

NO. 43758-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY HUMPHRIES

Appellant.

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

The Honorable Steve Dixon, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove constructive possession where the contraband was found in the police car where the defendant had been briefly seated.

2. The state failed to prove possession of oxycodone where the state charged possession of oxycontin.

3. There was insufficient evidence to prove driving under the influence.

4. Appellant was denied his right to a fair trial based on ineffective assistance of counsel.

5. Appellant was denied his right to a fair trial based on prosecutorial misconduct: misstating the law.

Issues Presented on Appeal

1. Did the state fail to prove constructive possession where the contraband was found in the police car where the defendant had been briefly seated?

2. Did the state fail to prove possession of oxycodone where the state charged possession of oxycontin.

3. Was there insufficient evidence to prove driving under the influence?

4. Was appellant denied his right to a fair trial based on ineffective assistance of counsel?

5. Was appellant denied his right to a fair trial based on prosecutorial misconduct: misstating the law.

B. STATEMENT OF THE CASE

Mr. Humphries was charged with possession of Oxycontin. CP 1-8; 79-101. After the state rested it unsuccessfully moved the court for permission to amend the information to possession of Oxycontin. RP 390-392, 423. Over defense objection the court issued jury instruction # 17 defining “Oxycontin” as a controlled substance. CP 290-325; RP 425, 435. The trial court also denied defense motion to dismiss the charge of possession of Oxycodone based on a complete lack of evidence of possession. RP 432, 455. Mr. Humphries was also charged and convicted of DUI and possession of cocaine with intent to deliver; he was acquitted of the firearm charge. CP 1-8; 326-329.. This timely appeal follows. CP 402-414.

DUI Facts

Sergeant Renfro received a dispatch to investigate a white passenger car near the south end of Warren Bridge driven by Timothy Humphries. RP 113. Officer Renfro passed a car matching that description, turned around and followed for two and a quarter blocks. RP 113, 135. During the two and a

quarter blocks of driving, Mr. Humphries had no problems driving, no swerving, no near misses and he parked easily. RP 136-137. After officer Renfro stopped Mr. Humphries, Mr. Humphries had no difficulty getting out of his car or walking with his hands in handcuffs. RP 140-141. Mr. Humphries was compliant and quiet when in custody. RP 170.

Officer Hall was also dispatched and arrived at the scene just seconds behind officer Renfro. RP 154-156. Officer Hall did not observe any driving but agreed that Mr. Humphries did not stumble or sway or have any issues following commands or getting out of his car or walking. RP 171, 174-75., 177 Officer Hall did not note any watery blood shot eyes or slurred speech and could not recall an odor of intoxicants. RP 177-178. Officer Hall performed the arrest and conducted a pat down search if Mr. Humphries before placing him in the back officer Thurig's patrol car. RP 158-160.

Officer Thurig another officer on scene did not see Mr. Humphris stumble and did not note any slurring or anything indicating that Mr. Humphries was intoxicated. RP 210-211. Officer Thurig did not recall seeing Mr. Humphries asleep in the back of his patrol car during the few minutes that Mr. Humphries was seated. RP 194, 211.

Donnell Rogers, a drug recognition expert (DRE) responded the scene of the arrest following a request from officer Renfro. RP 296-298, 300.

Officer Rogers contacted Mr. Humphries after he was seated in officer Renfro's patrol car. RP 301-302. Contrary to all other officer observations, officer Rogers testified that Mr. Humphries had very red watery eyes, dilated pupils, a strong odor of marijuana and alcohol., slow, slurred speech, stumbling and staggering. RP 303-306. Officer Rogers testified that Mr. Humphries stated that he might have had a drink or two and had smoked some pot. RP 308.

Officer Rogers did not observe Mr. Humphries drive and indicated that Mr. Humphries had no difficulty exiting the patrol car but somehow had trouble with balance once he exited the car. RP 342. Officer Rogers admitted that he did not make any of the observation typical to an arrest or detention for DUI. Id. Officer Rogers also admitted that a person could have red watery eyes for many reasons and that Mr. Humphries had no trouble getting out of the patrol car and into the jail or elevator or walking in the jail. RP 341, 350. Officer Rogers also indicated that he could not determine what type of alcohol or when Mr. Humphries might have consumed it or when he might have smoked marijuana earlier in the day. RP 344. Although a DRE expert, officer Humphries did not offer Mr. Humphries a DRE test or request a blood test because he was busy. RP 352.-353

Prescription Pills

Officer Hall began to read Mr. Humphries his Miranda rights but did not finish. RP 166. During the Miranda warning, Mr. Humphries was handcuffed with his hands behind his back, while sitting in the back of the patrol car. RP 163, 180-181. After Mr. Humphries was arrested, officer Hall searched his pockets and obtained a wallet, cigarettes, cash and some prescription pills. RP 164. During examination of officer Hall, he did not recognize the baggie of pills as being the same ones taken from Mr. Humphries because there were too many. Officer Hall did believe that the pills were at least “consistent” with those found on Mr. Humphries. RP 168. RP 167. Washington State Patrol Forensic scientist Tami Lee identified the pills as Oxycodone made from two different manufacturers. RP 224-225.

Officer Hall indicated that when a person such as Mr. Humphries is handcuffed with his hands behind his back, that person only has “very minimal” movement. Officer Hall indicated that it was possible if a person was very flexible that they could reach their back pocket while in handcuffs. RP 186. Officer Thurig another officer on scene shares his patrol cars with other officers but does inspect the patrol car at the beginning of each shift. RP 189-190. Officer Thurig indicated that it was possible to wedge something in between the nooks and crannies in the back seat of the patrol car near the seatbelt opening. RP 192. Officer Thurig did not find anything during his

search of the patrol car he used the night Mr. Humphries was arrested and placed in his patrol car. RP 193.

Mr. Humphries was seated in Officer Thurig's patrol car for only a few minutes and did not fidget. RP 197. After Mr. Humphries was removed, officer Thurig testified that he found a packet of Newport cigarettes in the back seat that contained rock cocaine, identified by forensic scientist Ms. Kee and a razor blade. RP 196, 198-199, 246. Officer Hall gave the cash, pills and cocaine to officer Roessel to place into evidence. RP 217, 219, 220. Mr. Humphries had \$900 in cash and 17.7 grams of cocaine in six baggies. RP 221, 246.

K-9 Used on Cash.

After the arrest, back at the police department Jason Glasgow a police handler with a dog named Lance was asked to have his K-9 unit apply to Mr. Humphries cash. RP 256. Lance cannot detect between different odors but is trained to alert to five odors: pot, crack, cocaine, meth and heroin. RP 251. Officer Glasgow placed the \$900 cash in one bundle under one of four orange traffic cones. RP 261. Lance alerted to one of the cones, but the alert could have been for any one of the five odors and the alert was not for each of the many bills but rather for the bundle. RP 284, 288, 290. According to officer Glasgow a better test would have been to test each bill separately or to have

placed something under each cone, rather than under just one cone. RP 264, 288-290. Ultimately, officer Glasgow indicated that based on Lance's past record, he could not determine Lance's accuracy. RP 293. Defense counsel objected under to the testimony from officer Glasgow regarding Lance and his alert to one of the five odors he is trained to detect. ER 702, ER 703, ER 704 and ER 402 and ER 403. RP 268-272. The trial court ruled that as follows on the relevance: "I think it's relevant if it is more probable than prejudicial". RP 269.

Defense counsel continued to object on relevance stating that the evidence was not relevant to the DUI charge, the possession of the pills charge or the weapon charge and that although relevant to the possession with intent to deliver charge, the evidence was insufficient to establish that the dog Lance mad a hot for cocaine and the evidence of a "hit" would be overly prejudicial because the prosecutor is trying to argue that the hit was cocaine without any evidence. . RP 270-271. The trial court affirmed its prior ruling that the evidence was relevant and more probative than prejudicial. RP 271.

Defense counsel objected to any DRE evidence under ER 702, 703, 704 on grounds that the evidence did not meet the Frye test. RP 271-272. The trial court denied the objection ruling that

And my position, in my estimation, the necessary

foundation testimony would be that in the field of dog scent training, it is axiomatic that animals can be trained to alert to only five scents. If that testimony was elicited, then I think that it would be proper under the seven hundreds. It has not been. I don't know if it will be, but I think that is the missing link there.

RP 272-273.

Closing Argument

The defense attorney argued inclosing a theory of constructive possession without a jury instruction on constructive possession.

But let's talk about actual possession here.

There's two ways that an individual can possess something, actual possession and constructive possession. Now, it could be said that I'm in actual possession of the jury instructions. I'm holding them. Maybe they're in my pocket, my jacket. I'm in actual possession. Clearly, what's been proffered before you is that Mr. Humphries wasn't in actual possession of any cocaine. There's been no evidence of that. Now, what the State's theory is is that Mr. Humphries was in constructive possession of the cocaine, ie., he had some dominion and control over it, even though he may not have actually possessed it. You guys all just saw me put that down there. I'm in arms reach of it. You guys can tell me I'm in constructive possession of those jury instructions. But you guys saw me put it there. You guys see that I'm standing near it. In this case, what we have is, we have Mr. Humphries placed in the back of a patrol car,

RP 467. Later, defense counsel inadvertently referred to the possession of oxycontin as constructive but corrected himself to argue that the state's

theory was actual possession. RP 570. The prosecutor too argued constructive possession of the cocaine.

Counsel also talked about actual possession versus constructive possession. Timothy Humphries was in actual possession up until the moment he ditched these drugs in the patrol car. And I'm not sure if I quite follow Counsel's argument from there, whether or not it was saying that once he leaves these drugs behind he's no longer in possession of the cocaine? I'm not sure if we're supposed to then charge Officer Thurig with possession of a controlled substance, since they were in his car, at that point? But the constructive possession is there. The actual possession is there until the moment he tries to hide them.

RP 480.

C. ARGUMENT

1. THE STATE FAILED TO PROVE DRIVING UNDER THE INFLUENCE.

There was no blood or breath evidence of intoxication, there were no filed sobriety tests and there was no evidence of bad or erratic driving. In this case two of three officers (Hall and Thurig) who observed Mr. Humphries drive following the police signal to stop and pull over all testified that Mr. Humphries did not drive erratically or swerve or drive in a manner that caused concern. RP 174-175, 177-178, 209-211. Officer Renfro alone believed Mr. Humphries was intoxicated and called for a Drug Recognition expert. RP 131-133. These same officers also each observed Mr. Humphries

and none other than officer Renfro indicated that Mr. Humphries was sloppy, had slurred speech, blood shot eyes, or any balance or other obvious signs of intoxication. RP 132. Officer Renfro also testified that Mr. Humphries was asleep and drooling during the few minutes that Mr. Humphries was handcuffed with hands behind his back in the back seat of a patrol car. RP 131-132. Officer Rogers, the DRE expert who never observed Mr. Humphries drive and only arrived on the scene after the arrest, met Mr. Humphries while he was seated in the back of a patrol car. RP 332-333, 336-337.

Officer Rogers, contrary to the testimony of officers Hall and Thurig testified that he observed, Mr. Humphries with red, watery eyes, slurred speech and balance issues such as stumbling and swaying. RP 303-306. Officers Rogers had no idea when Mr. Humphries might have consumed alcohol or marijuana. RP 344.

In Washington, there is no statutorily defined “per se” level of intoxication for any drug, as there is with alcohol. Where, as herein, the allegation is drugged driving, or where the allegation involves a combination of drugs and less than the per se level of alcohol (0.08), the prosecution can only proceed under what is referred to as the “affected by” prong—proof that the person drove while under the influence of any drug, or combination of

intoxicating liquor and any drug. 32 Wash. DUI Practice Manual § 14:2 (2012-13 ed.)

Without blood or breath tests, ‘under the influence’ is defined as any influence that lessens in any appreciable degree the ability of the accused to handle his or her automobile. *State v. Hurd*, 5 Wn.2d 308, 315, 105 P.2d 59 (1940); *State v. Hansen*, 15 Wn.App. 95, 96, 546 P. 2d 1242 (1976).

Thus it is not illegal to drink and drive; it is illegal to drink to the point it affects driving.” *State v. Hansen*, 15 Wn.App. at 96. While proof of erratic driving is not required to convict of driving under the influence there must be sufficient evidence to support an inference that the defendant's ability to drive was impaired. *State v. Wilhelm*, 78 Wn.App. 188, 193, 896 P.2d 105 (1995).

In *State v. Gillenwater*, 96 Wn.App. 667, 671, 980 P.2d 318 ((1999), while the Court acknowledged that mere evidence that a driver has had something to drink is insufficient to convict and “perhaps to establish probable cause[.]” , in that case there was more—a cooler full of beer and three opened cans of beer were found in the car along with a strong order of alcohol on the driver. *Id.*

Cases finding impairment have included evidence that the defendant was speeding, and veered out of his own lane of travel. *State v. Randhawa*, 133 Wn.2d 67, 74, 941 P.2d 661 (1997); that he defendant had a blood level

of intoxicants *State v. Crediford*, 130 Wn.2d 747, 756-57, 927 P.2d 1129 (1996); the defendant failed field coordination tests (*State v. Lovelace*, 77 Wn.App. 916, 920, 895 P.2d 10 (1995)); and a toxicologist offered an opinion of the degree of impairment based on a breath test of .14 (*State v. Hettich*, 70 Wn.App. 586, 592, 854 P.2d 1112 (1993)).

Here unlike in any of these cases, there was no evidence of impaired driving; there were no field tests, or any sort of quantification of intoxicants in Mr. Humphries blood or breath. After the arrest, there was conflicting evidence of possible intoxication from two of the states five witnesses, but none of the witnesses who observed the defendant drive witnessed any impaired driving and three of the five witnesses did not observe any signs of intoxication at all, thus leaving only two witnesses who believed that Mr. Humphries was impaired based on the questionable observation of blood shot watery red eyes, slurred speech and balance issues. While it is not this Court's role to ascertain the credibility of the two officers who contradicted the testimony of three other officers, it is this court's function to determine if the evidence presented was sufficient to establish the elements of the crime beyond a reasonable doubt. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010).

“When the sufficiency of the evidence is challenged in a criminal

case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Kintz*, 169 Wn.2d at 551, quoting, *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Partin*, 88 Wn.2d 899, 906-907, 567 P.2d 1136 (1977), *overruled on other grounds by State v. Lyons*, 174 Wn.2d 354, 275 P.3d 314, 320 (2012)).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)). “Circumstantial evidence and direct evidence are equally reliable” in determining the sufficiency of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

The Washington Practice DUI practice § 3:5 (2012-2013 ed) series has addressed the difficulty in establishing a nexus between a person’s blood THC level and has recommended against trying to establish impairment based on THC levels in the blood. Washington Practice DUI practice § 3:5 (2012-2013 ed), citing, Fiona Couper and Barry K. Logan, National Highway Traffic Safety Administration, Drugs and Human Performance Fact Sheets (DOT HS 809 725) (2004) at 8–9.

According to the fact sheet for cannabis, it is “difficult to

establish a relationship between a person's THC blood or plasma concentration and performance impairing effects... .
..... Thus, the fact sheet cautions that “[i]t is inadvisable to try and predict effects based on blood THC concentrations alone, and currently impossible to predict specific effects based on THC-COOH concentrations.” Id at 9.]

Washington Practice DUI practice § 3:5 (2012-2013 ed).

Generally Quantifying drug impairment is very difficult for a number of reasons. Even when blood test results provide a specific drug concentration, it is difficult to determine by such concentration, what impairment would result in a particular individual. This is so because people vary in their response to drugs, and in their tolerance and individuals often become more tolerant the longer they use a drug. There are also variations possible in different drugs that have extended or time-released formulas. There are few studies evaluating driving performance with drug dosages and blood drug concentrations; the results of such studies, mostly based on laboratory performance or closed-track studies, are difficult to extrapolate to actual driving situations. *Modern Scientific Evidence: The Law and the Science of Expert Testimony* § 42:55 Interpretation—Drugs and driving cases, David L. Faigman, David H. Kaye, Michael J. Saks, Joseph Sanders (2009).

Given the imprecision and difficulty in extrapolating drug use and impairment and the lack of any observable driving impairment in Mr. Humphries case, the evidence presented against Mr. Humphries was not sufficient to establish “influence that lessen[ed] in any appreciable degree the ability” to handle his automobile. *Hurd*, 5 Wn.2d at 315; *Hansen*, 15 Wn.App. at 96. For these reasons, Mr. Humphries DUI conviction should be reversed and remanded for dismissal with prejudice. Based on insufficient evidence.

2. THE JURY INSTRUCTIONS RELIEVED THE STATE OF PROVING THE NATURE OF THE SUBSTANCE IN THE CHARGE OF POSSESSION OF OXYCONTIN.

The state charged Mr. Humphries with unlawful possession of “oxycontin. CP 1-8; 87-101. Oxycontin is not listed as a controlled substance in the RCW’s. Oxycodone is a schedule II controlled substance. RCW 69.52.206. The to-convict jury instruction #17 required the jury to find that Mr. Humphries possessed “oxycontin”. Jury instruction 18 provided that “Oxycodone is a controlled substance.”. CP 290-325. No instruction defined oxycontin as oxycodone. Id. Tami Kee the forensic scientist for the State Patrol Crime Lab testified that she analyzed one of each of two different kinds of pills and each contained oxycodone. RP 245. Ms. Kee identified

“oxycontin” as oxycodone. RP 216, 229, 245-26. The prosecutor argued in closing that oxycontin was oxycodone. RP 420. She also argued that Mr. Humphries possessed cocaine, and smoked marijuana. RP 421, 475.

Mr. Humphries challenges the possession of oxycontin “to-convict” jury instruction when he was charged with possession of “oxycodone”. CP 290-325. Mr. Humphries preserved the issue for review by objecting to the state’s motion to amend the information to replace “oxycontin” with “oxycodone” after the defense rested. CP 391-395, 408-419. The trial court denied the motion. *Id.* The defense also timely objected to jury instruction #17. RP 425.

This Court reviews errors in jury instructions de novo. *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010). For a conviction to be upheld, the State must prove every essential element of the crimes beyond a reasonable doubt. *Sibert*, 168 Wn.2d at 311; *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)). “An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). Thus a “to convict” jury instruction must contain all of the elements of the crime because it serves as a “yardstick” by which the jury measures the evidence to determine guilt or innocence.” *Sibert*, 168 Wn.2d at 311, (quoting *State v. Smith*, 131 Wn.2d

258, 263, 930 P.2d 917 (1997) (quoting *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953))). “It cannot be said that a defendant had a fair trial if the jury must guess at the meaning of an essential element of the crime with which the defendant is charged, or if the jury might assume that an essential element need not be proven.” *State v. Davis*, 27 Wn.App. 498, 505, 618 P.2d 1034 (1980), *Disapproved on other grounds of by State v. Riker*, 123 Wn.2d 351, 869 P.2d 43 (1994); *State v. Pawling*, 23 Wn.App. 226, 597 P.2d 1367 (1979).

The reviewing Court may **not** look to other jury instructions to supply a missing element from a “to convict” jury instruction. *Sibert*, 168 Wn.2d at 311, (citing *Smith*, 131 Wn.2d at 262-63 (emphasis added)). The identity of a controlled substance is an essential element of a crime where it increases the statutory maximum sentence that a defendant may face upon conviction. *Sibert*, 168 Wn.2d at 311 (citing *State v. Goodman*, 150 Wn.2d 774, 785-86, 83 P.3d 410 (2004)). Under RCW 69.50.4013, a conviction for possession of a controlled substance generally carries a maximum sentence of five years of confinement. However, a conviction for possession of less than 40 grams of marijuana carries a maximum sentence of one year of confinement. Therefore, here as in *Siebert*, the identity of the controlled substance determined the level of the crime and its penalty, making it an “essential

element.” *Sibert*, 168 Wn.2d at 312, (citing *Goodman*, 150 Wn.2d at 785-86).¹

In *Siebert*, the defendant was charged only with possession of a controlled substance with intent to deliver. *Sibert*, 168 Wn.2d at 313. The to-convict instruction did not name the identity of the controlled substance, however contrary the law set forth in *State v. DeRyke*, 149 Wh.2d 906, 912, 73 P.3d 1000 (2003), the Court reasoned that the error was harmless for the following reasons: incorporating the charging document in the to-convict instruction supported the possession conviction; the jury had only methamphetamine to consider as a controlled substance; and the prosecutor in closing argument named methamphetamine as the only controlled substance possessed. *Sibert*, 168 Wn.2d at 314.

In *Sibert*, only a plurality of the state Supreme Court decided that omission of the identity of a controlled substance in the “to convict”

1 Under former RCW 69.50.401(2)(b) (2003), a conviction for possession with intent to deliver methamphetamine carried a maximum sentence of 10 years. A conviction based on a different controlled substance may have resulted in a maximum sentence of five years. Therefore, the identity of the controlled substance in this case determined the level of the crime and its penalty, rendering it an “essential element” under the reasoning set forth in *Goodman*, 150 Wn.2d at 785–86; see also *State v. Eaton*, 164 Wn.2d 461, 468–70, 191 P.3d 1270 (2008) (Johnson, J., concurring).

instruction for a controlled substance charge was not error. *Sibert*, 168 Wn.2d at 309. However, only four members of the court signed the lead opinion concluding there was no error. *Sibert*, 168 Wn.2d at 317. A fifth justice concurred in that result only, but supplied no rationale for the concurrence. *Id.* Three other justices dissented, concluding that the omission of the name of the substance-methamphetamine-was error, but harmless beyond a reasonable doubt. . *Sibert*, 168 Wn.2d at 325. From this plurality, there was no unifying rationale for the opinion in that case.

“A plurality opinion has limited precedential value and is not binding on the courts” because it is not possible to determine the correct holding of an opinion signed by only four justices with the fifth vote concurring in the result alone. *Kailin v. Clallam County*, 152 Wn.App. 974, 985-956, 220 P.3d 222, 227 (2009) (quoting *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004)). Thus the opinion in *Siebert* does not provide controlling authority in this case.

In *DeRyke*, 149 Wh.2d 906, 912, 73 P.3d 1000 (2003), an opinion with a clear majority, the Court held that “it was error to give the jury a ‘to convict’ instruction for the charge of attempted first degree rape which did not specify the degree of the rape allegedly committed” *Id.* The Court applied a harmless error analysis to a missing element in the “to-convict” instruction

and held that “a reviewing court may not rely on other instructions to supply the element missing from the ‘to convict’ instruction.” *DeRyke*, 149 Wh.2d at 910, 912. The Court reiterated that automatic reversal was only required when the instructions failed to instruct on all elements of the crime charge. Since the instructions as a whole provided for all of the elements and the jury was not allowed to consider any other degree of rape than first degree, automatic reversal was not required. *DeRyke* 149 Wn.2d at 911-912.

In *Davis*, the jury was not instructed on the underlying offense of “robbery” in an attempt charge. Defense counsel argued duress and the trial the Court reversed holding that by failing to instruct on the robbery relieved the state of its burden to prove all essential elements because “[t]he instructions assumed the existence of a robbery and placed the burden on the State to prove only those elements instructed upon[.]” rather than on each element of the crime charged. *Davis*, 27 Wn.App. at 507-8. “[F]ailure to instruct as to the State's burden to prove every element beyond a reasonable doubt is reversible error. *Davis*, 27 Wn.App. at 508, citing *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188 (1977) (“the failure of the court to state clearly to the jury the definition of reasonable doubt and the concomitant necessity for the state to prove each element of the crime by that standard is far more than a simple procedural error, it is a grievous constitutional

failure.”)

While it is true that generally, “an erroneous jury instruction is ordinarily subject to harmless error analysis.”....an instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.’ “. *Siebert*, 168 Wn.2d at 312, 320 (Alexander J. dissenting) (quoting *State v. Brown*, 147 Wn.2d at 339.

Under a harmless error analysis, as applied to omissions or misstatements of elements in jury instructions, an omission or misstatement of an element in jury instructions is only harmless if that element is supported by uncontroverted evidence. *Id.* (internal citations omitted). “Restated, “[i]n order to hold the error harmless, the Court must “conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.” ‘ “. *Siebert*, 168 Wn.2d at 320 (Alexander J. dissenting). (quoting *Brown*, 147 Wn.2d at 341, (quoting *Neder v. United States*, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999))).

Here, the charging document identified “oxycodone” and the to-convict instruction identified “oxycontin”. The instructions as a whole did not identify oxycodone as oxycontin, thus the jury had no instruction informing them that oxycodone was oxycontin, and the charging document did not explain that oxycodone was the same as oxycontin and unlike in *Siebert*, the

prosecutor argued about cocaine, oxycodone, oxycontin and marijuana, thus allowing the jury to consider multiple controlled substances. Based on the facts of this case, it is not possible to conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. *Siebert*, 168 Wn.2d at 320 (Alexander dissenting). Rather, here the instructions assumed that oxycontin and oxycodone was the same drug and placed the burden on the State to prove only those elements instructed upon. As in *Siebert*, *DeRyke*, *Davis* and *McHenry*, this was reversible error.

3. THE STATE FAILED TO PROVE POSSESSION OF COCAINE BASED ON THE DISCOVERY OF COCAINE IN THE BACK SEAT OF A POLICE CAR WHERE APPELLANT WAS BRIEFLY DETAINED.

As stated supra, evidence is only sufficient if when viewed the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *Kintz*, 169 Wn.2d at 551. Mr. Humphries was convicted of unlawful possession of a cocaine with intent to deliver contrary to RCW 69.50.401. The statute reads in relevant part as follows:

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(2) Any person who violates this section with respect to:

(a) A controlled substance classified in Schedule I or II which is a narcotic drug

Mr. Humphries challenges the statutory element of possession.

To convict Mr. Humphries of unlawful possession of cocaine, the state had to prove Mr. Humphries (1) unlawfully possessed (2) with intent to deliver (3) a controlled substance. *State v. Atsbeha*, 96 Wn. App. 654, 981 P.2d 883, *reversed on other grounds*, 142 Wn.2d 904, 16 P.3d 626. (1999).

Possession may be actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). There was no evidence that Mr. Humphries had actual possession of the cocaine. To establish constructive possession, the State had to show that Mr. Humphries had “dominion and control over either the drugs or the premises upon which the drugs were found.” *George*, 146 Wn.App. at 920 (quoting *State v. Mathews*, 4 Wn.App. 653, 656, 484 P.2d 942 (1971)). “Dominion and control” means that Mr. Humphries had the ability to reduce the cocaine to actual possession immediately. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

Control need not be exclusive, but the state must show more than mere proximity. *Raleigh*, 157 Wn.App. at 737. This Court examines the evidence under the “totality of the situation” to ascertain if substantial

evidence exists to establish circumstances from which the trier of fact can reasonably infer the defendant had dominion and control over the contraband. Reasonable inferences from the evidence are construed in the State's favor. *Partin*, 88 Wn.2d at 906.

Constructive possession may be proved by circumstantial evidence. *State v. Sanders*, 7 Wn.App. 891, 893, 503 P.2d 467 (1972). Here the State did not show that Mr. Humphries had actual possession and did not show that he had dominion and control over the premises or the cocaine.

In *Mathews*, this Court held that the defendant, who was a passenger in an automobile, “exercised dominion and control of the area in which the heroin was found but explained that mere proximity to concealed narcotics was insufficient unless there were “other circumstances” linking the defendant to the drugs. *Mathews*, 4 Wn.App. at 658. Constructive possession cases are fact sensitive and comparisons to other cases with similar facts can be useful. *George*, 146 Wn.App. at 920. Here as in *Mathews*, Mr. Humphries was merely within proximity to the cocaine and there were no “other circumstances” linking him to the cocaine.

In *State v. George*, 146 Wn.App. 906, 919, 193 P. 3d 693 (2008), the police stopped a car carrying three people, none of whom admitted owning the marijuana pipe lying next to George. *George*, 146 Wn.App. at 912. In that

case, no other circumstances linked the defendant to the drugs. For example, there was no “testimony tending to rule out the other occupants ... as having possession,” no evidence relating to why and for how long defendant was in the area where police found drugs, and the defendant did not make “statements or admissions probative of guilt.” *George*, 146 Wn.App. at 922.

The same analysis and conclusion applies here. There was no evidence tending to connect Mr. Humphries to the cocaine in the back seat and the testimony of officer Renfro provided evidence that Mr. Humphries, was asleep with his hands in handcuffs behind his back for the few minutes he was in the patrol car. Wirth these facts it is not possible that Mr. Humphries could not have secreted the cocaine in the back seat. RP 131. Thus, without some connection other than proximity, the state cannot establish constructive possession. *George*, 146 Wn.App. at 922.

In *State v. Spruell*, 57 Wn.App. 383, 388–89, 788 P.2d 21 (1990), there was insufficient evidence of constructive possession where Police merely found defendant present, amongst a group of people, in a location where the police also found drugs, there was no evidence relating to why the defendant was in the house or showing that he was anything more than a mere visitor. *Spruell*, 57 Wn.App. at 388–89.

Similarly, in *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400

(1969), police executed a search warrant on a houseboat. The defendant was found sitting at a table on which police found various pills and hypodermic needles. Police also found a cigar box filled with drugs close to the defendant on the floor. The defendant admitted ownership of two books on drugs, two guns, and a set of broken scales found on the boat. He also admitted actually handling the drugs earlier that day. *Callahan*, 77 Wn.2d at 28. Although the defendant in that case admitted to exercising control over the drugs by handling them, was in close proximity to other drugs, and admitted ownership of guns, books on narcotics, and measuring scales, this evidence was not sufficiently substantial to support a finding of constructive possession. *Callahan*, 77 Wn.2d at 31-32.

In this case, the State failed to present evidence from which a jury could reasonably conclude that Mr. Humphries had dominion and control over the drugs. As in *Mathews*, *George*, *Spruell* and *Callahan*, there was nothing to connect Mr. Humphries to the contraband: he had no personal property item near the cocaine, he was asleep in the back of the patrol car, he was seated in the patrol car for only a few minutes and at all times with handcuffs on behind his back, and he never had dominion and control over the premises. Here, viewing the evidence in the light most favorable to the State, the evidence was insufficient to support the jury's finding that Mr.

Humphries possessed cocaine.

5. APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL BASED ON TRIAL IRREGULARITY INVOLVING THE PROSECUTOR AND DEFENSE COUNSEL ARGUING A THEORY THAT WAS NOT SUPPORTED BY THE JURY ISNTRUCTIONS.

Prosecutorial misconduct may deprive a defendant of a fair trial and only a fair trial is a constitutional trial. *State v. Davenport*, 100 Wn. 2d 757, 762, 675 P. 2d 1213 (1984). The defense bears the burden of showing that (1) the State committed misconduct and (2) the misconduct had prejudicial effect. *State v. Lindsay*, ___P.3d___, 2012 WL 5423705 (Div. 2); *State v. Anderson*, 153 Wn.App. 417, 427, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002, 245 P.3d 226 (2010). Once the defendant establishes that the State made improper statements, the Court then must determine whether those improper statements prejudiced the defendant under the following standard of review. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

Where, as here, the defendant failed to object to the improper argument at trial, the defendant must show that the State's misconduct “was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice.” *In re Pers. Restraint of Glasmann*, ___ Wn.2d ___, ___

–, 286 P.3d 673 (2012) (citing *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). Under this standard of review the defendant must show that an instruction would not have cured the State's misconduct. *Emery*, 174 Wn.2d at 762. In other words, whether the misconduct has engendered “a feeling of prejudice” that would prevent a defendant's fair trial. *Emery*, 174 Wn.2d at 762 , quoting *Slattery v. City of Seattle*, 169 Wn. 144, 148, 13 P.2d 464 (1932)).

As a state agent, the prosecuting attorney represents the people and must act with impartiality in the interest of justice. Because of this responsibility, the prosecutor who fails to scrupulously honor his or her duty to search for justice necessarily fails in his obligation to guarantee the defendant a fair trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011) (citations omitted); *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009); *State v. Case*, 49 Wn.2d 66, 70, 298 P.2d 500 (1956) (quoting *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497 (1899)).

Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Thus, a prosecutor must function within boundaries while zealously seeking justice.

Monday, 171 Wn.2d at 676. “Over and over again, courts have reminded

prosecutors that they are something more than mere advocates or partisans and that they represent the people and act in the interest of justice. “*Lindsay*, ___P.3d___, 2012; *Fisher*, 165 Wn.2d at 746, 202 P.3d 937.

This responsibility includes limiting argument to the law provided in the jury instructions. *Davenport*, 100 Wn.2d at 764-765; *State v. Carothers*, 84 Wn.2d 256, 265, 525 P.2d 731 (1974), *overruled on other grounds in State v. Harris*, 102 Wn.2d 148, 685, P.2d 584 (1984), *overruled on other grounds in State v. McKinsey*, 116 Wn.2d 911, 810 P.2d (1991); *State v. Frazier*, 76 Wn.2d 373, 456 P.2d 352 (1969). For example, “[w]hile it is not unconstitutional to charge a person as a principal and convict him as an accomplice, the court must instruct the jury on accomplice liability.” *Davenport*, 100 Wn.2d at 764-765; *Carothers*, 84 Wn.2d at 265. A defendant cannot constitutionally be convicted of a charge where the jury was not provided with an instruction on that charge. *Davenport*, 100 Wn.2d at 765. In this case, Mr. Humphries was charged with possession of cocaine, and the jury was only instructed on actual possession, not constructive possession of cocaine. CP 290-305.

In *Davenport*, the defendant was charged with second degree burglary as a principal not as an accomplice. The State did not present direct evidence proving that the defendant had been inside the burglarized residence and did

not request an accomplice liability instruction. Defense counsel argued in closing that there was only evidence that the defendant had received stolen property outside the residence, and that this was insufficient to prove that he was guilty of burglary. In rebuttal, the prosecutor stated “it doesn't make any difference actually who went into the house ... they are accomplices.” *Davenport*, 100 Wn. 2d at 759. The defendant objected, but the court overruled the objection.

After deliberating for about two hours, the jury sent a note to the trial judge requesting a definition of “accomplice” and asking whether the defendant had to physically enter and remove the identified items. *Davenport*, 100 Wn. 2d at 759. The court directed the jury to “rely on the law given in the Court's instructions to the jury.” *Davenport*, 100 Wn. 2d at 759. The jury found the defendant guilty.

The Court of Appeals held that while the State's conduct was improper and may have been prejudicial under the circumstances the error was harmless. The Supreme Court reversed, stating that “the ultimate inquiry is not whether the error was harmless or not harmless but rather did the impropriety violate the petitioner's due process rights to a fair trial.” *Davenport*, 100 Wn. 2d at 762. The Supreme Court concluded that the jury's question to the trial court established “not only that during deliberations the

jury was considering the prosecutor's improper comment, but also, that the jury considered the statement to be a proper statement of law.” *Davenport*, 100 Wn. 2d at 764. Further, the trial court's response could not fairly be called a curative instruction. Because “the record established that the jury was influenced and possibly misled by the prosecutor's comment, the Court was unable to conclude that the trial was fair” *Davenport*, 100 Wn. 2d at 765.

The misconduct in *Davenport*, where the prosecutor argued a misstatement of law not in harmony with the court's instructions, was an irregularity so serious as to deny the defendant his right to a constitutional trial. *Davenport*, 100 Wn. 2d at 761, 765.

Here as in *Davenport*, the prosecutor argued this theory of constructive possession as the “law” without a jury instruction to legitimize that theory. The lack of an instruction just as in *Davenport* denied Mr. Humphries his right to a fair trial.

Glasmann is also analogous to the instant case. In *Glasmann*, the prosecutor misstated the law on the burden of proof without objection from the defense. The Supreme Court reversed on other grounds of misconduct but held that misstating the law was flagrant and ill-intentioned misconduct that it could not have been cured by an instruction. *Glasmann*, 286 P.3d at 679-682.

Here, as in *Davenport* and *Glaskan*, the prosecutor misstated the law

when she argued constructive possession. This misconduct, like the misstatement of law in *Glasmann* regarding the burden of proof could not have been cured with an instruction. The effect of the misconduct here as in *Glasmann* and *Davenport*, permitted the jury to convict Mr. Humphries on a basis that was not legally before the jury: constructive possession. Without the improper argument, the jury could not have made a finding of guilt on the cocaine charge because there was no evidence to support a verdict based on actual possession. For this reason, the misconduct was prejudicial and reversal is required.

5. COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST AN “UNWITTING POSSESSION” JURY INSTRUCTION

Defense counsel did not request a jury instruction on “unwitting possession” or on “constructive possession”. The trial court’s only instruction on “possession” defined “possession” in instruction #11 to mean “having a substance in one’s custody or control”. CP 290-305.

The Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington State Constitution guarantee the right to counsel. More than the mere presence of an attorney is required. *State v. Hawkins*, 157 Wn.App. 739, 747, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011). The attorney must perform to the standards of the profession. *Id.*

Counsel's failure to live up to those standards will require a new trial when the client has been prejudiced. *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). Appellate courts review an ineffective assistance of counsel claim de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006).

To establish a claim for ineffective assistance of counsel, the defendant must prove that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Deficient performance is that which falls “below an objective standard of reasonableness based on consideration of all the circumstances.” *McFarland*, 127 Wn.2d at 334–35. Prejudice is established if the defendant can show that “there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different.” *Nichols*, 161 Wn.2d at 8. If a party fails to satisfy one element, a reviewing court need not consider both *Strickland* prongs. *State v. Foster*, 140 Wn.App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

In evaluating claims for ineffectiveness, courts are deferential to

counsel's decisions and there is a strong presumption that counsel performed adequately. *Strickland*, 466 U.S. at 689–91. Strategic and tactical decisions are not grounds for error, but where there is no conceivable legitimate tactic explaining counsel's performance, the reviewing Court will reverse. *Id.*; *Reichenbach*, 153 Wn .2d at 130.

This Court must determine de novo whether Mr. Humphries was entitled to an unwitting possession instruction and whether it was unreasonable for defense counsel not to seek that instruction. If so, this Court then decides whether Mr. Humphries was prejudiced. *State v. Kruger*, 116 Wn.App. 685, 690-91, 694, 67 P.3d 1147 (2003).

Failure to Request Unwitting Possession Instruction.

Unwitting possession is an affirmative defense to possession. *State v. Bradshaw*, 152 Wn.2d 528, 537-38, 98 P.3d 1190 (2004). To establish the defense, a defendant must prove by a preponderance of the evidence that his possession of the unlawful substance was unwitting. *State v. Riker*, 123 Wn.2d 351, 368-69, 869 P.2d 43 (1994). Drug cases are the only cases that apply an unwitting possession instruction. *State v. Michael*, 160 Wn.App. 522, 247 P.3d 842 (2011). The pattern unwitting possession instruction used in drug cases provides:

A person is not guilty of possession of a controlled

substance if the possession is unwitting. Possession of the controlled substance is unwitting if a person did not know that the firearm was in his possession.

The burden is on the defendant to prove by a preponderance of the evidence that the [-----] was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

11 WASHINGTON PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 52.01, at 1007 (3d ed. 2008). Because unwitting possession is an affirmative defense, it falls on the defendant to prove the unwitting possession. *Cleppe*, 96 Wash.2d at 381, 635 P.2d 435. This instruction is particularly important in defense of drug cases, where the State does not have to prove an intent element. *Michael*, 160 Wn.App. at 527.

“Where defense counsel fails to identify and present the sole available defense to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial. *In re Personal Restraint of Hubert*, 138 Wn.App. 924, 932, 158 P.3d 1282 (2007) (the Court of Appeals reversed where defense counsel failed to request reasonable belief instruction in rape case).

In *State v. Powell*, 150 Wn.App. 139, 153, 206 P.3d 703 (2009) the defendant was charged with second degree rape by engaging in sexual intercourse with another person who was incapable of consent by reason of

being “mentally incapacitated” or “physically helpless.” *Id.*, quoting, RCW 9A.44.050(1)(b). Factually, PLM, the victim, testified that, “soon after the sexual activity began, she had purposefully acted as if she were a willing participant because she was afraid, although she apparently did not display her fear to Powell. “ The Court held that this evidence, that PLM pretended to be a willing sexual participant, entitled Powell to a “reasonable belief” instruction. *Powell*, 150 Wn.App. at 153. The Court in *Powell* reversed and remanded holding that Powell’s attorney’s performance was both deficient, without a tactical basis and prejudicial. *Powell*, 150 Wn.App. at 155-158

Here the officer discovered the cocaine in a cigarette packet in the vehicle's back seat of the patrol car where Mr. Humphries was seated in handcuffs behind his back for only several minutes. The State's theory was entirely one of constructive possession and the defense argued lack of evidence of possession: “the intent element here isn't the most important element of this offense. It's actually the possession. Did Mr. Humphries possess cocaine in the first place?” RP 456, 467, 470, 480.

Counsel never requested an unwitting possession” instructions even though counsel continued to argue a lack of actual possession based on the facts: that Mr. Humphries was asleep, drooling on himself during the few minutes that he was seated in the back of the patrol car. RP 131, 467-468. As

in *Powell*, under these facts where the defense presented evidence to support their theory of the case, Mr. Humphries could show by a preponderance of evidence that he was entitled to the unwitting possession instruction, and at best, his possession was unwitting.

Defense counsel argued before the jury during closing argument that Mr. Humphries did not actually possess the drugs and thus the jury could not find that Mr. Humphries had dominion and control over the drugs, yet defense counsel did not seek an instruction supporting that argument. There is no tactical reason why defense counsel did not seek an unwitting possession instruction because the defense's theory was primarily that Mr. Humphries was not aware of the drugs and, in fact, unwitting possession was Mr. Humphries's only real defense to constructive possession here. Without an unwitting possession instruction, the jury could not rely on the defense argument to find unwitting possession. *Lindsay, supra*, See *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005) (jury instructions are proper when they, in part, permit the parties to argue their theories of the case). Under these circumstances, defense counsel's failure to request an unwitting possession instruction was not objectively reasonable.

Mr. Humphries also establishes that there is a reasonable probability that, but for defense counsel's deficient performance, the results at trial would

have differed. *Strickland*, 466 U.S. at 694. Here, without the instruction, the jury could not acquit him based on unwitting possession defense. On facts that support unwitting possession, it is impossible to assert to a reasonable degree of certainty that the outcome at trial would not have differed had the trial court instructed the jury on the defense of unwitting possession. Thus this Court must reverse Mr. Humphries conviction based on ineffective assistance of counsel and remand for a new trial because he meets both prongs of *Strickland*.

Defense Argument on Constructive Possession without a Corresponding Jury Instruction.

As discussed, it is not possible to discern a reason for defense counsel not to request an unwitting instruction when its entire theory was that Mr. Humphries was unaware of the drugs in the back of the patrol car. Defense counsel compounded the problem of not asking for an unwitting instruction by inviting the argument without a legal basis and then by not objecting to the state's argument on constructive possession. Without an unwitting possession instruction, the defense could not properly argue its theory of the case. *Willis*, 153 Wn.2d at 370. Under the circumstances of this case, defense counsel's argument on unwitting possession without an instruction, and his invitation

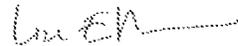
and failure to object to the state's argument on constructive possession was ineffective assistance of counsel that denied Mr. Humphries his right to a fair trial. Id.

D. CONCLUSION

Mr. Humphries respectfully requests this Court reverse and dismiss with prejudice the charges of possession of a controlled substance: cocaine and oxycodone and dismiss with prejudice the DUI, each based on insufficient evidence. In the alternative, Mr. Humphries, requests remand for a new trial.

DATED this 10th day of December 2012.

Respectfully submitted,



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WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Kitsap County Prosecutor's Office kcpa@co.kitsap.wa.us and Timothy Humphries DOC# 746553 at Airway Heights Corrections Center 11919 W. Sprague Avenue PO Box 1899 Airway Heights, WA 99001-1899 a true copy of the document to which this certificate is affixed on December 10, 2012. Service was made by electronically to the prosecutor and to Mr. Humphries by depositing in the mails of the United States of America, properly stamped and addressed.

Lu EN

Signature

ELLNER LAW OFFICE

December 10, 2012 - 12:26 PM

Transmittal Letter

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Case Name: State v. Humphries

Court of Appeals Case Number: 43758-9

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Appellant's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Sender Name: Lise Ellner - Email: liseellnerlaw@comcast.net

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