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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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STATE OF WASHINGTON, Respondent,

v.

STEPHANEY MALONE, Appellant,

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The insufficient evidence was to support Counts I and IV because the State failed to prove “constructive delivery” beyond a reasonable doubt.
2. The evidence was insufficient to prove that Ms. Malone possessed the cocaine in her home with the intent to deliver.
3. The evidence was insufficient to prove that Ms. Malone was guilty of Leading Organized Crime.
4. The evidence was insufficient to prove that Mr. Malone was a minor on the day of the drug transaction in Count II.
5. The court must dismiss each of the school bus enhancements because they failed to conclusively establish whether the drug transactions occurred with 1,000 feet of a school bus stop.
6. The evidence was insufficient to support the school bus enhancement on Counts III and IV, because that enhancement cannot attach to a charge based upon accomplice liability unless the defendant herself was within the school bus zone stop.
7. RCW 9.94A.535(3)(e) is void for vagueness.
8. Even if the underlying statute is not unconstitutional, the evidence was insufficient to support the finding aggravator of a major VUCSA.
9. Ms. Malone’s trial counsel was ineffective because all or some of Ms. Malone’s convictions were based upon “the same criminal conduct” and he failed to object at sentencing.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the evidence was insufficient to support Counts I and IV when the State failed to prove “constructive delivery” beyond a reasonable doubt.
2. Whether the evidence was insufficient to prove that Ms. Malone possessed the cocaine in her home with the intent to deliver when

the State did not present evidence that the amount of the drug or the circumstances are commonly associated with drug dealing.

3. Whether the evidence was insufficient to prove that Ms. Malone was guilty of Leading Organized Crime when the evidence did not establish that Ms. Malone did not control or otherwise direct three people in conducting the three delivery charges.
4. Whether the evidence was insufficient to prove that Mr. Malone was a minor on the day of the drug transaction in Count II.
5. Whether the court must dismiss each of the school bus enhancements when the State failed to conclusively establish whether the drug transactions occurred within 1,000 feet of a school bus stop.
6. Whether evidence was insufficient to support the school bus enhancement on Counts III and IV when that enhancement cannot attach to a charge based upon accomplice liability unless the defendant herself was within the school bus zone stop.
7. Whether RCW 9.94A.535(3)(e) is void for vagueness.
8. Whether the evidence was insufficient to support the jury's finding of the aggravator of a major VUCSA.
9. Whether Ms. Malone's trial counsel was ineffective when all or some of Ms. Malone's convictions were based upon "the same criminal conduct" and he failed to object at sentencing.

III. INTRODUCTION

After a three day trial, a jury convicted Ms. Malone of several drug related charges based upon three separate deliveries of small amounts of cocaine and a possession with intent to deliver charge. The total weight of the drugs involved in the deliveries was a mere 3.6 grams. RP 45. These three transactions stood as the basis for the majority of Ms. Malone's

incredible sentence:¹ with no prior criminal history, Ms. Malone was given an astonishing 18 year sentence.

IV. STATEMENT OF THE CASE

Ms. Malone was ultimately convicted of number of different crimes, all relating to three alleged delivery charges and one possession with intent charge. The three delivery charges were facilitated by a confidential informant, Justin Miller, after he was arrested for possession of heroin. RP 22. Authorities turned Mr. Miller into a CI against Ms. Malone, in return for dismissal of that charge. RP 22. Law enforcement used Mr. Miller to set up several controlled buys at the direction of Ms. Miller. RP 23; CP 13.

The first buy occurred on September 28, 2010 (basis for Counts I and II) was on September 28, 2010, Mr. Miller called Ms. Malone in an attempt to purchase cocaine for \$100. This conversation was recorded and admitted into evidence under State's Exhibit 7A. During the phone conversation, you can clearly hear Mr. Miller telling Ms. Malone that *he* wants to meet her at "the Walmart" because he is already going to be there with his sister.

¹ Ms. Malone was also convicted of possession with intent to deliver, although the record appears to be devoid of the amount of drugs that apparently stood as the basis for this conviction.

Ms. Malone tells Mr. Miller that she cannot sell him cocaine, but she tells Mr. Miller to give Derrick Malone a call. Mr. Miller responds, "Alright, I'm going to tell Derrick Malone." Exhibit 9A. Mr. Miller calls Derrick Malone several times but he does not answer and he calls Ms. Malone back; Ms. Malone again tells Mr. Miller that she cannot sell him any cocaine, "Ya'll need to hook up. I can't regulate that right now from here." Exhibit 9A, Track 4.

Mr. Miller met Derrick Malone at the meeting location and entered the back of a Mr. Malone's GMC Yukon, disappearing from the sight of the police surveillance. RP 31. After a short time in the Yukon, Mr. Miller returned to the police vehicle with a small amount of crack cocaine in a wadded up paper towel. RP 31. Mr. Miller went to that location and was surveyed by law enforcement. RP 29. Law enforcement and Mr. Miller testified that Derrick Malone met with Mr. Miller and handed him 1.6 grams of crack cocaine in exchange for \$100.

The second controlled buy occurred on October 5, 2010 (basis for Count III). CP 13. The buy started much the same as the first, with Mr. Miller again contacting Ms. Malone on the phone. Exhibit 8A. They set up the buy location and agreed to meet at the Dollar Store because Ms. Malone was already planning on going there (for an unknown purpose) and had already arranged a ride. Ms. Malone was driven to the meeting

location by Carlos Vargas, no evidence was produced that Carlos Vargas knew anything about the drug transaction. At some point, moved the suspect vehicle approximately 50 or 100 yards away from the original location.

The third controlled buy occurred on October 28, 2010 (basis for Count IV). CP 13. This buy also began with a phone call from Mr. Miller to Ms. Malone. He again told her he wanted to buy \$100 worth of cocaine. At trial, Detective Sawyer did not know exactly where he dropped Mr. Miller off. RP 121 (“I mean that’s the area I think we dropped him off. I mean, it was a year and a half ago... I just know we were in the general area.”). However, the audio clearly shows that the original meeting location was you can hear the Detective mention that the original meeting location was at 36th and Oak. Exhibit 7A.

Frank Arce, an admitted drug dealer, met with Mr. Miller in a park near the meeting location. RP 249-54. Mr. Arce testified and told the court that he never spoke with Ms. Malone about the drug deal. RP 249-54. His girlfriend Angie asked him to meet someone in the near a park at 36th and Oak sell them someone cocaine. Mr. Arce testified that he sold the cocaine to Mr. Miller. Detectives and Mr. Miller testified that Mr. Arce sold Mr. Miller “\$100 worth” of cocaine, but Mr. Miller only received .39 grams,

instead of the 1.6 grams that were involved in the first two transactions.

RP 45.

On November 4, 2010, the authorities executed a search warrant at a residence where Ms. Malone allegedly lived (Basis for Count V). CP 13; RP 47. Inside the residence, authorities found an undisclosed amount of cocaine in one of the bedrooms (Basis for Count V). The jury found Ms. Malone guilty on all of the above Counts. In addition, based upon the three delivery charges described above, it also found her guilty of leading organized crime for allegedly involving Derrick Malone, Carlos Vargas, and Frank Arce in the three deliveries.

With no criminal history, based almost entirely on three separate transaction involving less than 3.6 grams of cocaine, RP 45, Ms. Malone was sentenced to an astonishing 18 years. The court ordered an exceptional sentence based upon the jury's finding that "the current case" was a "major VUCSA." CP 53; the court ordered Ms. Malone's sentences under cause number 12-1-901461-9 and 10-1-01183-5 to run consecutive. CP 66-67. Although the court did not specifically state that this was an exceptional sentence, this is the only way the court could have run them consecutively because such sentences are presumed to run concurrent, absent an exceptional sentence.

V. ARGUMENTS

A. There was insufficient evidence to support Counts I and IV because the State failed to prove “constructive delivery” beyond a reasonable doubt.

Evidence is sufficient to support a verdict if the jury has a factual basis for finding each element of the offense proven beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). The State bears the burden of proving each element of the charged offense beyond a reasonable doubt. The State had to prove that Ms. Malone (1) delivered a controlled substance and (2) knew the delivered substance was controlled. *State v. Martinez*, 123 Wn. App. 841, 844, 846, 99 P.3d 418 (2004). Washington's Uniform Controlled Substances Act (UCSA) provides: "'Deliver' or 'delivery,' means the actual or constructive transfer from one person to another of a substance, whether or not there is an agency relationship." RCW 69.50.101(f).

Constructive transfer is not defined in the UCSA. However, looking to its common dictionary meaning, this Court has interpreted "constructive delivery" to mean “the transfer of a controlled substance belonging to the defendant or under the defendant's control, by some other person or manner at the instance and direction of the defendant.” *Id.*; see also *State v. Campbell*, 59 Wn. App. 61, 63, 795 P.2d 750 (1990).

Thus, to prove constructive transfer of a controlled substance when the defendant is alleged to have used a “middle man” to perform the transfer, the State must prove that (1) the defendant “the controlled substance either belong[ed] to the defendant or [was] under the defendant's control, and (2) the delivery occurred “at the instance *and* direction of the defendant.” *See id.*

Courts have warned that “the better practice” is to include an instruction on constructive delivery, but this did not happen here. It was not instructed as to the definition of the “constructive transfer.” The jury was only instructed that “Deliver or delivery means the actual or constructive transfer of a controlled substance from one person to another.” CP 33. This lack of an instruction resulted in Ms. Malone’s convictions on these counts, as the State failed to present sufficient evidence of a constructive delivery in Counts I and IV. Each Count must be dismissed.

1. Count I

a. The State failed to prove that Derick Malone was under Ms. Malone’s control when he delivered the cocaine to Mr. Miller.

To prove constructive delivery in Count I, the State first needed to prove beyond a reasonable doubt that Ms. Malone either owned or controlled the cocaine given to Mr. Miller. On September 28, 2010, Mr.

Miller called Ms. Malone in an attempt to purchase cocaine for \$100. State's Exhibit 9A. Ms. Malone directed Mr. Miller to call Derrick Malone so they could meet up. Ms. Malone's involvement ended there. No evidence was introduced as to where the cocaine came from or even that the cocaine belonged to Ms. Malone. This evidence was not sufficient to prove that Ms. Malone had control over the cocaine delivered to Mr. Miller on September 28, 2010.

b. Derrick Miller's delivery did not occur at the instance and direction of Ms. Malone

The evidence fails to show that Ms. Malone insisted and directed Derrick Malone to sell the cocaine to Mr. Miller. When Mr. Miller called Ms. Malone to purchase the cocaine, Ms. Malone she told Mr. Miller that she cannot sell him cocaine, but told him to contact Derrick Miller instead. No evidence suggests that Derrick Malone did not sell the cocaine to Mr. Miller. These facts are not sufficient to show that Ms. Malone insisted and directed Derrick Malone to sell the cocaine to Mr. Miller because one cannot rule out the obvious alternative: that Ms. Malone simply facilitated the transaction by connecting Mr. Miller with Derrick Malone. The facts at trial actually tend to prove that Ms. Malone did not insist or direct Derrick Malone as shown by Ms. Malone's own statements to Mr. Miller

show that she did not have control over the delivery, “Ya’ll need to hook up. I can’t regulate that right now from here.” Exhibit 9A, Track 4.

2. Count IV

a. The State failed to prove that Mr. Arce’s cocaine was under Ms. Malone’s control.

No evidence proved beyond a reasonable doubt that Ms. Malone possessed the cocaine that Mr. Arce sold to Mr. Miller. No evidence was presented at trial that affirmatively proves that the cocaine that Mr. Arce delivered to Mr. Miller belonged to Ms. Malone or was actually under her control. Mr. Arce testified and told the court that he never spoke with Ms. Malone. RP 249-54.

In fact, Mr. Arce testified that he delivered the drugs at the request of his girlfriend, not Ms. Malone. The only evidence regarding the source of the cocaine shows that it belonged to Mr. Arce or to his girlfriend, and Mr. Arce openly admitted that “this was not the first time [he] had delivered drugs for his girlfriend.” RP 258.

Finally, the grossly disproportionate amount of cocaine that Mr. Arce gave to Mr. Miller in this transaction also severely undercuts any argument that Ms. Malone had possession or control over the .39 grams of cocaine Mr. Arce Delivered to Mr. Miller.

b. Mr. Arce’s Delivery did not occur at the instance *and* direction of Ms. Malone

Mr. Arce testified and told the court that he never spoke with Ms. Malone. RP 249-54. Instead, his girlfriend Angie asked him to meet someone near a park at 36th and Oak to sell someone cocaine. Mr. Arce testified that he sold the cocaine to Mr. Miller. No witness testified that Ms. Malone directed Mr. Arce to sell cocaine to Mr. Miller. In fact, the low quantity actually suggests that Ms. Miller did not have control over the drugs or Mr. Arce, Mr. Arce only gave him ¼ the amount given to Mr. Miller on the other occurrences. RP 45. These facts do not show that Ms. Malone insisted or directed Mr. Arce to deliver the drugs to Mr. Miller.

3. This case is not factually analogous to *State v. Campbell*; therefore, the reasoning in that case and its result do not apply here.

The State will likely argue that this case is similar to *State v. Campbell*, 59 Wn. App. 61, 795 P.2d 750 (1990), in which Division I held that constructive transfer was proved beyond a reasonable doubt when the defendant used a “middle man” to physically hand the cocaine to an undercover officer. In *Campbell*, the defendant was charged with delivery of cocaine after he sold cocaine to an undercover police officer. Apparently, the delivery occurred in a vehicle, at which time “Campbell placed the cocaine on a car seat, where at his direction a third person, B., picked it up and handed it to” the undercover officer.

This case is not analogous because in that case, it was not disputed that Campbell both “directed” the straw man to hand the cocaine to undercover officer and the “control” over the cocaine before it was delivered: Campbell simply handed the cocaine to another person (a straw man) who then handed it to the undercover officer. The evidence here then, according to the *Campbell* Court, was enough to establish that Campbell directed a constructive transfer of cocaine.

B. The Evidence was insufficient to prove that Ms. Malone possessed the cocaine in her home with the intent to deliver.

The State had to prove Ms. Malone constructive possessed the cocaine in the home with the intent to deliver it. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Bare possession of a controlled substance is not enough to support a conviction of intent to deliver; at least one other factor supporting an inference of intent must exist. *State v. McPherson*, 111 Wn. App. 747; 46 P.3d 284 (2002); *State v. Brown*, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993), quoting *State v. Harris*, 14 Wn. App. 414, 418, 542 P.2d 122 (1975) (possession, plus an officer's testimony that the quantity possessed was “in excess of the amount commonly possessed for personal use only,” was insufficient to support a conviction for possession with intent to deliver).

Even if the State established that Ms. Malone constructively possessed the cocaine found in the home, the State did not prove that she intended distribute it. When executing the search warrant, the police did not find any paraphernalia, i.e. scales or packaging, that are commonly found used to distribute drugs. In addition, the State offered no testimony as to the amount of cocaine found in the home and no expert testimony as to whether the amount was more than for personal use. Consequently, because no reasonable juror could have fairly concluded that she intended to distribute the cocaine found in the home the court should dismiss the Possession with Intent Conviction.

C. The evidence was insufficient to prove that Ms. Malone was guilty of Leading Organized Crime.

When the State fails to prove all elements of a crime beyond a reasonable doubt, the court must reverse and dismiss the conviction with prejudice. *In re Winship*, 397 U.S. 358, 361-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Even when the "to convict" instruction contains an unnecessary element, if the State does not object to it, the State assumes the burden of proving that element beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998) (conviction dismissed for lack of evidence of venue, an element inadvertently included in the "to convict" instruction).

In this case, the Second Amended Information charges Ms. Malone with Leading Organized Crime, by intentionally organizing, managing, directing, supervising or financing three people (Derrick Malone, Carlos Vargas, and Frank Arce) with the intent to distribute and sell crack cocaine. CP 14. The jury instructions similarly defined leading organized crime, “A person commits the offense of leading organized crime by intentionally **organizing, managing, directing, supervising, or financing** any three or more persons with the intent to engage in a pattern of criminal profiteering activity.” CP 41.

The “to convict” instructions read as follows:

To convict the defendant of the crime of Leading Organized Crime in Count VI, each of the following elements of the crime must be proved beyond a reasonable doubt:

- 1) That on or about the period between September 1st, 2010 and November 4th, 2010, the defendant intentionally organized, managed, directed or supervised three or more persons *in the commission of the crime of delivering a controlled substance*;
- 2) That the defendant acted with the intent to engage in a pattern of criminal profiteering activity;
- 3) That the acts contained within the elements listed above occurred in the State of Washington.

To convict the defendant of Leading Organized Crime all twelve jurors must agree that the same three acts of criminal profiteering constituting a pattern of criminal profiteering activity have been proved beyond a reasonable doubt. Furthermore, to convict the defendant of Leading Organized Crime all twelve jurors must agree that the same three or

more persons were managed, directed, supervised or financed by the defendant, with the intent to engage in a pattern of criminal profiteering activity. If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 14. The jury instructions also defined criminal profiteering as follows:

Criminal profiteering means any act, including any anticipatory or completed offense, committed for financial gain, that is chargeable or indictable under the laws of the state in which the act occurred. The delivery or manufacture of controlled substances, or possession with the intent to deliver or manufacture controlled substances are acts that constitute criminal profiteering.

CP 43. As required by the law of the case doctrine, the State needed to prove that Ms. Malone “intentionally organized, managed, directed or supervised three or more persons in the commission of the crime of delivering a controlled substance.”

Here, the evidence was insufficient to prove Leading Organized Crime because there was no evidence that Ms. Malone organized, managed, directed or supervised Frank Arce” to perform the delivery charge in Count IV, which stood as the predicate offense as stated in the to-convict instructions.

- 1. The evidence was insufficient to prove that Ms. Malone was in control of Frank Arce so as to establish that she “intentionally organized,**

managed, directed or supervised” Frank Arce in the drug transaction at the Park.

The undisputed evidence shows that Ms. Malone never directed or even communicated with Frank Arce to perform the deal at the Park with Justin Miller. Mr. Arce never spoke with Ms. Malone regarding his delivery of cocaine to Mr. Miller on October 28th. RP 249-54. In fact, Mr. Arce testified that he delivered the drugs at the request of his girlfriend, not Ms. Malone. Without any proof that Ms. Malone contacted Mr. Arce on October 28, 2010, it is impossible to conclude that she somehow controlled or directed him within the meaning of the Leading Organized Crime Statute

In fact, the evidence only shows that he acted at the direction of *his girlfriend* and not Ms. Malone. Mr. Arce openly admitted that he was a drug dealer and that he acted independently of Ms. Malone, “this was not the first time [he] had delivered drugs for his girlfriend.” RP 258. This also supports the reasonable conclusion that Mr. Arce was not acting at the direction of Ms. Malone.

- 2. The evidence was insufficient to prove that Ms. Malone was in control of Carlos Vargas so as to establish that she ”intentionally organized, managed, directed or supervised” with the intent to facilitate the drug transaction that occurred at the Dollar Tree.**

As a preliminary point, no evidence shows that Mr. Vargas was in any way involved in the drug transaction at the dollar tree. Although he drove Ms. Malone to the Dollar Tree store, there is absolutely no evidence that he did so at the direction of Ms. Malone. The evidence simply shows that Mr. Vargas drove Ms. Malone to the Dollar Tree, but not that he had any idea that Ms. Malone intended to complete a drug transaction. RP 267-68.

With that factual framework established, the State then must have relied upon the simple fact that Mr. Vargas gave Ms. Malone a ride to the dollar store. This, however, is insufficient under the Leading Organized Crime as stated in the jury instructions submitted by the State, which required both (1) that Ms. Malone “intentionally organized, managed, directed or supervised three or more persons *in the commission of the crime of delivering a controlled substance*” and (2) that when she did so, she “acted with the intent to engage in a pattern of criminal profiteering activity.” CP 24.

First, no evidence shows that Ms. Malone directed or requested Mr. Vargas to drive her to the Dollar Tree store. What the evidence does show is that Mr. Vargas had already planned on picking Ms. Malone up and taking her there, as shown by the recorded phone conversation between Ms. Malone and Mr. Miller. Exhibit 8A.

In it, Mr. Miller first suggested that they meet at the Walmart (the location he suggested for the first transaction), but Ms. Malone stated that she already had a ride to the dollar store. Thus, Ms. Malone had already agreed with Mr. Vargas that they were going there, before she even spoke with Mr. Miller. Because Mr. Vargas and Ms. Miller had already agreed to go to the dollar store, we cannot simply infer that Ms. Malone directed Mr. Miller to drive her there. Mr. Vargas had already offered to do so before the purchase was arranged.

Second, and more importantly, even if we assumed that Ms. Malone actually directed Mr. Miller to the Dollar Tree, there simply no evidence that can establish Ms. Malone's intent engage in "criminal profiteering," because Ms. Malone had already arranged the ride to the Dollar Tree *before* the drug transaction was set up, we do not know what her intention was when she arranged for Mr. Vargas to drive her there. As Ms. Malone stated in the recorded phone conversation, Mr. Vargas was already driving to the Dollar Tree and he was merely giving Ms. Malone a ride there. There was no evidence that shows that the act of driving to the Dollar Tree was in any way directed by Ms. Malone. This evidence fails to prove that Ms. Malone controlled Mr. Vargas during that transaction as required by the Leading Organized statute.

3. The evidence was insufficient to show that Ms. Malone committed each act “for financial gain”.

RCW 9A.82.060 requires a showing that the defendant intentionally organized, managed, directed, supervised, or financed any three or more persons with the intent to engage in a pattern of criminal profiteering activity. RCW 9A.82.010(4) defines criminal profiteering as “any act, including any anticipatory or completed offense, committed for financial gain, that is chargeable or indictable under the laws of the state in which the act occurred and, if the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable as a felony and by imprisonment for more than one year, regardless of whether the act is charged or indicted, as any” of several enumerated crimes, such as delivery of a controlled substance.

Read together, and applied to Ms. Malone, these statutes require the State to prove that Ms. Malone (1) intentionally organized, managed, directed, supervised, or financed three or more persons (2) with the intent to engage in three separate acts that are each (a) “committed for financial gain.” Similarly, the jury instructions required that the jury find that the same the crimes involved here were “committed for financial gain.” CP 44.

In this case, even if the State had proved that Ms. Malone was legally responsible in Mr. Arce's transaction at the park or Mr. Malone's transaction at Wal-Mart, it failed to show that Ms. Malone received any "financial gain" from either of those transactions, as she was not personally involved and no other evidence was introduced to show that she profited from those transactions. Consequently, the court should dismiss Count VI with prejudice.

D. The evidence was insufficient to prove that Mr. Malone was a minor on the day of the drug transaction in Count II.

To prove that Ms. Malone was guilty of Involving a Minor in a Drug Transaction, the State needed to prove that on or about September 28, 2010, she "compensated, threatened, solicited, or in any other manner, involved a minor in the sale or delivery of a controlled substance[.]" RCW 69.50.401(f). This additional conviction was based upon the same facts that gave rise to the Delivery charge between Derrick Malone and Mr. Miller at the Walmart. The State alleged that Derrick Malone was a minor (i.e. under the age of 18) when this transaction occurred.

In *State v. Duran-Davila*, 77 Wn. App. 701, 892 P.2d 1125 (1995), Duran was convicted of involving a minor in a drug transaction after he involved a "juvenile" in a transaction to sell cocaine. At trial, the court conversed on the telephone with a juvenile court clerk about Woody's

juvenile court files. It then took judicial notice of Woody's age. This court “concluded that this evidence was inadmissible hearsay and that the State failed to prove an element of the crime: that Woody was under the age of 18.” *Id.*

Duran-Davila is directly on point and controls the result here. In this case, the only evidence concerning Derrick Malone’s age came from Detective Streissguth and Detective Sawyer (just as it did here). This evidence came in two forms. The first piece of evidence came from inadmissible hearsay that—despite a timely defense objection—was incorrectly admitted as evidence. The second piece of evidence was based upon Detective Swayer’s speculation as to Mr. Sawyer being a “juvenile.”

First, the hearsay statements about Mr. Malone’s age should not have been admitted. The court should thus consider the facts without them. Second, with or without the hearsay statements regarding Mr. Malone’s age, the State still failed to prove Mr. Malone was under the age of 18 as required to prove Count II.

a. The trial court should have excluded the hearsay statements.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay statements are not

admissible unless explicitly provided for under the rules of evidence. ER 802. Here, the trial court allowed the State, over defense counsel objection, to ask the detective when Mr. Malone's birthday was. Mr. Malone objected on the grounds that any answer would be hearsay. RP 30. The court quickly overruled the objection.

The detective testified that he believed that Mr. Malone was a minor on the date of the drug transaction, RP 30. The detective clearly had no personal knowledge with regard to Mr. Malone's birthday and based his belief upon information he read in "police reports." RP 30. The trial court clearly erred in admitting such statements and as a result, they cannot establish the element of age. *Id.* at

b. With or without those hearsay statements, the evidence was insufficient to prove Mr. Malone's age.

Evidence that a person is a "juvenile" is not sufficient to support the conclusion that he is under 18 years old. *Id.* sufficient to show that he was under 18, and the remaining testimony amounted to guesses by the detectives. *Id.* at 706 (testimony that officer saw drug transaction participant appear in juvenile court was insufficient to prove he was under 18 at time of offense). Here, the facts are indistinguishable from *Druan-Davlia*. Thus, all references to Mr. Miller being a juvenile or "going to

juvenile, fail to establish that Mr. Miller was under 18 on September 28, 2010.

c. Ms. Malone's conviction must be dismissed.

Accordingly, the State failed to prove an element of the charge of involving a person under the age of 18 in a drug transaction and Ms. Malone's conviction on that count must be dismissed. *Id.* at 706.

E. The court must dismiss each of the school bus enhancements because they failed to conclusively establish whether the drug transactions occurred within 1,000 feet of a school bus stop.

The State has the burden of proving all elements of a sentence enhancement beyond a reasonable doubt. *State v. Hennessey*, 80 Wn. App. 190, 194, 907 P.2d 331 (1995). In order to prove the school bus stop enhancement, the State must prove that the drug deliveries took place within 1,000 feet of a designated school bus stop. *Id.* On appeal, the standard of review is whether a rational trier of fact taking the evidence in the light most favorable to the State could find, *beyond a reasonable doubt*, the facts needed to support the enhancement. *Id.*

Here, the State failed to meet this standard because "it did not submit adequate evidence about the distance from the school bus stops to the site of the drug sale." *Id.* In a similar case, *State v. Hennessey*, although the State presented sufficient evidence of the exact location of the school bus stops, this court determined that the State failed to prove with

reasonable certainty *where the drug deliveries* occurred and dismissed the enhancements. *Id.*

The errors here are even more dramatic than in *Hennessey* because the state failed to prove both the *exact location* school bus stops and *the exact locations* of the underlying drug transactions. Like in *Hennessey*, even though the “lay opinion” with regard to the school bus stops were “admissible, without more, it was insufficient for a trier of fact to find, *beyond a reasonable doubt*, that any of the relevant distances was less than 1,000 feet.” *Id.*

F. The court must vacate the school bus enhancement on Counts III and IV, because that enhancement cannot attach to a charge based upon accomplice liability unless the defendant herself was within the school bus zone stop.

Whether a defendant can be held strictly liable for a sentencing enhancement committed by an accomplice within a school bus zone is a question of first impression in this court. While it is an issue of first impression, however, this court’s decision is controlled by clearly settled case law that specifically focuses on the plain language of two statutes: (1) RCW 9A.08.020 reads (accomplice liability statute) and (2) RCW 69.50.435 (school zone enhancement statute). *See State v. McKim*, 98 Wn.2d 111, 115-16, 653 P.2d 1040 (1982) (analyzing RCW 9A.08.020 and concluding that it did not provide a triggering device for penalty

enhancement, as the old accomplice liability statute, former RCW 9.01.030 (1909), did). *State v. Silva-Baltazar*, 125 Wn.2d 472, 480-84, 886 P.2d 138 (1994); *State v. Pineda-Pineda*, 154 Wn. App. 653, 660, 226 P.3d 164 (2010).

During Ms. Malone's trial, the parties specifically discussed the most relevant case with regard to this issue *State v. Pineda* (discussed *infra*); however, neither the defendant nor the State (nor the Court) interpreted the holding in that case correctly. RP 286. As shown by the jury instructions, the parties apparently believed that *Pineda* stood for the proposition that so long as the Ms. Malone "directed" an accomplice to the meeting location within a school bus zone, the enhancement must attach. CP 50. This is an incorrect view of that case and its progeny and this court should vacate the enhancements on Counts III and IV.

In vacating those enhancements, this court should hold that defendant cannot be held strictly liable for the school zone enhancement without evidence that she was physically present in the school zone at the time of delivery because unlike the firearm enhancement statute, the school zone enhancement statute does not authorize such an enhancement under accomplice liability. *See id.* Such a holding simply follows the logical progression of *McKim*, *Silva-Baltazar*, *Pineda*, and their progeny

and is necessitated by the plain language of the accomplice liability and school zone statutes.

In *State v. Silva-Baltazar*, the Supreme Court affirmed sentencing enhancements for accomplices who were physically present in a school zone when the crime occurred. *Silva-Baltazar*, 125 Wn.2d at 480-84. While *Silva-Baltazar* leaves no doubt that an accomplice may receive a school zone sentencing enhancement when the accomplice is physically present in the school zone, it explicitly deferred the question of whether RCW 69.50.435 applies to accomplices not within the school zone:

We reiterate that this case involves Defendants who were themselves within 1,000 feet of a school bus stop during the events of the crime, and confine ourselves to the facts here present. We do not decide whether RCW 69.50.435 applies to accomplices who are not within the drug-free zone themselves when another participant in the crime engages in the specified drug activity within the drug-free zone.

125 Wn.2d at 480. In deciding *Silva-Baltazar*, the Court left unanswered whether or an accomplice could be held liable for the crime if she was not within the drug-free zone when the crime was committed.

In *State v. Pineda-Pineda*, Division II was faced with the very same question that was left open in *Silva-Baltazar* and the same on that this Court now faces. *Id.* In that case, the defendant was charged with multiple delivery offenses (like Ms. Malone here). In one of those

transactions, the defendant directed two women to a buy location within an enhancement zone where the buy took place. The defendant was not present at the buy location. Eventually, the defendant was arrested, charged, and convicted of delivery of cocaine under an accomplice liability. The jury also found that the defendant's accomplices performed the buy within an enhancement zone, as they did here.

On appeal, Pineda argued—as Ms. Malone does here—that “a defendant cannot be held strictly liable for the school zone enhancement without evidence that he was physically present in the school zone at the time of delivery.” *Id.* at 662. Although the court vacated the school zone enhancement under facts that are nearly identical to the situation, it appears the *Pineda* court may have unartfully stated its holding. Specifically, the *Pineda* court held “that where there is no explicit statutory authorization for imposition of a sentence enhancement on an accomplice, the defendants' own acts must form the basis for the enhancement.” *Id.* at 660. This holding—read literally—could be interpreted to allow an accomplice to be responsible for a school zone stop without being present in that school bus stop. Such a broad interpretation of that holding—as the State will advance here—should be rejected.

First, had the *Pineda* court intended that result, it would not have vacated Pineda's conviction, because the facts in that case, like in this one,

make it quite clear that the defendants in each case actually directed the accomplices to a meeting spot within a drug-free zone. In *Pineda*, the defendant was contacted by the CI and they agreed to meet at a particular location which was within a drug-free zone. Instead of handling the transaction himself, Pineda directed two acquaintances to handle the deal for him. Pineda was ultimately convicted as an accomplice. Likewise, in Counts III and IV, Ms. Malone was convicted based upon accomplice liability and the jury found the aggravator because she “directed Justin Miller” to a meeting location within a protected zone. CP 50. There can be no distinguishing these two cases on any meaningful grounds.

Second, holding that a school zone enhancement could apply based upon accomplice liability if the defendant merely “directed” the principle to the meeting location (as the jury was instructed here), would contravene the well-established precedent upon which the *Pineda* holding was founded and the plain language of RCW 9A.08.020 (accomplice liability statute) and (2) RCW 69.50.435 (school zone enhancement statute). Because “it is well established that the accomplice liability statute cannot be the basis to impose a sentencing enhancement on an accomplice,” a sentencing enhancement based upon an accomplice’s actions is only authorized by law if it is specifically provided for by the *specific sentencing statute*, here the school zone enhancement statute. *McKim*, 98

Wn.2d at 115-16 (analyzing RCW 9A.08.020 and concluding that it did not provide a triggering device for penalty enhancement, as the old accomplice liability statute, former RCW 9.01.030 (1909), did); *Pineda-Pineda*, 154 Wn. App. at 660.

Unlike the firearm enhancement statute, the school zone enhancement statute does not authorize a school zone enhancement based upon an accomplice's actions within a designated school zone. *Id.* Therefore, if a defendant is convicted as an accomplice to a drug transaction that occurs within school zone, any attendant enhancement is invalid unless the defendant was herself present within the school zone. *See id.*

G. RCW 9.94A.535(3)(e) is void for vagueness.

If a statute does not define a particular statute “with sufficient definiteness that ordinary people can understand what conduct is proscribed” or if it does not provide the jury with “ascertainable standards of guilt to protect against arbitrary enforcement,” the statute unconstitutionally vague. *State v. Myles*, 127 Wn.2d 807, 812, 903 P.2d 979 (1995).

The statutory language for the aggravating circumstance of a major VUCSA violation reads as follows:

The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

As the comments to the pattern jury instruction for the so-called “major VUCSA” aggravator point out, RCW 9.94A.535(3)(e) is not clear on what needs to be proved to establish this aggravating circumstance.

There are three different ways that the statute can be construed.” WPIC 300.14 (comment). Although the WPICs are of course not controlling law,

it's descriptions of the ambiguities in the statute gives great context to the specific ambiguities and possible interpretations:

Under the first possible construction, the state is required to prove only one fact: “a major violation of the Uniform Controlled Substances Act.” This construction interprets the word “which” as an explanation rather than a restriction — which is grammatically correct. In other words, “more onerous than typical” is a description of “a major violation,” not an additional fact that the state must prove. Subdivisions (i) through (vi) are viewed as examples of facts that allow but do not require a finding of “a major violation.”

Under the second possible construction, the state is required to prove two facts: (1) a major violation of the Uniform Controlled Substances Act; and (2) that the violation is “more onerous than the typical offense of its statutory classification.” This construction prevents the latter phrase from being superfluous by interpreting the “which” as meaning “that.” Like the first construction, this treats subdivisions (i) through (vi) as illustrative examples.

Under the third possible construction, the state is only required to prove one of the factual situations set out in subdivisions (i) through (vi). This interprets the statutory references to both “a major violation” and “more onerous than typical” as descriptive of these situations. This is supported by the statement that “ANY” of these situations may identify an offense as a major VUCSA. (The Legislature set out this word in all capital letters.) It is also supported by RCW 9.94A.537(4), which deals with bifurcated trials. That statute refers to subdivision (e)(iv) as if it were a distinct aggravating circumstance. (RCW 9.94A.535(3)(e)(iv) allows a finding of a major VUCSA if “[t]he circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy.”).

RCW 9.94A.535(3)(e) is substantially identical to language that has been in effect since 1986. Laws of 1986, Chapter

257, § 27(2)(d). Despite this, case law provides little help towards resolving the ambiguity in the provision.

WPIC 300.14 (comment).

As shown by the plain language of the “Major VUCSA” aggravator and the lack of any consistency from the limited case law on this statute, this court should conclude that this portion of RCW 9.94.A.535(3)(e) is unconstitutional because ordinary jurors will not come to the same conclusion as to what is required by the statute when asked to do so. *See id.*

H. Even if the underlying statute is not unconstitutional, the evidence was insufficient to support the finding aggravator of a major VUCSA.

A challenged jury instruction is reviewed de novo, in the context of the instructions as a whole. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995). Ms. Malone did not object to the court's instructions. Because this issue is raised for the first time on appeal, we must first determine whether the claimed error is of constitutional magnitude. RAP 2.5(a)(3). Under the exception under RAP 2.5(a)(3) the asserted constitutional error must be (1) "manifest" and (2) not harmless beyond a reasonable doubt. *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). To satisfy the constitutional requirement of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law and permit the

defendant to present his theory of the case. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005).

If the jury instructions either incorrectly defined or are silent on an element of a crime, the State is impermissibly relieved of its burden to prove beyond a reasonable doubt that the defendant committed all the essential elements. *State v. Williams*, 136 Wn. App. 486, 492-93, 150 P.3d 111 (2007). A failure to adequately instruct the jury on the elements of an aggravating factor for an exceptional sentence is manifest error affecting a constitutional right that may be argued for the first time on appeal. RAP 2.5(a); *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996).

Under RCW 9.94A.535(3)(e), a jury may find that an *offense* is a major violation of Washington's drug laws if the "offense" is more onerous than the typical offense of its statutory definition. One such way for the State to prove that is to show that "the current *offense* involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so." RCW 9.94A.535(3)(e)(i). This is the specific aggravator found by the jury in this case, which allowed the court to run Ms. Malone's convictions consecutive. Regardless of the ambiguous language used in the statute, the aggravator, as presented in the jury instructions misstated the law (manifest error) and was not harmless.

i. The aggravator instructions misstated the law.

First, the court instructed the jury that if it finds Ms. Malone guilty of **any** of the delivery charges, that it must consider whether **that crime** was a major VUCSA:

If you find the defendant guilty of any three counts of Counts I, III, IV, or V (do not consider count V if you found the defendant guilty of the lesser included charge of possession), then you must determine if the following aggravating circumstance exists:

Whether **the crime** was a major violation of the Uniform Controlled Substances Act.

CP 51 (emphasis added).

Then, however, in defining a “major VUCSA” to the jury, jury instruction number 31 couches the aggravator in more broad terms that encompasses the **entire case**:

A major trafficking violation of the Uniform Controlled Substances Act is one which is more onerous than the typical offense. The presence of the following factor may identify a major trafficking violation: Whether the current case involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so.

CP 53. While the statute is clear that the aggravator applies to a particular **offense** rather than an entire **case**, the Jury Instructions in this case asked the jury to find Ms. Malone guilty of the aggravator based upon the entire “case.” The instruction then is clearly an error as everywhere throughout

the criminal code, the word offense only refers to a offense as an individual crime. *See, e.g.* RCW 9.4.1.010 (using the word offense to refer only to a singular felony or misdemeanor). Any other interpretation would require the court to ignore the plain language of the statute. Furthermore, even if the statute was ambiguous, the rule of lenity would require interpretation in favor of Ms. Malone. *See State v. Lively*, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996);

ii. The error was not harmless beyond a reasonable doubt.

Generally, with regard to the elements of an underlying crime, Washington courts have stated that the correct standard to apply is the misstating an element in jury instruction is harmless only if it appears beyond a reasonable doubt that the error *did not contribute* to the verdict obtained. *See Williams*, 136 Wn. App. at 495. The burden of showing an error is harmless remains with the prosecution. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (establishing State's burden to show harmless error beyond a reasonable doubt). In this case, the State cannot meet its burden.

As stated above, the error in the jury instruction is obvious. It clearly broadened the scope of the aggravator by allowing the jury to find that the entire **case** was a “major drug trafficking” violation. This is not

supported by the wording of the statute, which narrows the definition to an individual **offense**. The State might argue that this error was harmless because the jury could have found that a particular offense (i.e. Leading Organized Crime) was the offense for which the jury intended to apply the aggravator to. Such an argument would fail for three reasons.

First, the prosecutor argued during closing argument that the three delivery charges in and of themselves were enough for the jury to conclude that Ms. Malone was guilty of both Count VI (Leading Organized Crime) and the “major VUCSA”: “Now, because it was three [deliveries], that is a unique situation that constitutes a major violation of the Uniform Controlled Substances Act.” RP 357.

Second, unlike elements of a crime, the aggravator in question here does not require the jury to determine that the aggravator exists even if every so-called element of the aggravator is met. Imposition of the aggravator is entirely within the jury’s own discretion, “The presence of the following factor *may* identify a major trafficking violation: Whether the current *case* involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so.” CP 48. Thus, it would be impossible for this Court to say beyond a

reasonable doubt that asking the jury to find the aggravator based upon the entire “Case” rather than just one “offense”

Third, the error cannot be deemed harmless beyond a reasonable doubt because even if this court were to substitute its judgment for that of the jury, it would not know which “offense” the jury found to deserve the aggravator. Specifically, jury instruction 29 instructed the jury as follows, “If you find the defendant guilty of any three Counts I, III, IV, or V . . . then you must determine if the following aggravator exists: Whether the crime was a major violation of the Uniform Controlled Substances Act.” CP 46. This is significant because the court must base its sentence on *the offense* to which the aggravator attaches.

iii. Under the Rule of Lenity, if the jury verdict and the “major VUCSA” statute are ambiguous and must be interpreted in favor of Ms. Malone.

The rule of lenity requires a court to interpret an ambiguous criminal statute in favor of the defendant. In the context of an ambiguous plea agreement the rule of lenity supports construing ambiguous plea agreements against the State. *See also United States v. De La Fuente*, 8 F.3d 1333, 1338 (9th Cir. 1993) (The Government “must bear responsibility for any lack of clarity” in a defendant’s plea agreement). Similar to the plea bargaining context, and very on point here, the rule of lenity also applies to when a verdict form is ambiguous and the State has

failed to request a jury instruction as to which specific acts constituted a particular element of a crime. *State v. DeRyke*, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002).

Under such circumstances, the Rule of Lenity requires the court to interpret that verdict in the defendant's favor. *Id.* There is no reason to distinguish *DeRyke* from the facts of this case because in both instances, the "ambiguity" was essentially created by the State—which is the party that drafted the ambiguous jury instructions in this case—and it could have easily been "eliminated had the State proposed [a more well-drafted jury] instruction." *Id.* Like in the above cited cases, this court should use the rule of lenity to interpret any ambiguities in the law or jury instructions favor of Ms. Malone.

I. Ms. Malone's trial counsel was ineffective because all or some of Ms. Malone's convictions were based upon "the same criminal conduct" and defense counsel failed to object at sentencing.

To establish ineffective assistance of counsel, Ms. Malone must demonstrate both (1) defense counsel's representation fell below an objective standard of reasonableness and (2) resulting prejudice. *Id.* Such deficit performance and prejudice is almost always shown when the crimes in question were in fact the same criminal conduct and would have been counted as one crime for purposes of the offender score. Such is the case here.

In order for separate offenses to "encompass the same criminal conduct" under the statute, three elements must therefore be present: (1) same criminal intent, (2) same time and place, and (3) same victim. The absence of any one of these prongs prevents a finding of same criminal conduct. *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). RCW 9.94A.589(1)(a) defines "same criminal conduct" as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." When considering if crimes encompass the same criminal intent, courts focus on the extent to which the criminal intent, viewed objectively, changed from one crime to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987).

1. Count VI (Leading Organized Crime) and Counts (I, III, and IV).

Although no reported Washington case has addressed whether these crimes are the same criminal conduct, application of case law regarding drug delivery convictions shows that these crimes are intended to be the same criminal conduct, assuming that they do not merge.

Here, all three of Ms. Malone's convictions for Delivery of a controlled substance were the same criminal conduct as her conviction for Leading Organized Crime because they were committed with the same

intent, at the same time and place, and against the same victim (the victim of both was the public at large). See *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

The definition of same criminal conduct requires inquiry into the defendant's "objective intent." *State v. Porter*, 133 Wn.2d at 185. The relevant inquiry is "the extent to which the criminal intent, objectively viewed, changed from one crime to the next. . . . This, in turn, can be measured in part by whether one crime furthered the other." *State v. Williams*, 135 Wn.2d 365, 367-68, 957 P.2d 216 (1998).

State v. Porter and *State v. Williams* control the result here. The defendant in *Porter* sold methamphetamine to a police officer, who then asked her if she had any marijuana. She was arrested after selling him some of that drug as well. The Court held that those crimes encompassed the same criminal conduct. They "occurred in a continuing, uninterrupted sequence of conduct as part of a recognizable scheme to sell drugs." 133 Wn.2d at 185-86.

In *Williams*, the Court further clarified the "same criminal conduct" doctrine with regard to drug case, emphasizing the distinction between drug crimes that require a present intent to commit a crime (i.e. Delivery and Leading Organized Crime) and those with a future intent (Possession with Intent). *Williams*, 135 Wn.2d 365, 367-68. The State in

that case attempted to argue that *Burns* required the court to find that the defendant committed several delivery charges with the same objective intent. Citing *Porter*, the Court rejected this argument, as this court should also do.

Unlike the defendants in *Burns*, Porter's criminal intent cannot be segregated into distinct present and future intents to commit criminal activity. Instead, her intent, objectively viewed, was to sell and profit from the sale of cocaine.

2. Counts I and II (Sept 28 delivery and Sept 28 "Involving a minor in a drug transaction).

Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. *State v. Deharo*, 136 Wn.2d 856, 858-59, 966 P.2d 1269 (1998). This is exactly what happened here. Counts I and II were based upon the exact same transaction on September 28, 2010: a single sale of cocaine to Mr. Miller. These two crimes should have been counted as one for purposes of sentencing.

VI. CONCLUSION

For the reasons stated above, Ms. Malone respectfully requests that the court grant the relief as designated in his opening brief.

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A handwritten signature in black ink, appearing to read "David Savage", written over a horizontal line.

On April 25, 2013, I emailed a copy of this Appellant's Opening Brief and proof of service to the appointed attorney of the State, David Trefry, via email at **TrefryLaw@WeGoWireless.com**. There is an agreement between our firm and Mr. Trefry that service via email is acceptable. The defendant in this case, Mr. Ramon Gonzalez, was sent a copy of the attached document and proof of service via the United States Postal Service at DOC#767724, Airway Heights Corrections Center, P.O. Box 1899, Airway Heights, WA 99001-1899.

Dated this 25th day of April, 2013.

A handwritten signature in black ink, appearing to read "Mitch Harrison", written over a horizontal line.

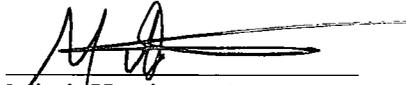
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AMENDED PROOF OF SERVICE

On April 25, 2013, I filed the attached Appellant's Opening Brief and proof of service by personally delivering it with the Court of Appeals Division I, location at 600 University St, Seattle, WA 98101. On this same date, I deposited into the United States Postal service a copy of a copy of this Appellant's Second Amended Brief and proof of service to the Cowlitz County Prosecuting Attorney's Office, located at 312 SW 1st Ave, Kelso, WA 98626. The appellant in this case, Ms. Malone DOC#359309, was sent a copy of the attached document and proof of service via the United States Postal Service at Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332-8300.

Dated this 25th day of April, 2013.



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