

No. 40996-8-II

IN THE
WASHINGTON STATE COURT OF APPEALS
DIVISION II

CERTIFICATE OF SERVICE

I certify that I mailed via e-mail

1 copies of SAG
to Counsel Cunningham
& Proc. Office Piccolo
1/21/11
Date Signed

STATE OF WASHINGTON,

Respondent,

VS.

DAVID MILES MARTIN,

Appellant.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

DAVID MILES MARTIN
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

COURT OF APPEALS
DIVISION II
11 JAN 20 AM 11:58
STATE OF WASHINGTON
BY [Signature]
DEPUTY

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I.

ASSIGNMENTS OF ERROR

1. The Trial Court Violated the Defendant's Right to a Jury Trial Under Both State and Federal Constitutions.
2. Appellant's Appointed Counsel Provided Ineffective Assistance By Advising Appellant To Agree To A Stipulated Facts [Bench] Trial.
3. Appellant's Appointed Counsel Provided Ineffective Assistance in Failing to Move for Suppression of Phone Call and Informant Evidence.
4. The Trial Court Improperly Sentenced Appellant Above The Statutory Maximum For a Class B Felony.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is a Criminal Defendant Deprived of His Right to a Jury Trial When He Waives Such Right Not fully Understanding His Jury Trial Rights?
2. Does An Attorney Provide Ineffective Assistance of Counsel By Advising A Criminal Defendant To Enter Into A Stipulated Facts [Bench] Trial Where The Judge Is Aware of The Defendants Extensive Criminal Past?
3. Does An Attorney Provide Ineffective Assistance By Failing to Move for Suppression of Excludable Evidence?
4. Does A Trial Court Exceed It's Sentencing Authority When It Sentences a Criminal Defendant Above The Statutory Maximum?

II.

Statement of the Case.

David Miles Martin [hereinafter Appellant] is currently serving a sentence of 134-months in prison after having been convicted in a stipulate facts [bench]

trial.

Appellant incorporates by reference the remainder of the statement of the case from the Opening Brief of Appellant and invites the Court to refer to the same.

III.

Argument

- A. THE TRIAL COURT VIOLATED THE APPELLANT'S RIGHT TO A JURY TRIAL UNDER BOTH STATE AND FEDERAL CONSTITUTIONS.

Under the U.S. Constitution's Sixth Amendment every person charged with an offense that could result in over six months imprisonment is entitled to a trial by jury. Cheff v. Schnackenberg, 384 U.S. 373, 86 S.Ct. 1523 (1966). Also see Duncan v. Louisiana, 391 U.S. 145, 149, 20 L.Ed.2d 491, 88 S.Ct. 1444 (1968). By contrast, the constitution of the State of Washington, Art. 1, §21, affords its citizens the right to trial by a jury for any offense defined as a "crime", the conviction of which could result in any imprisonment. Pasco v. Mace, 98 Wn.2d 87, 655 P.2d 618 (1982). Since all persons charged with a crime have a fundamental right to a jury trial, the waiver of this right may only be sustained if a defendant acts knowingly, intelligently, voluntarily and free

from improper influences. State v. Stegall, 124 Wn.2d 719, 725, 888 P.2d 979 (1994).

The waiver of the right to a jury trial must either be made in writing or made orally on the record. State v. Wicke, 91 Wn.2d 68, 591 P.2d 452 (1979). If the defendant challenges the validity of a jury waiver on appeal, the State bears the burden of proving that the waiver was knowingly, intelligently and voluntarily made. State v. Donahue, 76 Wn.App. 695, 697, 887 P.2d 485 (1995). Because it implicates the waiver of an important constitutional right, the appellate court reviews a trial courts' decision to accept the defendants' jury waiver de novo. State v. Ramirez-Dominguez, 140 Wn.App. 2 , 29, 165 P.2d 391 (2007). A reviewing court may not presume that a defendant waived his jury trial right unless the record establishes a valid waiver. State v. Pierce, 14 Wn.App. 76, 771, 142 P.3d 610 (2006); CrR 6.1(a) ("cases required to be tried by jury shall so be tried unless the defendant files a written waiver of a jury trial, and has consent of the Court).

While a written waiver is evidence that a defendant validly waived a jury trial, it is not determinative. Pierce, Id., at 771. The record must reflect a personal expression of waiver by the

defendant. Stegall, 124 Wn.2d at 725.

In this case, Martin was at least made aware that he did have the right to a jury trial, since the written waiver so states. However, both the shortness of the colloquy and the failure of the trial court to adequately inform the defendant of the essential nature of the jury waiver show that the waiver was not knowingly, intelligently, and voluntarily made. The court briefly mentioned that waiver included the right to have 12 people, rather than a judge, decide whether a crime had been committed. RP 111 However, the record contains no evidence that Martin understood that under the Washington constitution, there must be complete jury unanimity in order to enter a guilty verdict. See State v. Pierce, 134 Wn.App. 763, 142 P.3d 610 (2006); and State v. Vasquez, 109 Wn.App. 310, 34 P.3d 1255, aff'd, 148 Wn.2d 30, 59 P.3d 648 (2001)(waivers found valid where, among other things, defendant was expressly informed of right to unanimous verdict). Washington States constitutional right varies significantly from the United States Constitution and many other state constitutions, which do not require complete jury unanimity in order to sustain a guilty verdict. See State v. Gimarelli, 105 Wn.App. 370, 379, 20 P.3d 430 (2001); State v. Klimes, 117 Wn.App.

758, 770, 73 P.3d 416 (2003).

Absent advice on this important component of the right to jury trial under the Washington Constitution, Art. 1, §21, the State in this case cannot meet its burden of proving that the jury waiver was knowingly, intelligently, and voluntarily made. As a result, this Court should reverse the conviction and remand for a new jury trial.

B. APPELLANT WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." This fundamental right is assured in the State Court's by the Due Process Clause of the Fourteenth Amendment. Powell v. Alabama, 53 S.Ct. 55, 77 L.Ed. 158 (1932); U.S.C.A. VI., XIV; Wash. Const. Art. I, §22.

A criminal defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104

S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984)), cert. denied, 510 U.S. 944 (1993)(emphasis in original).

The Constitutional right to counsel includes the right to effective assistance of counsel at trial and on direct appeal. McMann v. Richardson, 397 U.S. 759, 771 N.14 (1970); Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437 1974); Evitts v. Lucey, 105 S.Ct. 800, 835 (1985).

The 2-two prong Strickland test requires proof that the attorney acted deficiently and that the deficient performance prejudiced the defense. Id., at 418. Deficient conduct by an attorney must show errors so serious that the defendant in effect has been deprived of his Sixth Amendment right to counsel. Id., at 418. That means performance falling below the "customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances." State v. Visitacion, 55 Wn.App. 166, 173, 776 P.2d 986 (1989). The prejudice prong is met by showing a reasonable probability that, absent the deficient performance, the outcome of the proceeding would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1985); Strickland, 466 U.S. at 694. Such a reasonable probability need

only undermine confidence in the outcome and need not show that the deficient conduct "more likely than not" altered it. Thomas, Id., at 26.

Washington Court's, however, have recognized that some circumstances require a presumption of prejudice. See In Re Richardson, 110 Wn.2d 669, 675 P.2d 209 (1983); In Re Boone, 103 Wn.2d 24, 233, 691 P.2d 964 (1984); In Re Farney, 91 Wn.2d 72, 593 P.2d 1210 (1978); State v. Kitchen, 110 Wn.2d 403, 413, 756 P.2d 105 (1988).

The Federal Court's have likewise presumed prejudice where an attorney fails to perform his duties. See United States v. Cronin, 466 U.S. 648, 658-61, (1984); Strickland, 466 U.S. at 692; Smith v. Robbins, 528 U.S. at 287; Roe v. Flores-Ortega, 528 U.S. 470, 483-84 (2000).

The claim whose omission forms the basis of an ineffective assistance claim may be either a federal-law or a state-law claim, so long as the "failure to raise the state or federal ... claim fell 'outside the wide range of professionally competent assistance.'" Strickland, 466 U.S. at 690, 104 S.Ct. at 2066).

In assessing the attorney's performance, a reviewing court must judge his conduct on the basis of the facts of the particular case, "viewed as of

the time of counsel's conduct," Strickland, Id., and may not use hindsight to second-guess his strategy choices, Fretwell, 506 U.S. 364, ___, 113 S.Ct. 838, 844.

In evaluating the prejudice component of the Strickland test, a court must determine whether, absent counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. "A reasonable probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. The outcome determination, unlike the performance determination, may be made with the benefit of hindsight. See Fretwell, 506 U.S. at ___, 113 S.Ct. at 844.

(a) Defense Counsel Provided Erroneous Advise Regarding a Stipulated Facts [Bench] Trial and the Elements of the Firearm Enhancement.

It is a well settled principal that defense attorney's have an obligation to discuss with their client's the pros and cons of a bench trial versus a jury trial, and provide sufficient information in order that a criminal defendant make an informed decision as to whether or not to plead guilty or not guilty. Von Moltke v. Gillis, 332 U.S. 708, 68 S.Ct. 316 (1948)("prior to trial an accused is entitled to

rely upon his counsel to make an independent examination of the facts, circumstances pleadings, and laws involved and then offer his informed opinion as to what plea should be entered).

Where, as here, a defendant is represented by counsel and waives his right to a jury trial and have a "stipulated Facts" [bench] trial upon the advise of counsel, the voluntariness of the waiver depends on whether counsel's advise "was within the range of competence demanded of attorney's in criminal cases." McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970); Tolett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973).

In this case, counsel advised appellant that he should waive his jury trial rights and have a stipulated facts [bench] trial because it would be better for him, and more likely that the judge would be apt to find appellant not guilty of the firearm enhancement. See Appendix "A" DECLARATION OF DAVID MILES MARTIN.¹

¹ Appellant recognizes that his declaration is evidence outside the record, however, he requests the court consider such pursuant to RAP 9.11(a). Also see Sackett v. Santilli, 101 Wn.2d 128, 5 P.3d 11, review granted, 142 Wn.2d 1016, 16 P.3d 1264, aff'd, 146 Wn.2d 498, 47 P.3d 948 (2001).

In this case, petitioner's defense attorney properly informed him of the State's offer for a stipulated facts [bench] trial, however, counsel erroneously recommended that petitioner accept the offer. This is so, because there was no evidence whatsoever that appellants' crime was committed while armed with a firearm, as the judge properly found that the evidence did not support the Firearm enhancement under the facts. RP 135-137 As there was no evidence of the essential elements for that crime, it necessarily follows that a jury would have found the same as the judge. Thus, counsel's failure to inform appellant that the elements for the firearm enhancement were not met [sufficiently supported] in this case amounts to deficient performance of counsel which should be presumed prejudicial. U.S. v. Cronin, 466 U.S. at 658; Strickland, 466 U.S. at 692.

In Addition, defense counsel never explained to appellant that the ultimate decision on whether to have a jury trial rested with appellant, and that the right to a jury included the right to have the jury rather than the judge make the guilty finding on the essential elements of the crime. See Appendix "A" Declaration of DAVID MILES MARTIN. Also see Jones v. Barnes, 463 U.S. 745, 751 (1983)(defendant has

ultimate authority to make fundamental decisions regarding his case, such as to whether to waive a jury); Sullivan v. Louisiana, 508 U.S. 275, 277, 124 L.Ed.2d 182, 113 S.Ct. 2078 (1993).

Moreover, even if prejudice is not presumed, counsel's deficient performance caused "actual prejudice". This is so as counsel should not have advised appellant to stipulate to a facts [bench] trial to avoid conviction for a crime not supported by the evidence. See Wanatee v. Auly, 39 F.Supp.2d 1164 (N.D. Iowa 1999)(Defense counsel's failure to advise petitioner of applicable law on the aiding and abetting liability, or joint conduct liability during plea negotiations for second degree murder warranted evidentiary hearing); Blaylock v. Lockhart, 898 F.2d 1367 (8th Cir. 1990)(same); Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d (1976)(where neither defense counsel nor the trial court had explained the elements of the offense ... the guilty plea was involuntary); Dickerson v. Vaughn, 90 F.3d 87 (3rd Cir. 1996)(habeas relief granted where petitioner's plea of nolo contendere after receiving faulty legal advise from trial counsel); U.S. v. Bigman, 906 F.2d 392 (9th Cir. 1990)(defense counsel's failure to apprise defendant of intent element of crime ... constitutes

ineffective assistance of counsel, rendering guilty plea involuntary and not knowingly made); Gaddy v. Linahan, 780 F.2d 935 (11th Cir. 1986)(same); Ivy v. Caspari, 173 F.3d 1136 (8th Cir. 1999)(Defense counsel's failure to advise 16-year old defendant that intent was element of second degree murder charge rendered the guilty plea involuntary and constitutes ineffective assistance); U.S. v. Streater, 70 F.3d 1314, 1318 (D.C. Cir. 1995)(guilty plea was not knowing and voluntary when induced by counsel's faulty legal advise regarding elements of possible defense); Scott v. Wainwright, 698 F.2d 427, 429-30 (11th Cir. 1983)(Trial counsel's failure to learn the facts and familiarize himself with the law in relation to the plea constitutes ineffective assistance and renders the guilty plea invalid); Strickland, 466 U.S. at 692. Also see Declaration of DAVID MILES MARTIN Appendix "A".

Finally, there simply would not have been any evidence to support appellant's conviction for a firearm enhancement based on the crime beyond a reasonable doubt, where there was no evidence that a firearm was used in the commission of the crime.

Furthermore, advising appellant to waive his right to a jury trial and proceed in front of a judge who knew his criminal record amounts to deficient

performance of counsel which should be presumed prejudicial. See Jemison v. Foltz, 672 F.Supp. 1002, (E.D. Mich. 1987)(Trial Counsel waived jury trial and allowed defendant to be tried before a judge that was fully aware of defendant's long criminal history); Miller v. Dormire, 310 F.3d 600 (2002); Strickland, 466 U.S. at 692.²

(b) Defense Counsel Failed to Move to Suppress the Evidence of the Informants Tip and the Alleged Phone Conversations and Wrongly Stipulated to the same.

Trial counsel's performance is presumed to be competent and decisions to omit questions or arguments at trial will normally be presumed to be "legitimate trial strategy". State v. Mak, 105 Wn.2d 692, 721, 718 P.2d 407 (1986). When no tactical reason would justify the omission, however, the failure to present valid objections or positions to the court will be deemed to be deficient performance. State v. Carter, 56 Wn.App. 217, 783 P.2d 579 (1989); State v. Aho,

² The sentencing hearing suggests that the trial judge used appellants prior criminal history in not only considering the sentence, but also making his findings regarding the guilt phase. RP 25-27 (July 2, 2010) This was prejudicial and requires reversal. See Edwards v. Balisok, 117 S.Ct. 1584, 1588 (1997)("A criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him); Johnson v. United States, 117 S.Ct. 1544, 1548, 1549-50 (1997).

137 Wn.2d 736, 975 P.2d 512 (1999). Such a failure can be grounds for reversal if trial counsel knew or reasonably should have known of omitted favorable material or position. State v. Byrd, 30 Wn.App. 794, 800, 68 P.2d 601 (1981).

Defense counsel's decision not to challenge evidence on constitutional grounds, by pretrial motion to suppress is not automatically assumed to be deficient performance. Failure to present a valid pretrial motion to suppress, however, can rarely be determined to be a legitimate tactical decision. State v. Rainy, 107 Wn.App. 129 (2001); State v. Klinger, 96 Wn.App. 619 (1999); Kimmelman v. Morrison, 477 U.S. 365, 385 (1986); Sager v. Maass, 84 F.3d 1212 (9th Cir. 1996).

Here, the record shows that an informant allegedly called appellant and discussed a drug transaction. CP 118-122 In State v. Rodriguez, 103 Wn.App. 693, 701, 14 P.3d 157 (2000), the court held that the State must establish the identity of each caller. Likewise, in U.S. v. Therm-All Inc., 352 F.3d 924 (9th Cir. 2003), the Ninth Circuit held it was insufficient evidence to support a (conspiracy conviction) unless the government can prove who participated in the calls, and also prove the substance of the conversations.

Although, the trial court made several findings of facts regarding the calls those facts did not include any findings of the participants conversations or identity, or the substance of the call. Such was all based on the police officer's hearsay. Thus, probable cause could not have been based on the alleged phone call, unless the state proved by a preponderance of the evidence it was appellant. The State failed to prove such here, and did not submit findings of facts or conclusions of law.

Likewise the informants statements to police are also not based on anything other than the officer's hearsay, and does not meet the Aguilar-Spinelli test to determine whether information provided by an informant establishes probable cause. State v. Jacobs, 121 Wn.App. 669, 677 (2004); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); Spinelli v. United States, 93 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). Here, the credibility of the informant was not established by police hearsay, thus, probable cause was lacking.

Both the phone call and informant evidence was stipulated to by counsel instead of challenged in a suppression hearing. This was deficient performance of counsel which should be presumed to

have caused prejudice. Kimmelman, Strickland, Cronic, supra.

C. THE TRIAL COURT ERRED IN SENTENCING APPELLANT ABOVE STATUTORY MAXIMUM FOR THE CRIME.

When a sentencing Court incorrectly calculates a offender's standard range sentence, under the Sentencing Reform Act (SRA), remand is required unless the record clearly shows that the sentencing court would have imposed the same sentence absent the error. State v. Barker, 12 Wn.2d 182, 189, 937 P.2d 575 (1991); In Re Call, 144 Wn.2d 315, 32, 28 P.3d 709 (2001); State v. Jackson, 129 Wn.App. 95, 117 P.3d 1182, 1186 (2005). Moreover, when a sentencing court bases a sentence on an incorrect standard sentence range it acts without statutory authority under the SRA. State v. Roche, 75 Wn.App. 500, 513, 878 P.3d 497 (1994); In Re Goodwin, 146 Wn.2d 861, 50 P.3d 618, 62 (2002); State v. Rowland, 97 Wn.App. 301, 304, 98 P.2d 696 (1999).

In this case, the trial court miscalculated appellants' applicable standard sentence range. This is so as the trial court sentenced appellant to 110-months. See RP 25-27 (July 2, 2010) The applicable top-end of the standard range is 144-months. The sentencing court then imposed a 24-month drug

enhancement, and a term of 12-months of community custody. The total sentence exceeds the statutory maximum for a Class B felony. See RCW 9.94A.510. Also see State v. Desantiago, 149 Wn.2d 402, 68 P.3d 1065 (2003)("[T]he total sentence including enhancements remains presumptively limited by the statutory maximum for the underlying offense unless the offender is a persistent offender; if the total sentence exceeds the maximum sentence, the underlying sentence, not the enhancement, must be reduced").

The community custody requirement also takes appellants sentence above the statutory maximum for a Class B Felony. See State v. Zalvala-Reynoso, 127 Wn.App. 119, 110 P.3d 827, 830 (2000).

The Court should remand for resentencing for a total of no more than 120-months. The failure to correct this defect could result in a denial of appellant's due process rights. See Hill v. Estelle, 653 F.2d 202, 204 (5th Cir. 1981), cert. denied, 454 U.S. 1036, 70 L.Ed.2d 481 (1981)(citing Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980)).

D. Conclusion

For the reasons stated, this Honorable Court should reverse Martins' conviction, and remand for a new trial, and resentencing, based on individual reversible error, or if the court finds none by itself to be prejudicial, than on the accumulation of error that denied appellant a fair trial. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); U.S. v. Necochehea, 986 F.2d 1273, 1281 (9th Cir. 1993).

DATED this 17 day of January, 2011.

Respectfully submitted,



DAVID MILES MARTIN
Appellant

APPENDIX

"A"

I N T H E
W A S H I N G T O N C O U R T O F A P P E A L S
D I V I S I O N I I

STATE OF WASHINGTON,)	
)	No. 409968-II
Respondent,)	
)	
vs.)	
)	
DAVID MILES MARTIN,)	
)	
Appellant.)	DECLARATION OF DAVID
)	MILES MARTIN
)	

STATE OF WASHINGTON)	
)	ss:
COUNTY OF FRANKLIN)	

I, DAVID MILES MARTIN after being first duly sworn upon oath deposes and declares under penalty of perjury under the laws of the State of Washington, and of the United States of America that the foregoing statements are true and correct to the best of my belief and knowledge: That I am above the age of 21-years, and am competent to testify to the matters stated herein which are based on my personal knowledge and which are admissible as evidence at the time of hearing in this matter.

1. That I am representing myself in this matter - preparing my (SAG) - and it is in that capacity that I prepare this declaration.

2. That my defense attorney advised me that having a stipulated facts [bench] trial would be better for me, as the Judge would be more likely to return a not guilty verdict on the firearm enhancement versus a jury. and further;

3. That my defense attorney never advised me that the necessary elements for a firearm enhancement were lacking under the facts of the case, and further;

4. That my defense attorney, specifically

informed me that a stipulated facts trial was not a guilty plea and further;

5. That my defense attorney, never informed me that the decision whether to waive a jury trial was mine and only mine to make and further;

6. That my defense attorney never informed me that if I stipulated to a facts [bench] trial that the judge would be privy to my criminal record or that if I had a jury trial the jury would not be privy to my criminal past record, and further;

7. That neither the trial court, or my defense attorney advised me that I had a right to have a jury determine my guilt on all essential elements of the crime's charged, and further;

8. That because of my defense attorney's advise or lack thereof, I waived my right to a jury trial and stipulated to have a bench trial, and further;

9. That if I had been informed [advised] by my defense attorney that the elements of the firearm enhancement were not supported by the facts of the case, I would have insisted on a jury trial and further;

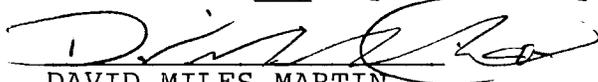
10. That if I had been informed [advised] by my defense attorney that the Judge would be privy to my criminal record, and a jury would not have been privy to the same, I would have insisted on a jury trial and further;

11. That if I had been informed [advised] by my defense attorney or Judge that the jury would have had to find every element of the crimes charged beyond a reasonable doubt, I would have insisted on a jury trial, and further;

12. That if I had been informed [advised] by my defense attorney that the decision to waive a jury trial was mine and only mine to make, I would have insisted on and choose a jury trial.

I, DAVID MILES MARTIN, certify, state, and declare under penalty of perjury that the foregoing is true and correct to the best of my personal knowledge. 28 U.S.C. § 1746; 18 U.S.C. § 1621.

DATED this 17 day of January, 2011.



DAVID MILES MARTIN

Affiant/Declarant

PROOF OF SERVICE BY MAILING
BY A PERSON IN STATE CUSTODY
(Fed.R.Civ.P.5, 28 U.S.C. § 1746)

I, DAVID MILES MARTIN, declare: I am over the age of 21-years, and a party to this action. I am a resident of the Coyote Ridge Corrections Center in the County of Franklin, State of Washington. My prison address is P.O. Box 769, Connell, WA 99326.

On the 17 day of January, 2010, I served a copy of APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW: on the Parties herein by placing true and correct copies thereof, enclosed in a sealed envelope, into the United States Mail (**postage pre-paid**) in a deposit box as provided at the above named correctional institution in which I am presently confined. The envelope's were addressed as follows:

"And Added Authority"

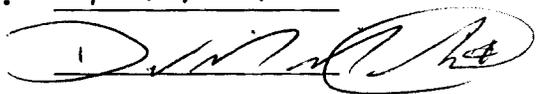
COURT OF APPEALS, DIVISION II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Kathleen Proctor
Prosecuting Attorney
930 Tacoma Avenue S. RM 946
Tacoma, WA 98402

I certify, state and declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

11 JAN 20 11:42
STATE OF WASHINGTON
BY
DEPUTY

COURT OF APPEALS
DIVISION II

EXECUTED ON: 1-17-11
SIGNATURE: 

I N T H E
W A S H I N G T O N C O U R T O F A P P E A L S
D I V I S I O N I I

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 DAVID MILES MARTIN,)
)
 Appellant.)
 _____)

No. 409968-II

ADDITIONAL AUTHORITY

RECEIVED
COURT OF APPEALS
DIVISION II
11 JAN 20 11 52 35
STATE OF WASHINGTON
BY DEPUTY

A. Identity of Moving Party

Movant' DAVID MILES MARTIN, [hereinafter petitioner] requests the Court take into consideration the following authority in consideration of the issues raised in the appellant's opening brief.

B. Additional Authority

Wong Sun v. United States, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963); U.S. v. Jackson, 415 F.3d 88, 98 (D.C. Cir. 2005)(Search of Backpack in trunk invalid because defendant's traffic violations and use of stolen license plates did not create probable cause to search trunk or backpack found therein); State v. Grib, 218 P.3d 644 (Div. III 2009); Arizona v. Gant, 129 S.Ct. 1710, at 1723-24 (2009)(police may search a car incident to occupants arrest only if the arrestee is within reaching distance of the

passenger compartment at the time of the search or it is reasonable to believe the car contains evidence of the offense of arrest); Terry v. Ohio, 392 U.S. 1 (1968)(conviction resulted from a detention that was not supported by probable cause); Maryland v. Buie, 454 U.S. 325 (1999)(evidence used against petitioner was unconstitutionally seized based on application of the "protective sweep" doctrine, despite the lack of probable cause); Mapp v. Ohio, 367 U.S. 643 (1961)(evidence used to convict petitioner was seized as the product of an unconstitutional search and seizure).

C. Conclusion

Wherefore, appellant respectfully requests that the Court take into consideration the aforementioned authority.

DATED this 17 day of January, 2011.

Respectfully submitted,



DAVID MILES MARTIN
Appellant