

NO. 40833-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHN COOPER,

Appellant.

10 NOV 19 PM 12:29
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

COURT OF APPEALS
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

OPENING BRIEF OF APPELLANT

JAN TRASEN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
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PM 11-18-10

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 2

THE TRIAL COURT ERRED IN INCLUDING TWO TEXAS
DEFERRED ADJUDICATIONS IN MR. COOPER’S OFFENDER
SCORE 2

 a. A sentencing court may only include prior out of state
 offenses in an offender score if they are “convictions.” 2

 b. Under Texas law, a deferred adjudication is not an
 adjudication of guilt; therefore, it is not a conviction..... 3

 c. It was error to include Mr. Cooper’s Texas deferred
 adjudications in his offender score..... 5

E. CONCLUSION 6

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Morley, 134 Wn.2d 588, 952 P.2d 167 (1998).....3, 6
State v. Wiley, 124 Wn.2d 679, 880 P.2d 983 (1994).....3, 6

Texas Court of Appeals

Castro v. State, 184 S.W.3d 252 (Tex. Cr. App. 2005).4
Jordan v. State, 36 S.W.3d 871 (Tex. Cr. App. 2001).....4
Tackett v. State, 989 S.W.2d 855 (Tex. App. 1999).....4
Watson v. State, 924 S.W.2d 711 (Tex. Cr. App. 1996)4, 5

Statutes

RCW 9.94A.0302, 3, 5
RCW 9.94A.5253
RCW 9.94A.5302
Texas C.C.P. Art. 42.12(5).....3, 4, 5

A. ASSIGNMENT OF ERROR

The trial court erred in counting two Texas deferred adjudications as prior convictions in calculating the offender score.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Before a sentencing court may include a prior out-of-state adjudication in an offender score, the State must prove the adjudication is final and guilt has been adjudicated. Where the State failed to show that two prior Texas deferred adjudications were adjudications of guilt, did the court err by including these findings in the offender score?

C. STATEMENT OF THE CASE

On May 3, 2010, John Cooper entered a guilty plea to attempting to obtain a false prescription for vicodin and bail jumping. CP 6; RP 5.¹ The trial court accepted the plea of guilty. RP 6.

On May 7, 2010, Mr. Cooper appeared before the court again for sentencing. RP 7-15. At sentencing, the State contended two Texas adjudications were prior convictions for purposes of calculating Mr. Cooper's offender score. RP 8-10. Mr.

¹ The Verbatim Report of Proceedings consists of one consecutively paginated volume from three proceedings conducted on May 3, 7, and 13, 2010; the report will be referred to as "RP," followed by the page number.

Cooper argued that the two Texas matters should not count as convictions under RCW 9.94A.030, as the Texas court deferred his adjudications of guilt in both cases. RP 8. Despite Mr. Cooper's objection, the trial court included both Texas deferred adjudications in the offender score. RP 17-18.

D. ARGUMENT

THE TRIAL COURT ERRED IN INCLUDING TWO TEXAS DEFERRED ADJUDICATIONS IN MR. COOPER'S OFFENDER SCORE.

The trial court concluded that Mr. Cooper's offender score included two prior Texas deferred adjudications. In August 2008, Mr. Cooper had been charged in Travis County, Texas, with one misdemeanor and one felony. CP 38-67; RP 16-18. The conclusion to include these offenses in the offender score was erroneous, because the Texas adjudications were not "convictions" under RCW 9.94A.030.

a. A sentencing court may only include prior out of state offenses in an offender score if they are "convictions." A defendant's offender score establishes the range a sentencing court may use in determining his or her sentence. RCW 9.94A.530; RCW 9.94A.712(3). The court calculates the offender score based upon its findings of the defendant's criminal history,

which is a list of the defendant's prior convictions. RCW 9.94A.030(14); RCW 9.94A.525. In Washington, Titles 10 and 13 define a conviction as an adjudication of guilt. RCW 9.94A.030(11). This may include a verdict of guilty, a finding of guilty, or an acceptance of a plea of guilty. Id.

In State v. Morley, 134 Wn.2d 588, 595-600, 952 P.2d 167 (1998), the Supreme Court held that out of state convictions which include a verdict or finding of guilty or the acceptance of a plea of guilty are convictions under the Sentencing Reform Act (SRA). With one exception,² the offender score includes only prior convictions for felony offenses. RCW 9.94A.525; State v. Wiley, 124 Wn.2d 679, 683, 880 P.2d 983 (1994).

b. Under Texas law, a deferred adjudication is not an adjudication of guilt; therefore, it is not a conviction. Article 42.12 of the Texas Code of Criminal Procedure governs deferred adjudications and community supervision. Section 5(a) of Article 42.12 specifically sets out the terms of the Texas deferred adjudication statute. Under Texas law,

[W]hen in the judge's opinion the best interest of society and the defendant will be served, the judge

² Where the current conviction is for a felony traffic offense, the SRA authorizes the court to include serious misdemeanor traffic offenses in the offender score. See RCW 9.94A.525(11).

may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision.

Texas C.C.P. Art. 42.12(5)(a) (emphasis added).

A defendant who appears before a trial judge and is granted a deferred adjudication under Article 42.12, therefore, has not been convicted of a crime under Texas law. In fact, in order for an adjudication of guilt to occur upon the violation of a condition of community supervision, a defendant must be physically detained, arrested, and brought back before the trial court. Texas C.C.P. Art. 42.12(5)(b). A new hearing must be conducted, limited to the determination of whether to "proceed[] with an adjudication of guilt on the original charge." Id. (emphasis added).

Texas appellate courts recognize that a deferred adjudication is not considered a conviction. Castro v. State, 184 S.W.3d 252, 256 (Tex. Cr. App. 2005). In Castro, the Texas appellate court held that deferred adjudication "does not cause [a defendant] to suffer a conviction until community supervision is revoked and guilt is adjudicated." Id. See Jordan v. State, 36 S.W.3d 871, 876 (Tex. Cr. App. 2001); Tackett v. State, 989 S.W.2d 855, 858-59 (Tex. App. 1999) (interpreting Watson v.

State, 924 S.W.2d 711 (Tex. Cr. App. 1996) (stating that deferred adjudication is also not a form of punishment).

c. It was error to include Mr. Cooper's Texas deferred adjudications in his offender score. Mr. Cooper received deferred adjudications for his two 2008 offenses in Travis County, Texas. CP 38-59. Texas law is clear that a deferred adjudication is not a finding of guilt, and is therefore not a conviction. Texas C.C.P. Art. 42.12(5)(a).

Moreover, Mr. Cooper entered a plea agreement as part of the deferred adjudication process on March 17, 2010. The Travis County court order specifically states that “the best interests of society and the defendant will be served in this cause by deferring further proceedings without entering an adjudication of guilt pursuant to Article 42.12, Section 5 of the code of Criminal Procedure, as amended.” CP 46-49; Appendix A. An identical court order was signed and filed in reference to Mr. Cooper's Texas misdemeanor. CP 56-59; Appendix B.

It was error to include the deferred adjudications in Mr. Cooper's offender score, as they were clearly not “convictions”

under Washington law. RCW 9.94A.030(11);³ Morley, 134 Wn.2d at 595-600; Wiley, 124 Wn.2d 679.

E. CONCLUSION

For the reasons stated above, Mr. Cooper respectfully asks this Court to reverse and remand his case for resentencing.

DATED this 18th day of November, 2010.

Respectfully submitted,



JAN TRASEN (WSBA 41177)
Washington Appellate Project (91052)
Attorneys for Appellant

³ "Conviction" means an adjudication of guilt pursuant to Titles 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty. RCW 9.94A.030(11)."

APPENDIX A

OFFENSE: THEFT PROP>=\$1,500<\$20K
FELONY - LEVEL S

NO. D1DC08302304-I

THE STATE OF TEXAS

IN THE 299TH DISTRICT COURT

vs.

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3
3

OF TRAVIS COUNTY, TEXAS

JOHN COOPER

ORDER OF THE COURT DEFERRING FURTHER PROCEEDINGS

On 11th day of March, 2010 AD, this cause was called for trial and the State appeared by her District Attorney, and the defendant, John Cooper, appeared in open court, his counsel, Chris Holub, also being present, and the said defendant having been duly arraigned, pleaded GUILTY to the indictment herein, both parties announced ready for trial, and thereupon a trial by jury was waived by all parties and the reading of the indictment was waived thereupon the State elected to waive Count II and proceed upon the offense of Theft Prop>=\$1,500<\$20k, Felony - Level S, and the defendant pleaded GUILTY thereto, and the Court having heard arguments of both sides found sufficient evidence to find the defendant guilty of the offense of Theft Prop>=\$1,500<\$20k, A Felony - Level S.

However, on 11th day of March, 2010, the Court being of the opinion that the best interests of society and the defendant will be served in this cause by deferring further proceedings without entering an adjudication of guilt pursuant to Article 42.12, Section 5 of the code of Criminal Procedure, as amended, it is therefore **CONSIDERED, ORDERED and ADJUDGED** that further proceedings in this cause shall be and are hereby deferred and the defendant placed on Community Supervision in this cause for a period of 4 YEARS from this date under the supervision of the Court and the duly appointed and acting Adult Community Supervision Officer of Travis County, Texas, subject to the following conditions of Community Supervision, and the defendant shall, during the term of Community Supervision:

1. Commit no offense against the laws of this or any State or of the United States.
2. Avoid injurious or vicious habits.
3. Avoid the use of all narcotics, habit forming drugs, alcoholic beverages, and controlled substances.
4. Avoid persons or places of disreputable or harmful character.
5. Report to the supervision officer as directed by the judge or the supervision officer and obey all orders of the Court and the rules and regulations of the Community Supervision and Corrections Department.
6. Refrain from disorderly conduct, abusive language, or disturbing the peace while present at the office of the Department.
7. Permit the Supervision Officer to visit you at your home or elsewhere.
8. Work faithfully at suitable employment as far as possible.
9. Do not change residence without permission of the Supervision Officer as directed.

Filed in the District Court
of Travis County, Texas
MAR 17 2010
At 10:20 A.M. / K
1 Amalia Rodriguez-Mendoza, Clerk

000046

- 10. Remain within _____ (Travis County [or another county] or State of Texas) unless given permission to depart by the Supervision officer.
- 11. While on community supervision, you must have on your person at all times a current, valid Texas Department of Public Safety photo identification card or a valid Texas Department of Public Safety photo driver's license. You must obtain this photo identification within thirty (30) days of the date of your community supervision.
- 12. Support your dependents.
- 13. Submit a urine specimen at the direction of the Supervision Officer, daily if ordered, and pay all costs if required.
- 14. Pay to and through the Community Supervision and Corrections Department of Travis County, Texas, in one lump sum or in installments, as set forth in the collection schedule, the following:
 - a. Court Costs \$ to be determined
 - b. Fine \$ 0.00
 - c. Attorney Fees \$ 0.00
 - d. Supervision Fee of \$60.00 per month (waived)
 - e. Restitution \$ 2350.95 to Ace Contractor Supply
 - f. Crime Stopper Fee of \$30.00 (waived)
 - g. Family Violence Center Fee \$100
 - h. _____

All special conditions and court-ordered fees must be paid in full and completed 60 days prior to discharge. If your case is transferred to another state, supervision fees are to be waived beginning on the date of acceptance of the receiving state and will be reinstated upon rejection of supervision by the receiving state or return of supervision to Texas.

- 15. Do not operate a motor vehicle without a valid Texas Driver's License and proof of automobile liability insurance.
- 16. Surrender your Driver's License for a term of _____
- 17. Participate in, and comply with the rules of the following program(s):
 - a. Electronic Monitoring
 - b. SCRAM for
 - c. Ignition Interlock and follow Ignition Interlock Additional Conditions of Community Supervision.
 - d. Other
- 18. Complete 100 hours of Community Service Restitution at a place approved and designated by the Community Supervision and Corrections Department (concurrent).
- 19. Report to, cooperate with, and participate in all programs (until successfully discharged), and pay all costs for the following classes and services:

Assessments:

 - a. CSCD Diagnostic
 - b. CSCD TAIP
 - c. Family Violence at CES
 - d. MHMR
 - e. Psychological or Psychiatric by a department approved service provider

JOHN COOPER

Cause #: D1DC08302304-1

Classes:

- f. Anger Management Program
- g. Certified Drug Education Class (15 hours) for driver's license reinstatement (if convicted)
- h. DWI Offender Certified Intervention Program (30 hours) and submit proof to DPS for driver's license reinstatement
- i. Parenting Classes
- j. Other as determined by the Supervising Officer
- k. Complete a drug/alcohol assessment in county of residence

20. Report to the supervision office for an evaluation for the following program or services and follow the recommendation and pay costs incurred while in the program.

- a. CSCD Counseling Center
- b. Counseling/Treatment designated by the Supervision Officer
- c. In-Patient Treatment Program at _____ or comparable treatment program recommended by TAIP and complete aftercare as recommended by the Treatment Provider
- d. Out-Patient Treatment Program at _____ or comparable treatment program recommended by TAIP and complete aftercare as recommended by Treatment Provider
- e. Relapse Prevention Program
- f. SMART Residential and Continuing Care
- g. _____

21. Assigned to the following specialized unit until the level of supervision is changed by the court and/or supervision officer and follow the department guidelines for the caseload.

- a. Mental Health Unit; participate in assessment for services through MHMR or designated treatment provider and follow recommendations; do not participate in clinical drug studies; sign all necessary releases and take all medications as prescribed.
- b. Sex Offender Unit and follow Sex Offender Additional Conditions of Community Supervision.
- c. Other Specialized Caseload

22. Register with and remain registered with the Travis County Domestic Relations Office, if ordered by the Court and/or your Supervision Officer.

23. Provide a DNA sample, as directed by the probation department, if convicted of a felony offense.

- _____(24) Attend support group meetings (i.e., AA/NA) as directed and provide documentation to your Supervision Officer.
- _____(25) Serve _____ days in the Travis County Jail, beginning _____; straight time/work release/weekends/credit for back time/SWAP Program.
- _____(26) Do not open or maintain a checking account until approved, in writing, by the Court and/or your Supervision Officer.
- _____(27) Have no contact with _____, either in writing, in person, by phone, electronically or through third parties.

DC BK10081 PG53

JOHN COOPER

Cause #: D1DC08302304-I

- _____ (28) Serve a term of confinement in a State Jail Felony Facility for a period of _____ days/one year, said term to begin on _____. Obey all rules and regulations and participate in the rehabilitative programs of said facility until discharged from the facility.
- _____ (29) Show proof of a high school diploma within ninety (90) days or obtain GED within year(s).
- _____ (30) Have no contact with gangs or gang members during term of community supervision.
- _____ (31) _____
- _____ (32) _____
- _____ (33) _____

Signed the 17 day of March, AD, 2010.

Charles J. Faird

Judge Presiding

I, AMALIA RODRIGUEZ-MENDOZA, District Clerk, Travis County, Texas, do hereby certify that this is a true and correct copy as same appears of record in my office. Witness my hand and seal of office on 4-9-10.

AMALIA RODRIGUEZ-MENDOZA

DISTRICT CLERK

By Deputy



[Signature]

APPENDIX B

OFFENSE: THEFT PROP>=\$500<\$1,500
MISDEMEANOR - LEVEL A

NO. D1DC08302238

THE STATE OF TEXAS

IN THE 299TH DISTRICT COURT

vs.

OF TRAVIS COUNTY, TEXAS

JOHN COOPER

ORDER OF THE COURT DEFERRING FURTHER PROCEEDINGS

On 11th day of March, 2010 AD, this cause was called for trial and the State appeared by her District Attorney, and the defendant, John Cooper, appeared in open court, his counsel, Chris Holub, also being present, and the said defendant having been duly arraigned, pleaded GUILTY to the indictment herein, both parties announced ready for trial, and thereupon a trial by jury was waived by all parties and the reading of the indictment was waived thereupon the State elected to proceed upon the lesser included offense of Theft Prop>=\$500<\$1,500, Misdemeanor - Level A, and the defendant pleaded GUILTY thereto, and the Court having heard arguments of both sides found sufficient evidence to find the defendant guilty of the offense of Theft Prop>=\$500<\$1,500, A Misdemeanor - Level A.

However, on 11th day of March, 2010, the Court being of the opinion that the best interests of society and the defendant will be served in this cause by deferring further proceedings without entering an adjudication of guilt pursuant to Article 42.12, Section 5 of the code of Criminal Procedure, as amended, it is therefore **CONSIDERED, ORDERED and ADJUDGED** that further proceedings in this cause shall be and are hereby deferred and the defendant placed on Community Supervision in this cause for a period of 2 YEARS from this date under the supervision of the Court and the duly appointed and acting Adult Community Supervision Officer of Travis County, Texas, subject to the following conditions of Community Supervision, and the defendant shall, during the term of Community Supervision:

1. Commit no offense against the laws of this or any State or of the United States.
2. Avoid injurious or vicious habits.
3. Avoid the use of all narcotics, habit forming drugs, alcoholic beverages, and controlled substances.
4. Avoid persons or places of disreputable or harmful character.
5. Report to the supervision officer as directed by the judge or the supervision officer and obey all orders of the Court and the rules and regulations of the Community Supervision and Corrections Department.
6. Refrain from disorderly conduct, abusive language, or disturbing the peace while present at the office of the Department.
7. Permit the Supervision Officer to visit you at your home or elsewhere.
8. Work faithfully at suitable employment as far as possible.
9. Do not change residence without permission ^{of the District Court} and report changes of employment to Supervision Officer as directed.

MAR 17 2010

At 10:20 A.M.
Amalia Rodriguez-Mendoza, Clerk

000056

JOHN COOPER

Cause #: D1DC08302238

- 10. Remain within _____ (Travis County [or another county] or State of Texas) unless given permission to depart by the Supervision officer.
- 11. While on community supervision, you must have on your person at all times a current, valid Texas Department of Public Safety photo identification card or a valid Texas Department of Public Safety photo driver's license. You must obtain this photo identification within thirty (30) days of the date of your community supervision.
- 12. Support your dependents.
- 13. Submit a urine specimen at the direction of the Supervision Officer, daily if ordered, and pay all costs if required.
- 14. Pay to and through the Community Supervision and Corrections Department of Travis County, Texas, in one lump sum or in installments, as set forth in the collection schedule, the following:
 - a. Court Costs \$ to be determined
 - b. Fine \$ 0.00
 - c. Attorney Fees \$ 0.00
 - d. Supervision Fee of \$60.00 per month
 - e. Restitution \$ 1250.00 to Martha Wingren
 - f. Crime Stopper Fee of \$30.00
 - g. _____ Family Violence Center Fee \$100
 - h. _____

All special conditions and court-ordered fees must be paid in full and completed 60 days prior to discharge. If your case is transferred to another state, supervision fees are to be waived beginning on the date of acceptance of the receiving state and will be reinstated upon rejection of supervision by the receiving state or return of supervision to Texas.

- 15. Do not operate a motor vehicle without a valid Texas Driver's License and proof of automobile liability insurance.
- 16. Surrender your Driver's License for a term of _____.
- 17. Participate in, and comply with the rules of the following program(s):
 - a. _____ Electronic Monitoring _____
 - b. _____ SCRAM for _____
 - c. _____ Ignition Interlock and follow Ignition Interlock Additional Conditions of Community Supervision.
 - d. _____ Other _____
- 18. Complete 100 hours of Community Service Restitution at a place approved and designated by the Community Supervision and Corrections Department (concurrent).
- 19. Report to, cooperate with, and participate in all programs (until successfully discharged), and pay all costs for the following classes and services:

Assessments:

 - a. _____ CSCD Diagnostic
 - b. _____ CSCD TAIP
 - c. _____ Family Violence at CES
 - d. _____ MHMR
 - e. _____ Psychological or Psychiatric by a department approved service provider

JOHN COOPER

Cause #: DIDC08302238

Classes:

- f. Anger Management Program
 - g. Certified Drug Education Class (15 hours) for driver's license reinstatement (if convicted)
 - h. DWI Offender Certified Intervention Program (30 hours) and submit proof to DPS for driver's license reinstatement
 - i. Parenting Classes
 - j. Other as determined by the Supervising Officer
 - k. Complete a drug/alcohol assessment in county of residence
20. Report to the supervision office for an evaluation for the following program or services and follow the recommendation and pay costs incurred while in the program.
- a. CSCD Counseling Center
 - b. Counseling/Treatment designated by the Supervision Officer
 - c. In-Patient Treatment Program at _____ or comparable treatment program recommended by TAIP and complete aftercare as recommended by the Treatment Provider
 - d. Out-Patient Treatment Program at _____ or comparable treatment program recommended by TAIP and complete aftercare as recommended by Treatment Provider
 - e. Relapse Prevention Program
 - f. SMART Residential and Continuing Care
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21. Assigned to the following specialized unit until the level of supervision is changed by the court and/or supervision officer and follow the department guidelines for the caseload.
- a. Mental Health Unit; participate in assessment for services through MHMR or designated treatment provider and follow recommendations; do not participate in clinical drug studies; sign all necessary releases and take all medications as prescribed.
 - b. Sex Offender Unit and follow Sex Offender Additional Conditions of Community Supervision.
 - c. Other Specialized Caseload
22. Register with and remain registered with the Travis County Domestic Relations Office, if ordered by the Court and/or your Supervision Officer.
23. Provide a DNA sample, as directed by the probation department, if convicted of a felony offense.
- (24) Attend support group meetings (i.e., AA/NA) as directed and provide documentation to your Supervision Officer.
 - (25) Serve _____ days in the Travis County Jail, beginning _____; straight time/work release/weekends/credit for back time/SWAP Program.
 - (26) Do not open or maintain a checking account until approved, in writing, by the Court and/or your Supervision Officer.
 - (27) Have no contact with Martha Wingren, either in writing, in person, by phone, electronically or through third parties.

DC BK10081 PG49

JOHN COOPER

Cause #: D1DC08302238

- ____ (28) Serve a term of confinement in a State Jail Felony Facility for a period of _____ days/one year, said term to begin on _____. Obey all rules and regulations and participate in the rehabilitative programs of said facility until discharged from the facility.
- ____ (29) Show proof of a high school diploma within ninety (90) days or obtain GED within year(s).
- ____ (30) Have no contact with gangs or gang members during term of community supervision.
- ____ (31)
- ____ (32)
- ____ (33)

Signed the 17 day of March, AD, 2010.

Charles J. Faird

Judge Presiding

I, AMALIA RODRIGUEZ-MENDOZA, District Clerk, Travis County, Texas, do hereby certify that this is a true and correct copy as same appears of record in my office. Witness my hand and seal of office on 4-9-10.



AMALIA RODRIGUEZ-MENDOZA

DISTRICT CLERK

By Deputy *Way Sabien*

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 40833-3-II
v.)	
)	
JOHN COOPER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF NOVEMBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MICHAEL KINNIE	(X)	U.S. MAIL
CLARK COUNTY PROSECUTING ATTORNEY	()	HAND DELIVERY
PO BOX 5000	()	_____
VANCOUVER, WA 98666-5000		
[X] JOHN COOPER	(X)	U.S. MAIL
340656	()	HAND DELIVERY
LARCH CORRECTIONS CENTER	()	_____
15314 DOLE VALLEY RD		
YACOLT, WA 98675		

SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF NOVEMBER, 2010.

X _____ 

BY _____
STATE OF WASHINGTON
DEPUTY

10 NOV 19 PM 12:29

COURT OF APPEALS
DIVISION II

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710