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ASSIGNMENTS OF ERROR

1. Ms. Donovan's DWLS conviction violated her Sixth and Fourteenth Amendment right to confront witnesses.
2. The trial court erred by admitting testimonial hearsay.
3. The trial court erred by admitting the CCDR, which included an affidavit presented in lieu of testimony, establishing key facts in the DWLS prosecution.
4. Ms. Donovan was denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel.
5. Defense counsel deprived Ms. Donovan of effective assistance by failing to object to hearsay testimony.
6. Ms. Donovan's possession conviction infringed her Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.
7. The prosecution failed to prove that Ms. Donovan possessed a sufficient quantity of methamphetamine to warrant conviction.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In a criminal case, the Sixth Amendment's confrontation clause prohibits the admission of testimonial hearsay unless the declarant is unavailable and the accused person had a prior opportunity for cross-examination. Here, the trial court admitted an affidavit indicating that "[a]fter a diligent search, our official record indicates that [Ms. Donovan's driving] status on May 26, 2010 was: Personal Driver License Status: Suspended in the third degree..." Did the admission of this testimonial hearsay violate Ms. Donovan's Sixth Amendment right to confront the witnesses against her?
2. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel in a criminal case. In this case, defense attorney failed to object to inadmissible

hearsay testimony that a driver's check revealed Ms. Donovan's driving status to be suspended in the third degree. Was Ms. Donovan denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel?

3. To convict Ms. Donovan of Possession of a Controlled Substance, the prosecution was required to prove that she possessed a sufficient quantity of drugs to warrant a felony conviction. At trial, the evidence established only that she possessed residue. Did Ms. Donovan's possession conviction violate her Fourteenth Amendment right to due process because the prosecution failed to prove the essential elements of the charged crime?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On May 26, 2010, Shannon Donovan was pulled over for a traffic infraction and arrested for Driving While License Suspended in the Third Degree (DWLS 3). RP 26-30. The arresting officer searched her and found drug paraphernalia, including a straw, in her coat pocket. RP 40-41. A subsequent lab test of residue from the straw revealed the presence of methamphetamine. RP 57-64.

Ms. Donovan was charged with DWLS 3, and with Possession of a Controlled Substance (Methamphetamine). CP 1.

Prior to trial, her attorney moved to exclude an exhibit purporting to be a certified copy of her driving record (CCDR), on the grounds that its admission would violate Ms. Donovan's confrontation rights. RP 7-8. The motion was denied as premature. RP 8.

At trial, the arresting officer described her interactions with Ms. Donovan. She testified (without objection) that Ms. Donovan said:

I'm not supposed to drive, but I had to drive today. I just had to go to the Department of Licensing and get this printout, but I can get my license now.

RP 29.

The officer also testified (again, without objection) that she ran “a driver’s check on [Ms. Donovan] and her driving record returned indicating she was suspended in the third degree.” RP 30.

The prosecution then offered Ms. Donovan’s CCDR. Exhibit 1, Supp. CP. The CCDR included a copy of a suspension letter, as well as an affidavit prepared by a Department of Licensing employee on May 27, 2010 (the day after Ms. Donovan’s arrest). The affidavit pertained to Ms. Donovan, and indicated (under penalty of perjury) that “[a]fter a diligent search, our official record indicates that the status on May 26, 2010 was: Personal Driver License Status: Suspended in the third degree...” Exhibit 1, Supp. CP.

Defense counsel objected on confrontation grounds. RP 31-35. He also asked the trial judge to strike the officer’s testimony relaying Ms. Donovan’s statements about her license status, arguing that their admission violated the *corpus delicti* rule. RP 34-35. He did not ask the court to strike the officer’s testimony about the return on the driver’s check. RP 31-35. The court overruled defense counsel’s objections, and admitted the CCDR. RP 35-36.

To prove the possession charge, the prosecution presented the testimony of a chemist from the Washington State Patrol crime lab. He indicated that he had tested the residue and determined that it contained

methamphetamine. RP 57-64. He did not weigh the residue, and did not establish the quantity of methamphetamine present. RP 57-64.

Ms. Donovan presented an unwitting possession defense. A witness testified that he was a methamphetamine addict, that he had borrowed her coat, and that the paraphernalia and residue belonged to him. RP 66-80. Ms. Donovan testified that the coat had been returned to her just before her arrest, and that she did not know that the items were in the pocket. RP 81-88.

The jury convicted on both charges, and Ms. Donovan timely appealed. CP 4, 13.

ARGUMENT

I. THE ADMISSION OF THE CCDR VIOLATED MS. DONOVAN'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010).

B. Testimonial hearsay is inadmissible at trial unless the declarant is unavailable and the accused person had a prior opportunity for confrontation.

The Sixth Amendment to the U.S. Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the right ... to be

confronted with the witnesses against him.” U.S. Const. Amend. VI.¹ A proponent of hearsay evidence bears the burden of establishing that its admission would not violate the confrontation clause. *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

The admission of testimonial hearsay violates the confrontation clause unless the declarant is unavailable and the accused had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). The admission of a CCDR violates *Crawford*, because the affidavit that is integral to the CCDR is “plainly created in order to provide evidence against [the accused] for purposes of prosecuting him [or her].” *State v. Jasper*, 158 Wash.App. 518, ___, 245 P.3d 228 (2010); see also *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).

C. A CCDR contains testimonial hearsay, and its admission violates the confrontation clause.

Ms. Donovan’s CCDR, admitted over her objection, included an affidavit like that in *Jasper*. Its admission violated her right to confrontation. *Jasper, supra; Melendez-Diaz, supra*. Accordingly, her

¹ This provision is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); U.S. Const. Amend. XIV.

DWLS conviction must be reversed and the case remanded for a new trial.² *Id.*

II. MS. DONOVAN WAS DENIED HER SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash. App. 29, 146 P.3d 1227 (2006).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

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

² Without the CCDR, Ms. Donovan’s statements about her driving status should have been excluded under the *corpus delicti* rule, as suggested by counsel. RP 35. The officer’s testimony that he learned of her driving status from dispatch was inadmissible hearsay to which defense counsel should have objected, and, in addition, was insufficient to prove the elements of the offense. RP 30. Her attorney’s failure to object denied Ms. Donovan the effective assistance of counsel, argued elsewhere in this brief.

Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir., 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); see also *State v. Pittman*, 134 Wash. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel’s performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to

the introduction of evidence of... prior convictions has no support in the record.”)

- C. Defense counsel was ineffective for failing to object to inadmissible hearsay.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

In this case, defense counsel should have objected to hearsay testimony admitted through Trooper Murphy. The officer was permitted to testify that she learned from dispatch that Ms. Donovan’s license had been suspended. RP 30. There was no strategic reason to allow this information before the jury, as it strengthened the prosecution’s case against Ms. Donovan.

Furthermore, the hearsay should have been excluded under ER 802. The information from dispatch was offered, at least in part, to prove that Ms. Donovan had been driving with a suspended license.

Finally, the judge relied on this evidence in denying counsel’s belated effort to strike his client’s testimony on grounds that its admission

violated the *corpus delicti* rule. RP 35. In addition, absent an objection and request for a limiting instruction, the evidence was available to the jury for use as substantive evidence of Ms. Donovan's guilt. *State v. Myers*, 133 Wash.2d 26, 36, 941 P.2d 1102 (1997).

Without the evidence, the prosecution would not have been able to establish the *corpus delicti* of driving while suspended. Ms. Donovan's statements would not have been admissible, and, in light of *Jasper, supra*, the prosecution would not have been able to prove the charge.

Counsel's failure to object deprived Ms. Donovan of the effective assistance of counsel. Accordingly, her conviction for DWLS must be reversed and the case remanded for a new trial. *Saunders, supra*.

III. MS. DONOVAN'S POSSESSION CONVICTION VIOLATED HER FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ESSENTIAL ELEMENTS BEYOND A REASONABLE DOUBT.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *State v. Schaler*, at 282. The interpretation of a statute is a question of law reviewed *de novo*. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009). The application of law to a particular set of facts is a mixed question of law and fact reviewed *de novo*. *In re Detention of Anderson*, 166 Wash.2d 543, 555, 211 P.3d 994 (2009). Evidence is insufficient to support a

conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Engel, at 576.*

- B. Washington should not become the only state to permit conviction of a felony based on possession of drug residue without proof of knowledge.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

To obtain a conviction for Possession of a Controlled Substance, the prosecution is required to prove beyond a reasonable doubt that the accused person possessed a controlled substance. RCW 69.50.4013. The statute does not specify a minimum amount necessary for conviction; however, common sense dictates that the prosecution must prove the possession of some minimum amount in order to sustain a conviction. Otherwise, guilt would be determined not by the actions of the accused person but by the sensitivity of the equipment used to detect the presence of the substance. *See, e.g., Lord v. Florida*, 616 So.2d 1065, 1066 (1993)

(“It has been established by toxicological testing that cocaine in South Florida is so pervasive that microscopic traces of the drug can be found on much of the currency circulating in the area.”)

Other states fall into three different categories when it comes to dealing with the problem of residue.

First, a number of jurisdictions have held that residue or trace amounts of a controlled substance cannot sustain a conviction. *See, e.g., Costes v. Arkansas*, 287 S.W.3d 639 (2008) (Possession of residue insufficient for conviction); *Doe v. Bridgeport Police Dept.*, 198 F.R.D. 325 (2001) (possession of used syringes and needles with trace amounts of drugs is not illegal under Connecticut law); *California v. Rubacalba*, 859 P.2d 708 (1993) (“Usable-quantity rule” requires proof that substance is in form and quantity that can be used).

Second, most jurisdictions require proof of knowing possession, and allow conviction for mere residue if that mental element is established.³ *See, e.g., Louisiana v. Joseph*, 32 So.3d 244 (2010) (Cocaine residue that is visible to the naked eye is sufficient for conviction if requisite mental state established; statute requires proof that defendant “knowingly or intentionally” possessed a controlled substance); *Finn v.*

³ Often, the element of knowledge can be established, in part, by proof that the residue is visible to the naked eye.

Kentucky, 313 S.W.3d 89 (2010) (possession of residue sufficient because prosecution established defendant's knowledge); *Hudson v. Mississippi*, 30 So.3d 1199, 1204 (2010) (possession of a mere trace is sufficient for conviction, if state proves the elements of "awareness" and "conscious intent to possess").⁴ For at least one state in this category, knowingly and unlawfully possessing mere residue is a misdemeanor, rather than a felony. See *New York v. Mizell*, 532 N.E.2d 1249, 1251 (1988).

The relationship between the mental element and the quantity required for conviction is best illustrated by the evolution of the law in Arizona. In that state, conviction for possession required proof of a "usable quantity" of a controlled substance. See *Arizona v. Moreno*, 374 P.2d 872 (1962). *Moreno* was decided under a 1935 statute which

⁴ See also, e.g., *Missouri v. Taylor*, 216 S.W.3d 187 (2007) (residue sufficient for conviction if defendant's knowledge is established); *North Carolina v. Davis*, 650 S.E.2d 612, 616 (2007) (residue sufficient if knowledge established); *Head v. Oklahoma*, 146 P.3d 1141 (2006) (knowing possession of residue established by defendant's statement); *Ohio v. Eppinger*, 835 N.E.2d 746 (2005) (state must be given an opportunity to prove knowing possession, even of a "miniscule" amount of a controlled substance); *Hawaii v. Hironaka*, 53 P.3d 806 (2002) (residue sufficient where knowledge is established); *Gilchrist v. Florida*, 784 So.2d 624 (2001) (immeasurable residue sufficient for conviction, where circumstantial evidence establishes knowledge); *N.J. v. Wells*, 763 A.2d 1279 (2000) (residue sufficient; statute requires proof that defendant "knowingly or purposely" obtain or possess a controlled substance); *Idaho v. Rhode* 988 P.2d 685, 687 (1999) (rejecting "usable quantity" rule, but noting that prosecution must prove knowledge); *Lord, supra* (mere presence of trace amounts of cocaine on circulating currency insufficient to support felony conviction); *Garner v. Texas*, 848 S.W.2d 799, 801 (1993) ("When the quantity of a substance possessed is so small that it cannot be quantitatively measured, the State must produce evidence that the defendant knew that the substance in his possession was a controlled substance"); *South Carolina v. Robinson*, 426 S.E.2d 317 (1992) (prosecution need not prove a "measurable amount" of controlled substance, so long as knowledge is established).

criminalized possession, and which required no proof of knowledge.

Arizona v. Cheramie, 189 P.3d 374, 377 (2008). The statute was

subsequently amended, adding a knowledge requirement to the crime of

simple possession. *Id.*, at 377-378. In response, the Arizona Supreme

Court removed the requirement that the state prove a “usable quantity.”

Id. The court explained the basis for the “usable quantity” rule and the

subsequent change in the law as follows:

Moreno's “usable quantity” statement affirmed that Arizona's narcotic statute requires something more than mere possession: it requires *knowing* possession. Thus, if the presence of the drug can be discovered only by scientific detection, to sustain a conviction the state must show the presence of enough drugs to permit the inference that the defendant knew of the presence of the drugs....

Because *Moreno* and its progeny were decided under a statute that imposed no mental state, proof of a “usable quantity” helped to ensure that defendants were convicted only after knowingly committing a proscribed act. The statute now expressly requires a knowing mental state, and establishing a “usable quantity” remains an effective way, in a case involving such a small amount that one might question whether the defendant knew of the presence of drugs, to show that the defendant “knowingly” committed the acts described...

Id., at 377-378.

In Washington, the Supreme Court has held that knowledge is not an element of simple possession.⁵ *State v. Bradshaw*, 152 Wash.2d 528,

⁵ The only other state without a *mens rea* requirement is North Dakota. See *Dawkins v. Maryland*, 547 A.2d 1041, 1045 (1988) (surveying statutes and court decisions in the 50 states).

536, 98 P.3d 1190 (2004). Because of this, it cannot fall into the second category of jurisdictions, which allow conviction for mere residue, but only upon proof of knowing possession.

The Supreme Court has never directly addressed the validity of a conviction based on mere residue. However, the Court has rejected a “usable quantity” test, and affirmed a conviction for possession of what it described as “a measurable amount” of a controlled substance. *State v. Larkins*, 79 Wash.2d 392, 395, 486 P.2d 95 (1971).

If Washington were to permit conviction for possession of residue, it would be the only state in the country to impose criminal liability for *de minimis* possession without proof of knowledge.⁶ Division II should reject this approach.⁷ It would be unduly harsh to convict someone of a felony for possessing something in a quantity so small as to be unnoticeable under most circumstances, especially since the substance possessed cannot be identified without the aid of chemical tests.

Both the *Rowell* court and the *Malone* court concluded that conviction was permitted for any quantity of drugs; however, neither case

⁶ North Dakota has apparently not yet had the opportunity to decide whether or not possession of residue is a felony.

⁷ Divisions I and III of the Court of Appeals have imposed such liability; Division II has not issued a published opinion on the subject. *See State v. Rowell*, 138 Wash.App. 780, 786, 158 P.3d 1248 (2007); *State v. Malone*, 72 Wash.App. 429, 438-440, 864 P.2d 990 (1994).

engaged in a full analysis. In *Malone*, Division I relied on *dicta* from an earlier case without even analyzing the plain language of the statute.⁸ *Malone*, at 439. The basis for the court’s conclusion in *Rowell* is even less clear; Division III’s decision in *Rowell* relied on two cases that did not even tangentially address the quantity issue in *dicta*.⁹ See *Rowell*, at 786 (citing *Bradshaw, supra*, and *State v. Staley*, 123 Wash.2d 794, 872 P.2d 502 (1994)).

Neither *Rowell* nor *Malone* acknowledged the judiciary’s power to recognize common law elements of an offense or even to create defenses. See, e.g., *State v. Goodman*, 150 Wash.2d 774, 786, 83 P.3d 410 (2004) (“the identity of the controlled substance is an element of the offense where it aggravates the maximum sentence”); *State v. Cleppe*, 96 Wash.2d 373, 381, 635 P.2d 435 (1981) (recognizing the judicially created affirmative defense of unwitting possession to “ameliorate[] the harshness of the almost strict criminal liability our law imposes for unauthorized

⁸ The *Malone* court relied on *State v. Williams*, 62 Wash.App. 748, 749-750, 815 P.2d 825 (1991), *review denied*, 118 Wash.2d 1019, 827 P.2d 1012 (1992). In *Williams*, the court suggested in *dicta* that “There is no minimum amount of narcotic drug which must be possessed in order to sustain a conviction.” *Id.*, at 751 (citing *Larkins, at 394*). As noted previously, *Larkins*, upon which *Williams* relied, was not a residue case: instead, it involved a “measurable quantity” of drugs.

⁹ At the conclusion of the opinion, the court also cited to *Williams, supra*. Thus, at best, *Rowell* suffers from the same infirmity as the opinion in *Malone*, as pointed out in the preceding footnote.

possession of a controlled substance”); *State v. Chavez*, 163 Wash.2d 262, 180 P.3d 1250 (2008) (upholding the common law definition of assault in the face of separation of powers challenge). Indeed, the legislature has explicitly authorized the judiciary to supplement penal statutes with the common law, so long as the court decisions are “not inconsistent with the Constitution and statutes of this state...” RCW 9A.04.060.

Instead of following *Malone* and *Rowell*, Division II should exercise this authority and supplement the statutory offense. Nothing in Washington’s statute is inconsistent with requiring proof of a minimum quantity, in order to obtain a conviction for simple possession.¹⁰

To convict a person of simple possession under RCW 69.50.4013, the prosecution must be required to prove some quantity beyond mere residue. In light of *Larkins*, it need not be a usable quantity, but it should be at least a measurable amount.¹¹ If such a common-law element is not recognized, Washington will be the only state in the nation that permits

¹⁰ In some states, for example, the statute permits conviction if a person knowingly possesses “any quantity” or “any amount” of a controlled substance. *See, e.g.*, Kentucky Revised Statutes §218A.1415 (“A person is guilty of possession of a controlled substance in the first degree when he knowingly and unlawfully possesses: a controlled substance that contains *any quantity* of methamphetamine...” (emphasis added)).

¹¹ The problem with defining the amount solely in terms of whether or not it is “measurable” is that the standards for measurability will always be in flux as technology improves.

conviction of a felony for possession of residue, without proof of knowledge.

Here, the prosecution did not prove that Ms. Donovan possessed more than mere residue. RP 57-64. Accordingly, her possession conviction must be reversed and the case dismissed with prejudice.

Smalis, supra.

CONCLUSION

For the foregoing reasons, Ms. Donovan's convictions must be reversed. The DWLS charge must be remanded for a new trial, and the possession charge dismissed with prejudice.

Respectfully submitted on March 2, 2011.

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Centralia, WA 98531

and to:

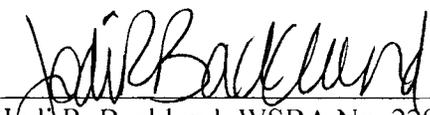
Lewis County Prosecuting Attorney
MS:pro01
360 NW North Street
Chehalis, WA 98532-1925

And that I sent the original and one copy to the Court of Appeals, Division II, for filing:

All postage prepaid, on March 2, 2011.

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

Signed at Olympia, Washington on March 2, 2011.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

CO. OF APPEALS
MARCH 02 2011
BY _____