he didn’t know it was there, it’s his burden to prove that by a preponderance of the evidence. He actually has to prove that he didn’t know it was there.” RP (7/2/08) 517.

Under proper instructions, a reasonable doubt about Mr. Yaden’s knowledge would have required acquittal. The erroneous instruction allowed the jury to convict even if it had a reasonable doubt that he “possessed pseudoephedrine with the intent to manufacture methamphetamine.” Instruction No. 7, Supp. CP. Accordingly, there is a reasonable probability that the erroneous instruction affected the verdict. *Reichenbach, supra*. Because Mr. Yaden was denied the effective assistance of counsel, his conviction must be reversed. The case must be remanded to the trial court for a new trial. *Reichenbach, supra*.

CONCLUSION

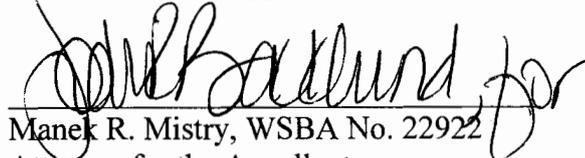
For the foregoing reasons, Mr. Yaden's conviction must be reversed and his case dismissed with prejudice. In the alternative, the case must be remanded for a new trial.

Respectfully submitted on February 20, 2009.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Jacob Yaden, DOC #771696
Stafford Creek Corrections Center
191 Constantine Way
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and to:

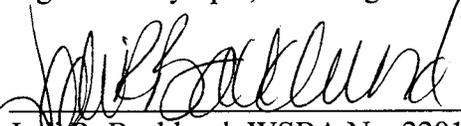
Clallam County Prosecuting Attorney
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on February 20, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 20, 2009.



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