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STATE OF WASHINGTON

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Clerk

NO. 40303-0-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**DANIEL JOHN KEMP,**

**Appellant.**

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**BRIEF OF APPELLANT**

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ORIGINAL

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court erred when it entered a finding of fact unsupported by substantial evidence.

2. The trial court erred when it denied the defendant's motion to suppress because the trooper in this case violated the defendant's right to privacy under Washington Constitution, Article 1, § 7, when he searched the defendant's vehicle without a warrant pursuant to the defendant's arrest after the defendant was handcuffed and placed in a patrol vehicle.

3. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it imposed a probation condition so vague that it does not put the defendant on notice of what conduct it prohibited.

4. This court's refusal to address Argument III as not ripe will violate the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, as well as the defendant's right to effective appellate review and effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

*Issues Pertaining to Assignment of Error*

1. Does a trial court err if it enters a finding of fact unsupported by substantial evidence?

2. Does a trial court err under Washington Constitution, Article 1, § 7, if it denies a defendant's motion to suppress evidence a police officer found after searching the passenger compartment of a defendant's vehicle without a warrant incident to the arrest of a defendant who was handcuffed and in the back of a patrol vehicle at the time of the search?

3. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it imposes a probation condition so vague that it does not put the defendant on notice of what conduct it prohibited?

4. Does the court of appeals' refusal to address a constitutional challenge to a community custody condition as not ripe for adjudication violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, as well as a defendant's right to effective appellate review and effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment?

## STATEMENT OF THE CASE

On November 24, 2008, at about 7:30 in the morning, Washington State Trooper Bill Jordan was on routine patrol in Clark County on SR 503 when he saw the defendant drive by in the opposite direction. RP 5.<sup>1</sup> Seeing that the defendant was not wearing a seat belt, Trooper Jordan turned around, caught up to the defendant, and activated his overhead lights. *Id.* The defendant responded by turning his vehicle into a Taco Bell parking lot and stopping. *Id.* Once the Trooper got his vehicle stopped, he walked up to the defendant's car and asked if he knew the reason for the stop. RP 6. The defendant responded that he wasn't wearing a seat belt. *Id.* As he did, the Trooper detected the odor of burnt marijuana coming from the vehicle. *Id.* However, he could not see a source of the odor. RP 16-17.

Upon running the defendant's identification, Trooper Jordan received confirmation that the defendant's license was suspended for unpaid tickets. RP 7. Based upon this information, the Trooper told the defendant he was under arrest for driving while suspended, had him get out of his vehicle, handcuffed him, searched his person incident to arrest, placed him in the back of a patrol vehicle, and read him his *Miranda* rights. RP 7, 8, 10, 20. At this

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<sup>1</sup>The record in this case includes the verbatim reports of four separate hearings bound together in a single, consecutively number volume designated herein as "RP [page #]."

point, the defendant admitted that there was a pipe with burnt marijuana in it in the center console of his car, along with a few vicodin tablets for which he did not have a prescription. RP 10. According to Trooper Jordan, he also arrested the defendant for possession of marijuana based upon this admission.

*Id.*

Once Trooper Jordan spoke with the defendant, he went to the defendant's vehicle and searched it, finding a marijuana pipe with residue in the center console along with nine vicodin tablets. RP 11, 21. At the time that Trooper Jordan searched the defendant's vehicle, it was sitting in a parking lot and not a danger to traffic. RP 21. In addition, while he could have obtained a warrant to search the defendant's vehicle, he did not do so because he did not think he needed one. RP 23-24.

Based upon the evidence the officer found during his search of the car, the Clark County Prosecutor charged the defendant with possession of vicodin, use of drug paraphernalia, and driving while suspended in the third degree. CP 1-2. Following the filing of these charges, the defendant moved to suppress the evidence the Trooper seized from his vehicle, arguing that under Washington Constitution, Article 1, § 7, the warrantless search was illegal. RP 29-31; CP 5-6, 7-9, 15-17, 21.

On September 17, 2009, the court called the case upon the defendant's motion to suppress. RP 1. At that time, the state called Trooper

Jordan as its only witness. *Id.* He testified to the preceding facts. RP 1-24. Following his testimony, the parties presented their arguments and the court denied the motion. RP 29-37. The trial court later entered the following findings of fact and conclusions of law in support of its ruling:

### **FINDINGS OF FACT**

1. On November 24, 2008, at approximately 0735 hours, in Clark County, Washington, Washington State Police Trooper Bill Jordan stopped defendant Kemp for a traffic infraction, defendant was not wearing a seatbelt. Upon contact with defendant in his vehicle, Trooper Jordan smelled the odor of marijuana coming from the car. Trooper Jordan confirmed that defendant was Driving While Suspended in the Third Degree (hereinafter DWS 3) status; and defendant was then arrested for DWS 3. Defendant was the only occupant in the vehicle.

2. Having been arrested for DWS 3, defendant was advised of his Miranda rights to which he responded that he understood and then verbalized that he chose to waive his rights. Post Miranda, defendant admitted that there was a pipe with marijuana in it and six or seven Vicodin pills in the center console of his vehicle. When asked by Trooper Jordan if defendant had a valid prescription for the Vicodin, defendant responded that he did not.

3. Based on the odor of marijuana and defendant's post Miranda statement about a pipe with marijuana in his car, defendant was then also under arrest for Possession of Marijuana. Based on his training and experience as a law enforcement officer, in handling drug crime investigations, and also the odor of marijuana coming from the vehicle, Trooper Jordan reasonably believed that evidence of the drug offenses of Possession of Marijuana, as well as Unlawful Possession of a Controlled Substance Vicodin, would be located in the defendant's vehicle.

4. There was no particularity issues as to the odor of marijuana coming from defendant's vehicle because defendant was the only occupant in the car. In addition, the court finds that the circumstances

were clear that the trooper had a right to search the vehicle because of possible destruction of the evidence.

5. Pursuant to the search of defendant's vehicle, Trooper Jordan found the pipe with burnt marijuana in the center console of defendant's car, as well as nine suspected vicodin pills in a wadded paper towel in the center console. Each drug item was found by Trooper Jordan in the spot where defendant had previously stated they would be located.

6. During transport to the jail, defendant additionally admitted that he used the pipe to smoke marijuana the night prior; and that he would get vicodin pills from a friend.

7. The police did not attempt to obtain a search warrant, although he could have done that.

### **CONCLUSIONS OF LAW**

1. The Court has jurisdiction of the defendant Daniel John Kemp and the subject matter.

2. Based on the odor of marijuana coming from defendant's vehicle which Trooper Jordan noticed and defendant's post-Miranda admissions that there was marijuana in the center console of his vehicle, as well as vicodin pills without a prescription, Trooper Jordan had sufficient probable cause, not just a reasonable belief, to search the vehicle incident to defendant's arrest for Possession of Marijuana.

3. Prior to any search of the vehicle in this case, there was sufficient probable cause for the crime of Possession of Marijuana; and Trooper Jordan had a reasonable belief that evidence of the subject drug offense would be found in defendant's vehicle.

4. In addition, the circumstances were clear that the trooper had a right to search the vehicle because of possible destruction of the evidence.

5. On the grounds set forth above, defendant's motion to suppress the evidence is DENIED.

CP 28-31.

The defendant later submitted to conviction by stipulated facts and sentencing within the standard range. CP 27, 32, 36-37, 38-42, 48-57. As part of the judgment and sentence on the use of paraphernalia charge, the court imposed two years of probation with conditions. CP 58-66. One of these conditions stated as follows:

- ☒ 8. Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, or hand held electronic scheduling and data storage devices. Defendant shall not frequent known drug activity areas or residences.

CP 63.

Following imposition of this sentence, the defendant filed timely notice of appeal. CP 67.

## ARGUMENT

### I. THE TRIAL COURT ERRED WHEN IT ENTERED A FINDING OF FACT UNSUPPORTED BY SUBSTANTIAL EVIDENCE

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error to them. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

In the case at bar, the defendant assigns error to the following portion of the findings of fact No. 4:

4. . . . In addition, the court finds that the circumstances were clear that the trooper had a right to search the vehicle because of possible destruction of the evidence.

CP 29 (emphasis added).

In addition, to the extent that the following conclusion of law contains

factual findings, the defendant assigns error to it.

4. In addition, the circumstances were clear that the trooper had a right to search the vehicle because of possible destruction of the evidence.

CP 30.

The reason the defendant assigns error to the noted portion of the fourth findings of fact, as well as the fourth conclusion of law to the extent it contains a factual finding, is that the claim that the trooper needed to or was justified in entering the defendant's vehicle to avoid the "possible destruction of the evidence" is simply fabricated out of whole cloth. No evidence in the record supports it. Rather, the Trooper's own testimony supports the opposite conclusion. As he admitted, the vehicle was legally stopped in a parking lot and was in no way obstructing traffic. At the time of the search, the defendant was handcuffed and in the back of a patrol car prior to being taken to and booked into the jail. The defendant had been alone in his vehicle. Thus, the claim that the Trooper needed to search the vehicle to avoid the destruction of evidence is unsupported by any evidence at all, much less substantial evidence in the record.

**II. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS BECAUSE THE TROOPER IN THIS CASE VIOLATED THE DEFENDANT'S RIGHT TO PRIVACY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7, WHEN HE SEARCHED THE DEFENDANT'S VEHICLE WITHOUT A WARRANT PURSUANT TO THE DEFENDANT'S ARREST.**

Washington Constitution, Article 1, § 7, provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The portion of the Washington Constitution’s Bill of Rights is significantly different from the language of the Fourth Amendment to the United States Constitution, and has long been interpreted by the courts of this state to afford more protection to individuals from searches and seizures by government than the Fourth Amendment to the United States Constitution. *See State v. Carter*, 127 Wn.2d 836, 904 P.2d 290 (1995); *see also State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990). In *State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009), the Washington Supreme Court first addressed the issue of whether or not Washington Constitution, Article 1, § 7, provides more protection during vehicle searches than that provided by the Fourth Amendment as applied in *Arizona v. Gant*, 556 U.S. —, 129 S.Ct. 1710, 173 L. Ed. 2d 485 (2009). The following examines the decision in *Patton*.

In *Patton*, a police officer got out of his vehicle and approached the defendant, telling him that he was under arrest on an outstanding warrant.

Upon hearing this, the defendant got out of his car and fled into his trailer. Once backup arrived, the officer entered the defendant's home, found him, put him in handcuffs, took him outside and placed him in the back of a patrol vehicle. At this point, the officer searched the defendant's vehicle incident to arrest and found methamphetamine. After being charged, the defendant moved to suppress, arguing that at the time of his arrest, he was not in the vicinity of his vehicle. Thus, the search was not valid under *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986). The trial court agreed and suppressed the evidence.

Following dismissal of the drug charge, the state sought review, and the Court of Appeals reversed, finding that for the purposes of an analysis under *Stroud*, the defendant was "under arrest" at the point that the officer approached him and stated that he was under arrest. Since this happened as the defendant was exiting his car, the search of the vehicle while the defendant was handcuffed and in the back of the patrol vehicle was valid under *Stroud*. The defendant then sought and obtained review before the Washington Supreme Court, arguing that the search was improper under both Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment.

During the pendency of the case, the United States Supreme Court issued its decision in *Gant*. The court then reversed the Court of Appeals and

reinstated the trial court's order to suppress. However, the court did not base its decision on a conclusion that the police officer had violated the Fourth Amendment as interpreted in *Gant*. Rather, the court based its decision upon Washington Constitution, Article 1, § 7. In so holding, the court followed the rule that "[w]hen a party claims both state and federal constitutional violations, we turn first to our state constitution." *State v. Patton*, 167 Wn.2d at 386 (citing *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

In addressing the defendant's claims under Washington Constitution, Article 1, § 7, the court began its analysis by noting the following concerning warrantless searches and exceptions to the warrant requirement.

Our analysis under article 1, section 7 begins with the presumption that a warrantless search is per se unreasonable, unless it falls within one of the carefully drawn exceptions to the warrant requirement. These exceptions are limited by the reasons that brought them into existence; they are not devices to undermine the warrant requirement.

*State v. Patton*, 167 Wn.2d at 386 (citing *State v. Ladson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

The court then reviewed automobile search exception and "the reasons that brought [it] into existence." The court noted:

One such exception, and the one at issue here, is the automobile search incident to arrest exception. Officer safety and the risk of destruction of evidence of the crime of arrest are the reasons that brought this exception into existence. *State v. Ringer*, 100 Wn.2d 686, 693-700, 674 P.2d 1240 (1983). (reviewing historical development of search incident to arrest exception under federal and

state law). Necessarily, these factors – also described as exigencies – limit the scope of the exception. Like all judicially created exceptions, the automobile search incident to arrest exception is limited and narrowly drawn, and it is the State’s burden to establish that it applies. *Parker*, 139 Wn.2d at 496.

*State v. Patton*, 167 Wn.2d at 386.

At this point, the court undertook a lengthy examination of automobile search exception under *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983), under *State v. Stroud, supra*, and under the numerous decisions that subsequently interpreted and expanded *Stroud*. Following this analysis, the court declared the following standard for automobile searches under Washington Constitution, Article 1, § 7:

Today we hold that the search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, ***and that these concerns exist at the time of the search.***

*State v. Patton*, 167 Wn.2d at 394-395; accord *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009).

A comparison of the standard for analyzing the validity of warrantless vehicle searches under the Fourth Amendment as applied in *Gant* to the standard for analyzing the validity of warrantless vehicle searches under Article 1, § 7, reveals one key distinction. Under the Fourth Amendment as applied in *Gant*, the police may search the vehicle for evidence of the crime for which the defendant is arrested even after the defendant is handcuffed and

placed in the back of a patrol vehicle. By contrast, under Article 1, § 7, as applied in *Patton*, once a defendant is handcuffed and placed in the back of a patrol vehicle, that defendant can no longer pose a risk or access evidence in the vehicle to destroy it. Thus, once a defendant is handcuffed and placed in the back of a patrol vehicle, the police may no longer make a warrantless search of the vehicle.

In the case at bar, the undisputed facts as presented by the state in both the CrR 3.5 hearing and the suppression motion reveal that the trooper did not attempt to search the defendant's vehicle until after the defendant was arrested, handcuffed, and placed in the rear of a patrol vehicle. Thus, the trooper had no concerns that the defendant could access weapons or destroy evidence "at the time of the search." Consequently, the trooper's actions violated the defendant's privacy rights under Washington Constitution, Article 1, § 7. As a result, this court should reverse the defendant's conviction and remand with instructions to suppress the evidence the trooper found upon his search of the defendant's vehicle.

**III. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT IMPOSED A COMMUNITY CUSTODY CONDITION SO VAGUE THAT IT DOES NOT PUT THE DEFENDANT ON NOTICE OF WHAT CONDUCT IT PROHIBITED.**

Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, “a statute is void for vagueness if its terms are ‘so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.’” *State v. Worrell*, 111 Wn.2d 537, 761 P.2d 56 (1988) (quoting *Myrick v. Board of Pierce Cy. Comm'rs*, 102 Wn.2d 698, 707, 677 P.2d 140 (1984)). This rule applies equally to conditions of community custody or probation, which have the effect of a criminal statute in that their violation can result in a new term of incarceration. *State v. Simpson*, 136 Wn.App. 812, 150 P.3d 1167 (2007).

As the Washington Supreme Court explained in *State v. Aver*, 109 Wn.2d 303, 745 P.2d 479 (1987), the test for vagueness rests on two key requirements: adequate notice to citizens and adequate standards to prevent arbitrary enforcement. In addition, there are two types of vagueness challenges: (1) facial challenges, and (2) challenges as applied in a particular case. *State v. Worrell*, 111 Wn.2d at 540. In *Aver*, the court explained the former challenge as follows:

In a constitutional challenge a statute is presumed constitutional

unless its unconstitutionality appears beyond a reasonable doubt. *Seattle v. Shepherd*, 93 Wash.2d 861, 865, 613 P.2d 1158 (1980); *Maciolek*, 101 Wash.2d at 263, 676 P.2d 996. In a facial challenge, as here, we look to the face of the enactment to determine whether any conviction based thereon could be upheld. *Shepherd*, 93 Wash.2d at 865, 613 P.2d 1158. A statute is not facially vague if it is susceptible to a constitutional interpretation. *State v. Miller*, 103 Wash.2d 792, 794, 698 P.2d 554 (1985). The burden of proving impermissible vagueness is on the party challenging the statute's constitutionality. *Shepherd*, 93 Wash.2d at 865, 613 P.2d 1158. Impossible standards of specificity are not required. *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wash.2d 455, 465, 722 P.2d 808 (1986).

*State v. Aver*, 109 Wn.2d at 306-07.

In the case at bar, the defendant argues that the following probation condition the court imposed violates due process because it is void for vagueness.

- ☒ Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling or data storage devices.

CP 64.

In this provision the phrase “any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances” is hopelessly vague. Literally, any item from a toothpick to a dump truck could qualify under this phrase. The following gives a few examples. Any type of telephone can and is used to facilitate the transfer of drugs. Is the defendant prohibited from

using any type of telephone? Any type of motor vehicle can be used for the transfer of drugs. Is the defendant prohibited from using motor vehicles? Blenders can be used to pulverize pseudoephedrine tablets as the first step in manufacturing methamphetamine. Is the defendant prohibited from using a blender? Matches are often used as a source of phosphorous in the manufacture of methamphetamine. Is the defendant prohibited from using or possessing matches? Cigarette paper is sometimes used to smoke marijuana. Is the defendant prohibited from possessing cigarette paper? Baggies are often used to contain controlled substances. Is the defendant now forced to only use waxed paper to wrap his sandwiches? Except waxed paper can also be used to make bindles, as can glossy pages out of magazines. Perhaps the defendant will be in violation if he possesses waxed paper or magazines with glossy pages. The list is endless and the reason it is endless is because the phrase "any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances" is so vague as to leave the defendant open to violation at the whim of his probation officer. Consequently, this condition is void and violates the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

**IV. THIS COURT'S REFUSAL TO ADDRESS ARGUMENT III AS NOT RIPE WILL VIOLATE THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, AS WELL AS THE DEFENDANT'S RIGHTS TO EFFECTIVE APPELLATE REVIEW AND EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.**

In *State v. Motter*, 139 Wn.App. 779, 162 P.3d 1190 (2007), this court ruled that constitutional arguments such as these are not ripe for decision given the fact that the state had not sought to sanction the defendant for violation of any of the conditions the defendant herein claims are improper. In *Motter*, a defendant convicted of first degree burglary appealed his sentence, arguing that the trial court imposed a number of community custody conditions that violated certain constitutional rights and which were not authorized by the legislature. One of these conditions prohibited the defendant from possessing "drug paraphernalia" which the court said included such items as cell phones and data recording devices. This court refused to address this condition on the basis that the issue was not ripe for decision. This court held:

Moreover, Motter's challenge is not ripe. In *State v. Massey*, 81 Wn. App. 198, 200, 913 P.2d 424 (1996), the defendant challenged a condition that he submit to searches. This court held that the judicial review was premature until the defendant had been subjected to a search he thought unreasonable. And in *State v. Langland*, 42 Wn. App. 287, 292-93, 711 P.2d 1039 (1985), we held that the question of a law's constitutionality is not ripe for review unless the

challenger was harmed by the law's alleged error. Here, Motter claims that the court order could prohibit his possession of innocuous items. But Motter has not been harmed by this potential for error and this issue therefore is not ripe for our review. It is not reasonable to require a trial court to list every item that may possibly be misused to ingest or process controlled substances, items ranging from pop cans to coffee filters. Thus, we can review Motter's challenge only in context of an allegedly harmful application of this community custody condition. This argument is not properly before this court and we will not address it.

*State v. Motter*, No. 34251-2-II (filed 7-24-05).

The defendant herein argues that this decision, while appropriate at the time of *Massey* and *Langland*, is inappropriate now, and that by applying it in *Motter* and applying it in the case at bar, this court violates the defendant's right to procedural due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment by denying the defendant appellate review as guaranteed under Washington Constitution, Article 1, § 22. The following presents this argument.

A criminal defendant does not have a federal constitutional due process right to either post-conviction motions or to appeal. *Rheuark v. Shaw*, 628 F.2d 297, 302 (5th Cir.1980), *cert. denied*, 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365 (1981). However, once the state acts to create those rights by constitution, statute or court rule the protections afforded under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, have full effect.

For example, in *In re Frampton*, 45 Wn.App. 554, 726 P.2d 486 (1986), the court held that once the state creates the right to appeal a criminal conviction, in order to comport with due process, the state has the duty to provide an indigent with all portions of the record necessary to prosecute the appeal at state expense. *State v. Rutherford*, 63 Wn.2d 949, 389 P.2d 895 (1964). The state also has the duty to provide appointed counsel to indigent appellants. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

In Washington a criminal defendant has the right to one appeal in a criminal case under both RAP 2.2 and Washington Constitution, Article 1, § 22. *State v. French*, 157 Wn.2d 593, 141 P.3d 54 (2006). Thus, this right includes the protections of procedural due process. At a minimum, procedural due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment requires notice and the opportunity to be heard before a competent tribunal. *In re Messmer*, 52 Wn.2d 510, 326 P.2d 1004 (1958). In the *Messmer* decision the Washington State Supreme Court provided the following definition for procedural due process.

We have decided that the elements of the constitutional guaranty of due process in its procedural aspect are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case; also to have the assistance of counsel, if desired, and a reasonable time for preparation

for trial.

*In re Messmer*, 52 Wn.2d at 514 (quoting *In re Petrie*, 40 Wn.2d 809, 246 P.2d 465 (1952)).

In *Massey* and *Langland*, the defendant's procedural due process right "to be heard or defend before a competent tribunal" was not violated even though the court found the defendant's constitutional challenge to certain probation conditions was not ripe. The reason is that in these cases the defendants had the right to contest the constitutionality of those conditions before the court in the future were the Department of Corrections to seek to sanction the defendant for failure to comply with conditions the defendant felt were unconstitutional. The problem with the decision in *Motter*, and the problem in the case at bar, is that probation violation claims are no longer adjudicated in court. Rather, they are adjudicated before a Department of Corrections hearing officer who only has the authority to determine (1) what the conditions were, (2) whether or not DOC has factually proven a violation of those conditions, and (3) what the appropriate sanction should be if the violation was proven.

Under WAC 137-104-050, the Department of Corrections has adopted procedures whereby defendants accused of community custody violations are tried before a DOC hearing officer on the claims of violation, not before a court. The first two sections of this code section provide as follows:

(1) Offenders accused of violating any of the conditions or requirements of community custody will be entitled to a hearing, prior to the imposition of sanctions by the department.

(2) The hearing shall be conducted by a hearing officer in the department's hearing unit, and shall be considered as an offender disciplinary proceeding and shall not be subject to chapter 34.05 RCW, the Administrative Procedure Act.

WAC 137-104-050.

There is no provision under this administrative code, nor under any of the other sections of WAC 137-104 to allow the defendant to challenge the constitutionality of community custody conditions that the court imposed. In addition, while this administrative code section does grant the right to appeal, it does not grant the defendant the right at the appellate level to challenge the constitutionality of the community custody conditions imposed by the court.

This section, WAC 137-104-080, states as follows:

(1) The offender may appeal the decision of the hearing officer within seven calendar days to the appeals panel. The request for review should be submitted in writing and list specific concerns.

(2) The sanction shall be reversed or modified if a majority of the panel finds that the sanction was not reasonably related to the: (a) Crime of conviction; (b) Violation committed; (c) Offender's risk of reoffending; or (d) Safety of the community.

(3) The appeals panel will also examine evidence presented at the hearing and reverse any finding of a violation based solely on unconfirmed or unconfirmable allegations.

WAC 137-104-080.

Under WAC 137-104-080 and the procedures by which community

custody violations are no longer adjudicated in court, the effect of the decision in *Motter* is to deny a defendant procedural due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment by refusing to hear constitutional challenges to community custody provisions at the direct appeal level (not ripe), and then refuse to hear constitutional challenges at the violation level under WAC 137-104 (no authority to hear the claim). Thus, to comport with minimum due process, this court should find that the defendant's constitutional challenges to community custody conditions may be heard as part of a direct appeal from the imposition of the sentence.

This court's decision in *Motter* is in accord with the more recent decision in *State v. Valencia*, 148 Wn.App. 302, 198 P.3d 1065 (2009) (review granted, argued 5/11/10). As the following points out, appellant argues that both of these decisions are in conflict with the Washington Supreme Court's decision in *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008).

In *Bahl, supra*, the defendant appealed community custody conditions imposed following his conviction for second degree rape, arguing that they were void for vagueness. These conditions prohibited the defendant from possessing "pornographic materials" and "sexual stimulus material." The state responded, in part, that since the defendant was still in prison and DOC

was not trying to enforce these conditions, the defendant's constitutional vagueness challenge was not yet ripe.

In addressing the ripeness question, this court relied heavily upon the analysis of the Third Circuit Court of Appeals' decision in *United States v. Loy*, 237 F.3d 251 (3d Cir. 2001). In *Loy*, the government argued that the court should refrain from reviewing a defendant's vagueness challenge to his probation conditions prior to a claim that the defendant had violated one of those conditions. Specifically, the government argued that "because vagueness challenges may typically only be made in the context of particular purported violations, [the defendant] must wait until he is facing revocation proceedings before he will be able to raise his claim." *Loy, supra*.

In addressing this argument, the court first noted that the other circuit courts of appeal uniformly allow defendants to challenge conditions of probation on direct review. Indeed, the failure to do so could well be seen as a waiver of the right to object. Second, under the "prudential ripeness doctrine" in which the court addresses the hardship that will arise from refusing to review a challenged condition of probation, the court found that failure to address a vagueness argument would cause hardship to the defendant. Specifically, the court noted "the fact that a party may be forced to alter his behavior so as to avoid penalties under a potentially illegal regulation is, in itself, a hardship." *U.S. v. Loy*, 237 F.3d at 257. In addition,

the court noted that a defendant should not have to “expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.” *Id.* (quoting *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974)). Finally, under the “fitness for judicial review” doctrine, the court in *Loy* noted that the vagueness challenge to the probation condition in question was almost exclusively a question of law. As such, it was particularly ripe for review.

After reviewing the *Loy* decision, this court held that a defendant could make a vagueness challenge to community custody conditions as part of a direct appeal if the challenge meets the “ripeness doctrine.” This court held:

For many of the same reasons that the court held in *Loy* that the defendant there could bring his preenforcement vagueness challenge, we hold that a defendant may assert a preenforcement vagueness challenge to sentencing conditions if the challenge is sufficiently ripe. First, as noted, such challenges have routinely been reviewed in Washington without undue difficulty. Second, preenforcement review can potentially avoid not only piecemeal review but can also avoid revocation proceedings that would have been unnecessary if a vague term had been evaluated in a more timely manner. Third, not only can this serve the interest of judicial efficiency, but preenforcement review of vagueness challenges helps prevent hardship on the defendant, who otherwise must wait until he or she is charged with violating the conditions of community custody, and likely arrested and jailed, before being able to challenge the conditions on this basis.

*State v. Bahl*, at 12.

This court then went on to note that under the “ripeness doctrine,” the

court applies the following four criteria for determining whether or not a vagueness challenge is sufficiently ripe for judicial review:

- (1) Whether or not the issue the defendant argues is primarily legal or not;
- (2) Whether or not the record requires further factual development for an adequate review;
- (3) Whether or not the challenged action is final; and
- (4) Whether or not withholding the court's consideration will create a hardship to the parties.

*State v. Bahl*, at 12-13.

In addressing these criteria in *Bahl*, this court had little difficulty in finding that the defendant's vagueness challenge was sufficiently ripe. Under the first two factors, the court found that the defendant's argument was primarily legal in nature and did not require the application of any particular set of facts in order to determine its application. Under the third factor, the conditions the defendant challenged were "final" since they were made a part of the sentence imposed by the court. Under the fourth factor, the imposition of the conditions upon the defendant's release would cause the defendant hardship at the time of his release, regardless of DOC's enforcement efforts. This would be because, as in *Loy*, the defendant would immediately upon release have to alter his conduct in an attempt to conform with potentially vague conditions, and he would have to live in constant fear of arrest and

incarceration upon a violation of what could ultimately be held to be an unconstitutional requirement. Thus, in *Bahl*, the court held that the defendant's challenge to his community custody conditions was "ripe for determination."

In the case at bar, the defendant's challenge to one of his community custody conditions is also "ripe for determination" under the four factors recognized in *Bahl*. First, as in *Bahl*, the argument on the vagueness challenge is primarily legal in nature. Second, it is not necessary that DOC actually make a claim of a violation to create a factual setting in order to sufficiently narrow the legal question the court must address. Specifically, in *Bahl*, the defendant argued that the conditions prohibiting him from possessing "pornography" was vague because the term "pornography" was unconstitutionally vague. The court in *Bahl* found this to be primarily a legal question. Similarly, in the case at bar, the defendant argues that the condition prohibiting him from possessing anything that can be used as "drug paraphrenalia" is vague because the term "drug paraphrenalia" is unconstitutionally vague. As in *Bahl*, this is primarily a legal question that does not need factual development for adequate review.

Third, in the case at bar, the challenged condition of community custody is "final" in the same manner that in *Bahl* the challenged condition of community custody was final because both were imposed as part of the

defendants' respective sentences. Fourth, in *Bahl*, the court held that the refusal to adjudicate the defendant's vagueness challenge created significant hardship because, upon release, the defendant would have to conform his conduct to meet what might well be ultimately held to be an unconstitutionally vague condition, and the defendant would also have to constantly live in fear that he would be arrested and incarcerated for violation of an unconstitutionally vague community custody condition. Similarly, in the case at bar, as in *Bahl*, this court's refusal to adjudicate the defendant's vagueness challenge would also cause the same hardships to the defendant as such a failure to adjudicate would have caused the defendant in *Bahl*. Thus, in the same manner that the defendant's vagueness challenge in *Bahl* was ripe for consideration on direct review, so in the case at bar, the defendant's vagueness challenge to one of his community custody conditions is also ripe for consideration on direct review.

The error that this court committed in *Valencia* was that it set an additional condition beyond those set by this court in *Bahl*. In her dissent in *Valencia*, Judge Van Deren notes the following on this issue:

*State v. Bahl*, 164 Wn.2d 739, 750-51, 193 P.3d 678 (2008), sets four requirements: (1) a primarily legal issue; (2) no necessary further factual development; (3) final action; and (4) a consideration of hardship to the parties if the court does not review the condition imposed. The majority adds a fifth requirement, evidence of harm before review is granted. The majority merely repeats *Motter's* requirement to show harm before review will be granted, *State v.*

*Motter*, 139 Wn.App. 779, 803-04, 162 P.3d 1190 (2007), essentially transforming the need for further factual development under *Bahl* to ripeness dependent on harm shown.

Harm will arise in the context of a hearing on violation of the community custody conditions, with sanctions imposed, i.e., revocation of community custody or additional time to be served. The majority suggests that following a finding of violation of the condition, a defendant may file a personal restraint petition for relief from unreasonable application or interpretation of the challenged community custody conditions. Majority at 13.

The majority ignores the hardship arising from arrest, hearing, confinement, and the delay inherent in personal restraint petitions and creates a necessity for further factual development via imposition of sanctions for violating community custody conditions that may, indeed, be unwarranted or unconstitutionally vague. This result shifts all of the hardship to the defendant, when addressing the imposition of particular community custody conditions on direct appeal imposes virtually no hardship on the State.

*Dissent*, at 23.

In fact, the harm that will accrue to the defendant in the case at bar by the refusal to find his vagueness argument ripe is far more insidious than that even recognized by Judge Van Deren in her dissent in *Valencia* because the failure to address the vagueness argument will deny the defendant his right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, as well as his right to full appellate review under Washington Constitution, Article 1, § 22, and his right to appointed counsel as an indigent under the Sixth Amendment, as the previous argument explained. Thus, this court should strike the vague

community custody condition from the judgment and sentence in this case.

In the decision in *Valencia*, the court suggested that the decision in *Bahl* is limited solely to pre-enforcement challenges to community custody conditions that implicate a defendant's rights under the United States Constitution, First Amendment. As the following points out, this argument is erroneous.

In the decision in *Valencia*, the court notes the following concerning its analysis of *Bahl*:

First, unlike the condition prohibiting the possession of pornography addressed in *Bahl*, Sanchez and Sanchez Valencia do not argue that their community custody conditions implicate any First Amendment rights. And vagueness challenges which do not involve First Amendment rights must be evaluated in light of the particular facts of each case, rather than for facial invalidity, a purely legal analysis. *City of Spokane v. Douglass*, 115 Wn.2d 171, 182, 795 P.2d 693 (1990). Therefore, a determination of whether the condition is unconstitutionally vague as applied to Sanchez or Sanchez Valencia is premature until the condition actually causes them harm based on the specific facts alleged to violate the condition. Accordingly, Sanchez and Sanchez Valencia's challenge to the drug paraphernalia prohibition fails to satisfy the first prong of the *Bahl* test.

*State v. Valencia*, 148 Wn.App. 302, 320, 198 P.3d 1065 (2009).

The reliance upon the decision in *City of Spokane v. Douglass, supra*, for the proposition that "vagueness challenges which do not involve First Amendment rights" may only be "evaluated in light of the particular facts of each case, rather than for facial invalidity" is misplaced. In *City of Spokane v. Douglass*, the City obtained review of a lower court decision finding a

Municipal Code section vague on its face. The City argued that since the code section at issue did not implicate the First Amendment, the lower court had erred in considering facial invalidity as opposed to considering vagueness as applied to the facts of the case. The Washington Supreme Court agreed, holding as follows:

The rule regarding vagueness challenges is now well settled. Vagueness challenges to *enactments* which do not involve First Amendment rights are to be evaluated in light of the particular facts of each case. Consequently, when a challenged ordinance does not involve First Amendment interests, the ordinance is not properly evaluated for facial vagueness. Rather, the ordinance must be judged as applied. Accordingly, the ordinance is tested for unconstitutional vagueness by inspecting the actual conduct of the party who challenges the ordinance and not by examining hypothetical situations at the periphery of the ordinance's scope.

*City of Spokane v. Douglass*, 115 Wn.2d at 182 (emphasis added).

The problem with *Valencia's* reliance upon the holding in *City of Spokane v. Douglass* is found in the word "enactments" as highlighted above. This word, as is used in this case, means a statute or ordinance enacted by a legislative body. For the purpose of judicial review, statutes or ordinances enacted by a legislative body, or "enactments" are presumed constitutional, and the party challenging the constitutionality of such an enactment bears the heavy burden of proving the unconstitutionality of the challenged law. As part of this presumption of constitutionality, and as part of the deference that the courts must give to legislative enactments, the courts will only allow

facial vagueness challenges to statutes or ordinances that impinge upon First Amendment guarantees. All other vagueness challenges can only be made on an “as applied” basis.

By contrast, in the case at bar, appellant does not make a facial vagueness challenge to an “enactment.” Rather he makes a facial vagueness challenge to a probation condition imposed by the sentencing court. The challenged probation condition is not a “law or ordinance” enacted by a legislative body and it does not merit the special deference that such enactments deserve. In *State v. Bahl*, this court specifically recognized this distinction, holding as follows:

While many courts apply to sentencing conditions the same vagueness doctrine that applies with respect to statutes and ordinances, there is one distinction. In the case of statutes and ordinances, the challenger bears a heavy burden of establishing that the law is unconstitutional. This burden exists because of the presumption of constitutionality afforded legislative enactments. A sentencing condition is not a law enacted by the legislature, however, and does not have the same presumption of validity. Instead, imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Imposition of an unconstitutional condition would, of course, be manifestly unreasonable.

*State v. Bahl*, 164 Wn.2d at 753.

Thus, in the case at bar, any holding that appellant’s challenge to one of his probation conditions is not ripe because the challenged condition does not implicate the First Amendment would be incorrect.

In addition, part of the error in *Valencia* flows from its apparent misapprehension as to the nature of appellant's vagueness challenge and the nature of the condition itself. The challenged condition in the case at bar states:

- ☒ Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling or data storage devices.

CP 63.

In its decision in *Valencia*, the Court of Appeals notes the following concerning appellant's challenge to this condition:

Second, Sanchez and Sanchez Valencia's community custody conditions prohibit them from possessing drug paraphernalia. And, unlike pornography, a court's determination of whether Sanchez or Sanchez Valencia have been provided sufficient warning of what items they are prohibited from possessing necessarily rests on a factual record demonstrating the manner in which they used or possessed the item alleged to violate the prohibition. For example, a soda pop can used for its intended purpose is not drug paraphernalia. But when that same soda pop can is modified for use as a pipe to ingest illegal drugs, it becomes drug paraphernalia. Thus, whether Sanchez and Sanchez Valencia's community custody condition prohibits them from possessing an item such as a can of soda pop depends on how they modify it for a different use or intend to use the item. And a reviewing court cannot make that determination without context. Because a more developed factual record is necessary to resolve Sanchez and Sanchez Valencia's vagueness challenge, they fail to satisfy the second prong of the *Bahl* issue maturity test.

*State v. Valencia*, 148 Wn.App. 302, 320-321, 198 P.3d 1065 (2009).

This portion of the court's holding turns upon its characterization that

the appellants were challenging “community custody conditions [that] prohibit them from possessing drug paraphernalia.” The error in this analysis is twofold: (1) the challenged community custody condition did not prohibit the “possession of drug paraphernalia,” and (2) the appellants’ intent in possessing the prohibited items was not an element of the prohibition. Rather, as the plain language of the condition states, the appellants were prohibited from possessing or using “any paraphernalia that could be used for the ingestion or processing of controlled substances.” Intent was not an element of the prohibition.

The same distinction is present in the case at bar between a probation condition that prohibits the possession or use of “drug paraphernalia” on the one hand, and a probation condition that prohibits the possession or use of any item “that can be used for the ingestion or processing of controlled substances” on the other hand. The former prohibition is not necessarily vague if it is interpreted to include a requirement that the item at issue be possessed with the intent to use it as drug paraphernalia. However, the latter prohibition is vague because it does not include a requirement that the item at issue be possessed with the intent to use it as drug paraphernalia. Rather, the latter condition leaves a reasonable person to wonder what items would not be prohibited to the appellant, since no intent is required. For example, is appellant prohibited from using telephones connected to land lines? These

certainly can be used to facilitate drug transactions in the same manner as can cell phones or other devices connected to the internet.

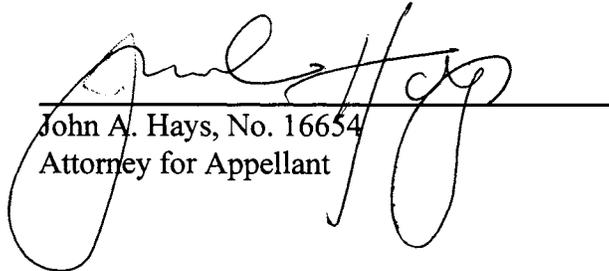
In fact, an inventive probation officer could envision any common place item as possible for use as drug paraphernalia. Paper can be used to make small bindles to hold drugs. Sandwich baggies can be used for the same purpose. Is the defendant prohibited from possessing or using paper or sandwich baggies? Since they can be used for this purpose, and are many times used for this purpose, is the defendant prohibited from possessing them? Once again, the community custody condition prohibits the defendant from possessing “any paraphernalia that can be used for the ingestion or processing of controlled substances” regardless of his intent in possessing the item. These examples illustrate the vagueness of the court’s condition in *Valencia* and the court’s condition in the case at bar. Thus, any holding in the case at bar that the defendant’s challenge is not ripe would be contrary to the decision of the Washington Supreme Court in *Bahl*.

## CONCLUSION

The trial court erred when it entered a finding of fact unsupported by substantial evidence, and when it denied the defendant's motion to suppress. As a result, this court should vacate the defendant's conviction and remand with instructions to grant the motion to suppress. In the alternative, this court should remand the case with instructions to strike probation condition No. 8 as void for vagueness.

DATED this 10<sup>th</sup> day of June, 2010.

Respectfully submitted,



John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

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

**UNITED STATES CONSTITUTION,  
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

**UNITED STATES CONSTITUTION,  
SIXTH AMENDMENT**

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

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

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COURT OF APPEALS  
DIVISION II

10 JUN 14 PM 12:21

STATE OF WASHINGTON

BY Cathy Russell  
FIDELITY

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

**STATE OF WASHINGTON,  
Respondent,**

**NO. 40303-0-II**

**vs.**

**AFFIRMATION OF SERVICE**

**DANIEL JOHN KEMP,  
Appellant.**

**STATE OF WASHINGTON )  
County of Clark ) : ss.**

**CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.**

**On June 10, 2010 , I personally placed in the mail the following documents**

- 1. BRIEF OF APPELLANT**
- 2. AFFIRMATION OF SERVICE**

**to the following:**

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**DANIEL JOHN KEMP  
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**Dated this 10TH day of JUNE, 2010 at LONGVIEW, Washington.**

Cathy Russell  
**CATHY RUSSELL  
LEGAL ASSISTANT TO JOHN A. HAYS**

**AFFIRMATION OF SERVICE - 1**

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