

NO. 46015-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

HEATHER DAWN ROARK,

Appellant.

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

Superior Court No. 12-1-00883-1

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BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED January 21, 2015, Port Orchard, WA

*Robert R. Nielsen*  
**Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the trial court properly admitted evidence that confidential informant Robert White was threatened and assaulted the week before trial because the evidence was relevant to White's credibility, and further, whether calls Roark made from jail before and during trial strongly suggested her involvement in the threats rendering them admissible as substantive evidence of consciousness of guilt?

2. Whether Roark's claim that her counsel was ineffective for not requesting a limiting instruction regarding the use of the threat and assault evidence is without merit because Roark fails to show counsel's decision was not tactical and further, she fails to show prejudice?

3. Whether the trial court correctly followed the plain language of the statute and the clearly stated legislative intent when it ordered that Roark's school-zone enhancements should run consecutively?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Heather Dawn Roark was charged by information filed in Kitsap County Superior Court with three counts of delivery of methamphetamine, one count of possession of methamphetamine with intent to deliver, and three counts of bail jumping. CP 20-26. The four drug counts also alleged that the offenses occurred within 1000 feet of a school or school bus stop

(hereafter “school zone”). CP 20-24.

During trial it was learned that the confidential informant was threatened and assaulted the week before trial. It was also learned that Roark had made two phone calls from the jail, one around the time of the assault, and one during trial. The trial court allowed the admission of this evidence. The factual details will be addressed in the course of the argument, *infra*.

The jury found Roark guilty as charged on all counts and on the four enhancements. CP 73-79. The trial court imposed a standard-range sentence, including a prison-based DOSA provision, and ran the four school zone enhancements consecutive to each other and to the other offenses. CP 146-47.

## **B. FACTS**

During May 2011, Bremerton detectives investigated Roark and Adam Carter. 2RP 170. Ultimately, four controlled buys were made from Roark through informant Robert White on May 23, 24, 27, and 31, 2011. 2RP 207, 226, 233, 237.

The events surrounding each buy were essentially the same: officers met with White and searched his person and vehicle. 2RP 172, 208-209, 229, 227, 234, 237, 3RP 413-14, 456, 461. They then followed him until he turned off Sidney Road in Port Orchard into the driveway.

2RP 172-73, 211, 228, 234. The house was above the street level and while White's car was always in view, they could not see White enter the house once he went up the driveway. 2RP 212, 238. White was in the house for a few minutes. 2RP 173, 212, 230, 238. They then followed him to a secure location and again searched White and his car, finding nothing. 2RP 173-74, 213, 230, 235. In each case, White produced an appropriate quantity of methamphetamine.<sup>1</sup> 2RP 213, 231, 235, 238. Lab testing confirmed that each purchase was methamphetamine. 3RP 433-38.

After the first, second and third buys White stated that Roark was the person who gave him the drugs and took the money. 4RP 563. The third buy took place outside. 4RP 564. After the fourth buy, White said Carter delivered the meth and took the money. 4RP 564.

After the four buys were completed, the police obtained a warrant to search the house. 2RP 241. They served the warrant on June 1, 2011. 2RP 242. They knocked on the door, but there was no response even though they could see someone inside. 2RP 177, 245. After waiting a reasonable time, they breached the door. 2RP 177, 246.

As they entered, Roark was coming out of the bathroom. 2RP 179, 247, 3RP 421-22, 472. The police found a bag of suspected

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<sup>1</sup> The first three buys yielded 1.6 grams each, the fourth, 1.5 grams. 2RP 215, 232, 235, 239-40.

methamphetamine in the toilet. 2RP 258, 3RP 487, 489. The found other meth in a black grocery-type bag in the bathroom trash can. 2RP 258, 3RP 487.

After waiving her rights, Roark told the police that she and Carter had been selling methamphetamine from the house for a few months. 2RP 251. She stated that Carter had done most of the sales, but that she had also done some. 2RP 252. She stated that their supplier was Mike, who drove a black BMW. 2RP 252. Mike had resupplied them the previous day. 2RP 252.

Roark also told them that she had been flushing methamphetamine when the police entered the house. 2RP 252. She heard them at the door and immediately tried to dispose of it. 2RP 252.

In the bedroom the police found Roark's driver's license and a pink pad with phone numbers on it. 3RP 480-81. There were also a temporary state ID in Roark's name, Roark's Squamish Casino club card and mail addressed to Roark that was postmarked May 2011. 3RP 481-82.

There was methamphetamine found on the floor in the bedroom. 2RP 264, 3RP 474. There was a box of small baggies used for packaging the meth. 2RP 265, 3RP 474, 482. In the dresser they found a pipe with meth residue in it. 2RP 266. There was another pipe in the living room. 2RP 270. There were two more meth pipes with residue in them in a pink

change purse. 3RP 401, 474, 476.

There was a digital scale with meth next to it and residue on it. 3RP 399, 477. There were two plastic containers with residue. 3RP 401.

In the bedroom closet, they found a hidden room behind a false wall. 3RP 403-04. There was a plastic baggie of meth in hidden room. 3RP 404, 459.

Buy money from the controlled buy was found. 4RP 562.

Lab testing showed that the meth found at the house totaled 6.9 grams. 3RP 440-42. The meth from bathroom was not weighed or tested because it was wet. 3RP 396-97.

White, the informant, testified that he was originally working off his girlfriend's charge. 2RP 274, 303. He then became a paid informant and received \$50 per buy. 2RP 274. He made four buys from Roark in the Spring of 2011. 2RP 275. The police searched him and his vehicle each time. 2RP 278.

For the first buy he went to Carter's house to buy the meth. 2RP 277. He went into the house and bought it from Roark. 2RP 279. Three sales were from Roark and one was from Carter. 2RP 280. Two of the buys from Roark were in the house and one was outside. 2RP 280. One inside buy from Roark was in the kitchen, one was in the bedroom, and a

third was outside. 2RP 280-81. The buy from Carter was also in the bedroom. 2RP 280. Two of the times the meth was already packaged. The other two times Carter weighed it out while he was there. 2RP 281. Then Roark handed it to him. 2RP 281. After the buy each time, he returned to the location with the police and they searched him and his car again, and he turned over the drugs. 2RP 282, 286.

White had known Roark and Carter for about six or eight months. 2RP 284. She was his roommate briefly, for less than a month. 2RP 284. That was two or three months before the buys occurred. 2RP 285.

On cross-examination White admitted that Roark never paid him rent, although she had agreed to. 2RP 286. There were other people present during the buys but White only knew Roark and Carter. 2RP 292. He was in the house for at most 20 minutes. 2RP 292

On redirect White explained did not really want to be testifying because he was concerned about his safety. 3RP 381. He had received threatening messages on Facebook from Roark's ex-boyfriend in February 2012. 3RP 382. Then just before trial he heard from a friend of his girlfriend that there was a bounty on his head. 3RP 382. The previous Thursday someone hit him as he was coming out of his house. 3RP 382. A man who was bigger than him approached him from behind as he was going to his car, and asked him if he was Robert White. 3RP 383. White

turned and the man hit him in the eye and fled. 3RP 383. White felt like it was because of his participation in the case. 3RP 383.

The morning he was testifying he saw Clayton Delanie going in and out of the courtroom. 3RP 384. White's girlfriend had known Delanie since she was a child. 3RP 384. White knew him from the drug community but had not seen him for eight months. 3RP 384. His presence seemed odd to White. 3RP 384. That morning was the first time White had seen Delanie during the trial. 3RP 385. White feared for his safety because of testifying. 3RP 385. He was not paid to testify. 3RP 385.

On re-cross, White admitted that he had previously testified in a 2011 trial about unrelated buys. 3RP 386. He was "outed" at that time as a CI. 3RP 386. Roark's ex-boyfriend that threatened him was Ryan Higgins. 3RP 386. White had also made controlled buys from Higgins. 3RP 386.

White also admitted that he had been caught ingesting some of the drugs he obtained in a controlled buy in Higgins's case. 3RP 387. That incident ended his status as a paid informant. 3RP 387. It was a violation of his work agreement. 3RP 388-90.

The messages did not say they were from Roark. 3RP 390. That was White's assumption. 3RP 391. He had a car burnt up two years

earlier. 3RP 391. The first one was after the buy from Roark. 3RP 391. The second one was the same night he received the messages from Higgins. 3RP 392.

Despite the assault, White showed up for trial. 3RP 392. He testified in other trials as well. 3RP 392.

White, however, Never testified in the Higgins case. 3RP 393. Nor did he recall being interviewed by defense counsel in Higgins case. 3RP 393.

Evidence established that the sales took place 979 feet from Sidney Glen Elementary School to the south, and 930 feet from a school bus stop on Berry Lake Road, to the north. 3RP 449, 496, 498, 4RP 544, 538.

The jury also heard the calls Roark made from the jail. 4RP 550, 555. The relevant portions will be referenced in the argument portion of the brief, *infra*. 4RP 576.

Finally, the jury heard evidence regarding the bail jumping charges. 4RP 577-618. Because those convictions are not challenged on appeal, the State will omit their underlying facts.

### III. ARGUMENT

- A. **THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT CONFIDENTIAL INFORMANT ROBERT WHITE WAS THREATENED AND ASSAULTED THE WEEK BEFORE TRIAL BECAUSE THE EVIDENCE WAS RELEVANT TO WHITE'S CREDIBILITY, AND FURTHER, CALLS ROARK MADE FROM JAIL BEFORE AND DURING TRIAL STRONGLY SUGGESTED HER INVOLVEMENT IN THE THREATS RENDERING THEM ADMISSIBLE AS SUBSTANTIVE EVIDENCE OF CONSCIOUSNESS OF GUILT.**

Roark argues that the trial court erred in admitting evidence that confidential informant Robert White was threatened and assaulted the week before trial. This claim is without merit because the evidence was admissible regarding White's credibility. Further calls Roark made from jail before and during trial strongly suggested her involvement in the threats rendering them admissible as substantive evidence of consciousness of guilt.

During trial it was learned that the week before trial began, someone assaulted confidential informant Robert White and burned his car. 3RP 319, 321. White also reported that he had heard that someone had placed a bounty on his head. 3RP 321.

Also a week or so before trial, in a call from the jail, Roark referred to White as "her rat" and that he made the buys for his girlfriend,

Destiny. 3RP 320. In an offer of proof, White testified that he was fearful to testify. 3RP 360. He had received Facebook messages the week before trial. 3RP 361. They commented that White and his girlfriend were at the police department and that White was a snitch. 3RP 361. The messages came before the car was burned. 3RP 361. Higgins and Roark had a long association. 3RP 361.

The week before trial, White heard from a mutual friend that Higgins had put a bounty on his head, and said that he was willing to pay money for pictures of White being beat up. 3RP 362. That night he was in the parking lot and someone came out of nowhere and punched him after asking if he was "Bob." 3RP 362. White could not identify the assailant. 3RP 362.

Although the Higgins threat related to Higgins's case, since Higgins and Roark were "together" at the time, White assumed Higgins was "trying to help her." 3RP 363. It caused him concern about testifying in this case. 3RP 363.

Then during trial, Roark spoke to Steve Irwin about "mustered the forces." 4RP 519. In the conversation, Roark spoke about White testifying at nine o'clock the next morning, and that Irwin needed to get them there as close to nine o'clock as possible. 4RP 519. She said that she did not need to have them here for the rest of the week, just that

morning. 4RP 519. She mentioned again about how White did the buys for Destiny. 4RP 519-20. Irwin showed up in the court room the day of White's testimony. 3RP 325.

The State sought to admit the evidence of White's assault and the torching of his car as well as recordings of the jail conversations. The State argued that the calls showed consciousness of guilt. 3RP 322. It also sought to admit the assault because the defense had sought to impeach White's credibility, and the evidence was relevant to rebut that. 3RP 333, 372.

The trial court determined that the assault, the threats and the phone calls were relevant and admissible. 3RP 333, 375, 4RP 520-21, 526, 528-30. It excluded the car burnings as too remote. 3RP 375.

This court reviews a trial court's admission of evidence for an abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). A trial court abuses its discretion when its decision is based on manifestly unreasonable or untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Under ER 404(b), evidence regarding attempts to influence or prevent testimony is admissible because it tends to show consciousness of guilt. *State v. Moran*, 119 Wn. App. 197, 217-18, 81 P.3d 122 (2003) (defendant wrote a letter to a friend asking the friend to "talk" to a witness

who was expected to provide unfavorable testimony), *review denied*, 151 Wn.2d 1032 (2004); *State v. McGhee*, 57 Wn. App. 457, 459-61, 788 P.2d 603, *review denied*, 115 Wn.2d 1013 (1990) (defendant called a witness a “snitch” and made a threatening gesture).

Likewise, in *State v. Bourgeois*, 133 Wn.2d 389, 400-02, 945 P.2d 1120 (1997), the Supreme Court explained that evidence of a witness’s reluctance or fear to testify against the defendant may be admitted to bolster the witness’s credibility when the witness’s credibility has been, or will be, challenged by the defense, or it is inevitably a central issue in the case. Thus, where credibility of a witness may be “an inevitable, central issue,” corroborating evidence may be offered. *State v. Petrich*, 101 Wn.2d 566, 575, 683 P.2d 173 (1984).

To admit such evidence under ER 404(b), the trial court must (1) find by a preponderance of the evidence that the uncharged acts occurred, (2) identify the purpose for admission, (3) determine that the evidence is materially relevant to that purpose, and (4) balance the probative value of the evidence against any unfair prejudicial effect. *State v. Kilgore*, 147 Wn.2d 288, 292, 53 P.3d 974 (2002). If the trial court decides to admit evidence under ER 404(b) immediately after both parties argue the issue and the record shows that the trial court agreed with one party over another, then this Court may excuse the trial court’s lack of specific

findings. *State v. Stein*, 140 Wn. App. 43, 66, 165 P.3d 16 (2007), *review denied*, 163 Wn.2d 1045 (2008).

***1. The trial court properly performed an analysis of the evidence pursuant to ER 404(b).***

Contrary to Roark's claim, the trial court did follow the four-step analysis required under ER 404(b). The trial court clearly found that the acts occurred:

One can infer from one of the conversations – well, two of them, one last night and one on 12/14, that Ms. Roark was threatening Mr. White or having people to do work against Mr. White, perhaps threaten him if he should testify against Ms. Roark. At least that appears to be the case from reading through the police report. ...

He [White] did appear in court yesterday with a bruised eye around his left eye. It was obvious he had been injured. Of course, there was no questioning about how he had been injured, but now we understand that Mr. White's understanding is that he was injured because he is testifying against Ms. Roark in this case.

Ms. Roark then calls her friend, Mr. Irwin, to muster the forces today to be in the court and that Mr. White, who she refers to as her, quote, rat, unquote, will be testifying in the morning.

3RP 329-330.

The court noted that the evidence would be relevant as consciousness of guilt, and further noted that it was relevant to White's credibility:

There are two inferences that one can take from that statement. One is that she wants to have support because there is a person who is testifying against her that could be particularly troubling for her. The other, more sinister, is to

[muster]<sup>2</sup> the forces so that Mr. White will know that there are a number of people who are out in the community who know who he is and can threaten him or have access to him at any time, which does have a tendency to chill an individual's motive to testify or his truthfulness on the witness stand. ...

I have been doing criminal cases now for 30 years, and it's extremely rare that this would not be sinister. It's extremely rare that this is simply a call to muster support. More often, it's when you see a witness coming into a courtroom with a black eye who believes that he has been a target of, at the very least, harassment and threats because he is testifying against an individual, and then you have the individual talking about him as a rat and then wanting to have folks in the courtroom on the day the "rat" testifies.

There hasn't been similar calls, to my knowledge, to muster up support for Ms. Roark. She hasn't called to ask her friends to be here prior to today while Musselwhite testifies, to my knowledge. If there are other phone calls that would mitigate against this inference, then certainly the parties should bring that before me, but right now the inference is, in my experience, one that does cause me some concern and alarm. ...

3RP 330-32. It thus concluded that the evidence was likely relevant:

I would like to address the evidentiary issue, and that is Mr. White's awareness of threats against him should he testify against Ms. Roark and the consequence to him just recently of having a black eye. His understanding and his state of mind is relevant to his credibility which has been called into question by Mr. Thimons.

So to rebut that, the prosecution should be allowed, in a limited fashion, to explore the issue of his bias with him in terms of his awareness of threats or physical violence, especially as it relates to actually testifying in this case.

3RP 333. After an offer of proof in which White testified, the court

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<sup>2</sup> RP reads "muscle." 3RP 330.

summarized the evidence and concluded the evidence of the assault on White and the jail phone call were relevant and admissible:

All right. Mr. White has testified that he is fearful of testifying in this case because of not just threats that have been made against him, which is that there is a bounty on his head, but also actual physical assault, which just occurred within days of this particular proceeding.

... Mr. White also testified that a gentleman, who continues to remain unidentified but who was present here in the courtroom who sat next to Mr. Irwin and who delivered a note to the defense attorney, was someone that he knew and that he was afraid of why it was that he was here.

The defendant called Mr. Irwin last night and told her to muster the forces because her, quote, rat, end quote, Mr. White, was going to be testifying this morning. This individual and the unnamed man that appeared here in the courtroom who was identified by Mr. White is someone that he knows has not been in this courtroom before today.

The inference is clear that his presence constitutes a threat to Mr. White and that the cause of that began with Ms. Roark's phone call to Mr. Irwin, who clearly knows the individual as they were sitting next to each other.

The state of the – Tegland, under ER 402, describes evidence is admissible that there is a – if a witness fears retaliation by a party who is the defendant, or others associated with the party, who are Mr. Irwin or this individual in the courtroom, can testify that he has those fears.

He has been identified as having been assaulted prior to this proceeding and that he was aware that there was a bounty on his head and he received threatening e-mails from Mr. Higgins whom he knows to have an association with Ms. White because they were boyfriend and girlfriend for a while during the course of the events that were described in these proceedings or shortly thereafter.

So the fact that Mr. Higgins is associated with Ms.

Roark that this individual in the – what I saw was a gray hoodie who was here in the courtroom is here perceived by Mr. White as a threatening gesture and the fact that he was assaulted, which gives credibility to the threat, all makes that relevant to Mr. White’s ability to testify and as a consciousness of guilt by the defendant.

The case that is cited is *State v. McGhee*, 57 Wn. App. 457 and *Bourgeois*, 133 Wn.2d 389. If there had not been an actual assault, or if there had not been an actual threat against Mr. White’s life by Mr. Higgins, then his fears of retaliation would have been irrelevant under the *Bourgeois* case. But here, there is a direct connection coming back to the defendant by virtue of the fact that she sends out a request to martial the forces because her rat is going to testify.

And then, for the first time, Mr. – this individual shows up today that is known to Mr. White, and Mr. White perceives the threat. He couples that with statements that have been made to him by Mr. Higgins, which are direct threats, and the connection that Mr. White – or that Mr. Higgins has with Ms. Roark, and all of that lends to a credible fear.

So ... [t]he assault can be admitted, and not the content of the threats by Mr. Higgins but just that he has been threatened can be admitted.

3RP 373-75.

The court again revisited the issue before the jail phone calls were admitted. The State explained that it was not seeking to admit the calls to prove that Roark caused the assault on White, but to show her consciousness of guilt by referring to White as “her rat.” 4RP 519. The court agreed:

There are two telephone calls which are the subject of this in limine motion. One is December 14th, which the Court notes was a Saturday. The other was December 18th,

which was last Wednesday. The first phone call is being proffered for consciousness of guilt, and I do find that the section of the phone call which refers to Mr. White and Mr. White doing the buys for Destiny is probative of consciousness of guilt.

There is no testimony that – or what was said, there was no testimony that was proffered in this case by Mr. White that discussed the actual transactions themselves, such as that he went inside of the house, that he and Heather Roark had small-talk, that you asked for a teener, that he paid her \$120 bucks, that he got a baggie or what else they talked about in order for him to be able to purchase the drugs.

The evidence, so far, indicates that Mr. White was doing the undercover buys for the police. The fact that Ms. Roark says, quote, he did the buys for Destiny, end quote, infers that that is what he must have said at the time in order to get Heather to be able to sell the methamphetamine to Mr. White. Mr. White's girlfriend has been identified as Destiny. So that – those phone calls will come in as consciousness of guilt, that phone call.

4RP 519-21. The court further noted that the jail call was relevant to “connect the dots” between Roark's call and White's fear:

There are many words that are used for confidential informants; rat being one of them. If she – but she said, “My rat,” which I find to be more conscious than “the rat.” And so since she said “my rat,” I do find that it does – it is relevant to show that she is conscious of guilt because of the use of the word, quote, my rat, not “the rat.” And so I do find that it's relevant.

Also, there is a tie-in to the confidential informant's testimony with respect to his state of mind while testifying that he was fearful, that he had been assaulted, that he saw someone in a courtroom the day he testified – the second day he testified that he had never seen before, which does up the ante with respect to – or connect the dots, I should say, with respect to the conduct, which is illustrative of consciousness of guilt.

4RP 528.

Finally, the court specifically noted that it was ruling that the evidence was more probative than prejudicial. 4RP 526. It went to explain this conclusion:

As I said earlier, the – if a witness fears retaliation by a party or others who are associated with the party, that evidence is ordinarily not admissible because unless there are actual threats made or there is actual conduct which would provide the link to those fears, then the fears are without basis. And so, therefore, it would be much more prejudicial than probative.

However, and by contrast, we have a witness who indicated that he feared retaliation by the defendant or others that were associated with her. Actual threats were made against him by virtue of the assault the Thursday before, and there is a nexus to the defendant who asked that Mr. Irwin join the forces. I think it was Irwin. ...

Steve Irwin, who has been here in the courtroom observing the process and who is the recipient on the telephone, and then a person shows up to court, Mr. Delanie, who had not been here before, and, frankly, who appears to have only been here for that one morning. So because the nexus is there, because she says the word “my rat,” I do find that it is probative of consciousness of guilt.

I don’t find that it’s unfairly prejudicial. These are the defendant’s own words. They were made during the course of the trial, and so – and the inferences to be brought from those are the kinds of inferences that would be brought against any defendant who says something incriminating.

4RP 529-30.

Further, although the court did not specifically utter the terms “more probative than prejudicial,” before White testified, the discussion

immediately following the court's initial ruling makes it clear that the court did weigh the probative value against the prejudicial effect.

The court had previously exclude proposed defense evidence that White had attempted to use some of the meth White had purchased in a controlled buy from Higgins in an unrelated case. The court cautioned the State that if White brought up Higgins's name then the defense would be permitted to explore the issue. 3RP 377. Defense counsel argued that he should be permitted to explore the fact that the threats came from Higgins and that Higgins also had a controlled buy with White. 3RP 377-78. The court ruled that the defense was welcome to get into that, but that it had excluded mention of Higgins's name because of the prejudicial effect:

It's all relevant in the sense that it shows the reasons for Mr. White's fears, and I -- it's prejudicial to the defendant because Mr. Higgins is tied to the defendant by virtue of the fact that she lived at his house, and she was in a dating relationship with him, and the fact that then there is a credibility to the threats that came from Mr. Higgins because of the presence of this individual and the conversation that Ms. Roark had with this individual ties Ms. Roark into that. So -- ...

You can get into that, Counsel, if you want. If you do, then it's generally prejudicial to the defendant, as I see it, as opposed to being directly impeaching in terms of weighing, but that can be your case strategy.

3RP 378. Thus it is clear that the trial court did in fact weigh the probative value of the proffered evidence against its prejudicial effect.

**2. Evidence of threats and an assault on Robert White the week before trial were properly admitted and used to weigh White's credibility; moreover, the first jail call suggests that Roark was behind them.**

Roark next complains that the evidence failed to establish that she was involved with the threats and assault on White. First it should be noted that Roark fails to cite any authority that the evidence would be inadmissible absent a connection to Roark. In *Bourgeois*, the Supreme Court made it clear that evidence of a connection between the threat and the defendant only affected the purposes to which the evidence could be put:

While we feel certain that the testimony of a witness regarding his or her fear or reluctance to testify might have a bearing on a juror's evaluation of that witness's credibility, such evidence might also have another effect. It could lead the jurors to conclude that the witness is fearful of the defendant. In that sense, the testimony would have to be viewed as substantive evidence of the defendant's guilt because evidence that a defendant threatened a witness is normally admissible to imply guilt. *State v. Kosanke*, 23 Wn.2d 211, 215, 160 P.2d 541 (1945). Here, however, no connection was established between *Bourgeois* and the reluctance of any witness to testify. Thus, it should not have been admitted for that purpose. The trial court apparently understood that and, consequently, instructed the jury that it could consider a witness's reluctance or fear only in evaluating his or her credibility.

*Bourgeois*, 133 Wn.2d at 400.<sup>3</sup> Thus, tying the assault and threats to Roark would merely have permitted the State to use them as substantive

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<sup>3</sup> Roark does not contest that she attacked White's credibility at trial.

evidence of Roark's guilt, rather than as evidence regarding White's credibility. However, the State only argued that the evidence should be considered to weigh White's credibility. The State did not discuss the assaults in its initial closing argument. It only brought them up in response to the defense argument:

Now, the State didn't offer the evidence of the phone calls or his statements about their being a bounty on him or this assault to try and prove that the defendant committed those acts. That is not what she is charged here with. No. That goes to something different. It goes to Mr. White's motivations. He was nervous when he was testifying. He was afraid, but he still came here.

4RP 668. Indeed, it emphasized the only purpose of the evidence:

No, this is not offered to show that she tried to assault him or she tried to arrange an assault. It's not offered to show that she was trying to threaten in some other way. ... It also goes to Mr. White's state of mind, what his perceptions were of that. ... It shows that he perceived the threats, but he still came here and testified as to what happened back in 2011 to the best of his ability.

4RP 673-74. Under these circumstances, it is difficult to understand Roark's point.

Moreover, the standard under ER 404(b) is a preponderance of the evidence. Here the State did presented evidence that combined with its close temporal proximity to the assault and threats, strongly suggests that Roark was behind them. On December 14, 2013, the week before trial started, she had the following conversation with an unidentified male:

ROARK: 13 to 20 years, dude...

MALE: Fuck that, man, who did...  
ROARK: Because of Bob White, because of Bob White, so you know.  
MALE: Rob, Rob White?  
ROARK: Bob White, yeah. Destiny and Bob.  
MALE: Okay kay kay kay gotcha.  
ROARK: Yeah, that's for Destiny. He did the buys for Destiny, but.  
MALE: No shit?  
ROARK: Yeah.  
MALE: Yeah. So don't yak, I got it. But anyway, um, thank you for giving her a call.<sup>[4]</sup>  
ROARK: Yeah, not a problem.  
MALE: Yeah, yeah, hey, she, um appreciates it and I'll get your help quickly.  
ROARK: Yeah I need it because I go to trial on Monday.  
MALE: Okay, okay, um.  
ROARK: So definitely.

Exh 78A (December 14, 2013, call, beginning at approximately 3:26).<sup>5</sup>

The reasonable inference, particular in light of the actual assault and threats, is that Roark and her friend were contemplating silencing White. As such, even were the threat and assault evidence admitted and used substantively against Roark, it would have been proper.

Further, even if the evidence were improperly admitted, any error

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<sup>4</sup> The bulk of this call, although on Roark's account, was between the male and another inmate.

<sup>5</sup> No transcript of the calls was prepared or submitted at trial. The excerpts were prepared by the undersigned based on the audio exhibit.

would be harmless. Where the error is from violation of an evidentiary rule rather than a constitutional mandate, this Court does not apply the more stringent “harmless error beyond a reasonable doubt” standard. Instead, “the rule [is] that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). “The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” *Bourgeois*, 133 Wn.2d at 403.

Here, as noted, the State never argued that the evidence should be held against Roark, arguing repeatedly that it went to White’s credibility. Further, on cross-examination White testified that the messages did not say they were from Roark. 3RP 391. He also conceded that he had been “outed” as a CI in a previous trial against another defendant.<sup>6</sup> 3RP 386. White that he had also made controlled buys from the person who made the threats against him. 3RP 386. Counsel also brought out that White was caught trying to ingest the purchased meth in that case, which ended his career as an informant. 3RP 387. Finally, it pointed out that despite the assault and threats, White testified in this case and in others. 3RP 392. Additionally, the unrefuted evidence at trial showed that Roark

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<sup>6</sup> See *State v. Davis*, 176 Wn. App. 385, 308 P.3d 807 (2013).

participated in four controlled buys. Further, when the police executed the search warrant, they located a great deal of methamphetamine, as well as numerous implement associated with the trade. Additionally, Roark was caught red-handed trying flush the meth down the toilet.

Finally, Roark also ignores the second jail call, which occurred during trial and in which she repeatedly referred to White as "her rat." This evidence was strongly probative of her consciousness of guilt and Roark does not appear to challenge its admission on appeal. The evidence also suggests an intent to intimidate White, again. The essential passages follow:

ROARK: And then, um, I need as many people as you can have show up like that we know at court tomorrow like in the morning time. I need to have as many of them come in the morning.

IRWIN: Who?

ROARK: Anybody.

IRWIN: Okay. Who do you want me call?

ROARK: Join the forces.

IRWIN: Okay. Ah, like, as many people?

ROARK: As many as you can.

IRWIN: Okay. I can do that.

ROARK: Tell everybody, like, um, you got a pen I'll give you a couple phone numbers and you can call.

IRWIN: Okay. No problem.

ROARK: You got a pen?

IRWIN: [unintelligible] After we're done talking you'll have to call me, you'll have to call me back again cause I'm walking around the road right now.

ROARK: Okay.

IRWIN: Okay so how'd it, how's the second half going?

ROARK: Huh?

IRWIN: How's the second half go?

ROARK: Uh we started interviewing, they started to interviewing my rat and um [unintelligible] and then tomorrow they're gonna finish interviewing my rat in the morning and um possibly call Adam to the stand, try to call Adam to the stand. He might plead the Fifth.

IRWIN: Yeah.

ROARK: So, that's gonna be in the morning then.

Exh 78A (December 18, 2013, call, beginning at approximately 1:18).

After discussing other matters, Roark concluded the call (exhibit at 6:08)

by again emphasizing the need for people to show up at the time White was scheduled to testify:

ROARK: So bring me those clothes in the morning and then I need as many people show up as they can. Like, preferably as close to 9:00 as they can.

The next morning, as requested, Irwin other appeared in court, which had the effect of frightening White. 3RP 325, 384. It would simply be unreasonable to suppose that the outcome of her trial would have been different without the threat and assault evidence. This claim should be rejected.

**B. ROARK'S CLAIM THAT HER COUNSEL WAS INEFFECTIVE FOR NOT REQUESTING A LIMITING INSTRUCTION REGARDING THE USE OF THE THREAT AND ASSAULT EVIDENCE IS WITHOUT MERIT BECAUSE ROARK FAILS TO SHOW COUNSEL'S DECISION WAS NOT TACTICAL AND FURTHER, SHE FAILS TO SHOW PREJUDICE.**

Roark next claims that her counsel was ineffective for not requesting a limiting instruction regarding the use of the threat and assault evidence. This claim is without merit because Roark fails to show counsel's decision was not tactical and further, she fails to show prejudice.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must

strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

Where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991). Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d at 335. Judicial scrutiny of a defense attorney's performance must be "highly deferential" in order to "eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court will defer to counsel's strategic decision to present or forego a particular defense theory when the decision falls within the wide range of professionally competent assistance. *United States v. Layton*, 855 F.2d 1388, 1420 (9th Cir.1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a

basis for a claim that the defendant did not receive effective assistance of counsel. *Lord*, 117 Wn.2d at 883.

The decision not to obtain a limiting instruction can be a legitimate trial tactic because such an instruction may simply underscore the damaging evidence. *See State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447 (1993) (“We can presume trial counsel decided not to ask for a limiting instruction as a trial tactic so as not to reemphasize this very damaging evidence.”); *State v. Dow*, 162 Wn. App. 324, 335, 253 P.3d 476 (2011) (“We can presume counsel did not request limiting instructions to avoid reemphasizing damaging evidence.”).

Roark also gives short shrift to the idea that counsel could have wished to avoid highlighting the evidence. He argues that because the evidence was so prejudicial, no competent counsel could have declined to ask for a limiting instruction. Notably, Roark fails to now suggest what such an instruction might have looked like. WPIC 5.30 sets forth the instruction to be used when ER 404(b) evidence is admitted:

Certain evidence has been admitted in this case for only a limited purpose. This [evidence consists of and] may be considered by you only for the purpose of . You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Tailoring the operative second sentence to the facts of this case would produce an instruction to the jury that would have read:

This evidence consists of the assault and threats against Robert White and may be considered by you only for the purpose of showing Robert White's credibility.

First, it is hard to see how telling the jury that the evidence of assault and threats could only be used to evaluate White's credibility could not have highlighted the evidence, and for that matter, reinforced the idea that Roark was behind them into the jurors' minds. Counsel's concern was valid.

Perhaps more importantly, such an instruction would not have well served the overall defense strategy. Roark's defense was that there was no one besides White had seen the actual sales and that White was not a reliable witness. Emphasizing evidence that added to White's credibility hardly would have served this strategy.

Further, for the same reason the alleged error in admitting the evidence would be harmless, as discussed above, Roark fails to show prejudice. In particular, defense counsel brought out repeatedly that White did not in fact know that Roark was behind the threats and the State repeatedly emphasized that the evidence was only relevant to weigh White's credibility. There is no reason to believe a limiting instruction would have changed the outcome of the trial. This claim should be rejected.

**C. THE TRIAL COURT CORRECTLY FOLLOWED THE PLAIN LANGUAGE OF THE STATUTE AND THE CLEARLY STATED LEGISLATIVE INTENT WHEN IT ORDERED THAT ROARK'S SCHOOL-ZONE ENHANCEMENTS SHOULD RUN CONSECUTIVELY.**

Roark argues that the trial court should have run the school zone enhancements concurrently. Her argument is contrary to the plain meaning of the statute. In addition, even if the statute were vague, the canons of statutory construction would dictate consecutive enhancements.

Statutory interpretation is a question of law that this Court reviews de novo. *State v. Mandanas*, 168 Wn.2d 84, 87, 228 P.3d 13 (2010). When interpreting any statute, the primary objective is to ascertain and give effect to the intent of the Legislature. *Id.* In order to determine legislative intent, the Court begins with the statute's plain language and ordinary meaning. *Id.* If the plain language of a statute is subject to only one interpretation, then the inquiry ends. *Id.* If a statute is subject to more than one reasonable interpretation, it is ambiguous. *Id.* The rule of lenity only allows the Court to interpret an ambiguous criminal statute in favor of the defendant if there is no legislative intent to the contrary. *Mandanas*, 168 Wn.2d at 88.

The school-zone enhancement specifically provides that “[a]ll

enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.” RCW 9.94A.533(6). Roark’s primary argument rests on the language of the firearm enhancement statute, which provides that those enhancements “shall run consecutive to all other sentencing provisions, including other firearm or deadly weapon enhancements” RCW 9.94A.533(4)(e). She contends that because the language regarding school zones did not say “including school zone enhancements” multiple school zone enhancements should run concurrently.

However, Roark’s argument ignores the meaning of the word “including.” The use of that term actually establishes that these enhancements are sentencing conditions. Her argument would amend the statute to read that “[a]ll enhancements under this subsection shall run consecutively to all other sentencing provisions, *except for enhancements under this subsection.*” Such an amendment would be contrary to both the plain meaning of the statute and the legislative intent.

Her argument also ignores the legislative intent. Here, that legislative history establishes that the language “consecutive to all other sentencing conditions” was added to the school zone enhancement statute to overrule the Court’s decision in *State v. Jacobs*. 154 Wn.2d 596, 115 P.3d 281 (2005). In *Jacobs*, two defendants were convicted of

manufacturing a controlled substance within a school zone and while a minor was present. In that case, the Court ruled that the enhancements should run concurrent because, at that time, the RCW contained no language with regard to whether the enhancements should be consecutive or concurrent with other sentencing provisions.

In direct response to *Jacobs*, the Legislature unanimously amended the statute to indicate that school zone enhancements should run consecutive to all other sentencing provisions. Laws of 2006 ch. 339; App. A, at 2. As stated in the final bill report, the amendment was enacted so that “sentence enhancements for ranked drug offense are to be served consecutively.” App. B, at 4. The house bill report, house bill analysis and senate bill report all provide that the amendment clarified “that all sentence enhancements relating to violations of the Uniform Controlled Substance Act in drug-free zones are to be run consecutively (instead of concurrently) to all other sentencing conditions.” App. C, at 2, 7, 12; App. D, at 2, 6, 15; App E, at 5. By way of background the house bill report and house bill analysis specifically referenced the Court’s decision in *Jacobs*. App. C at 7; App. D, at 6-7. In summarizing the statutory changes the house report and bill analysis state that the “[s]tatutory language is clarified to specify that all sentence enhancements relating to violations of the UCSA in drug-free zones are to be run consecutively to

all other sentencing provisions for all other sentences under the Sentencing Reform Act.” App. C, at 12; App. D, at 15. The senate bill report repeats this modification. This bill passed both the house and senate unanimously. App. A. As such, the legislative intent is clear and unequivocal; each enhancement must be served consecutively to all other sentencing conditions. *See Gutierrez v. Department of Corrections*, 146 Wn. App. 151, 156, 188 P.3d 546 (2008) (“The acknowledged purpose of the amendment was to overturn the decision in *State v. Jacobs*”).

Roark would distinguish this legislative correction on the grounds that *Jacobs* involved two enhancements applied to a single crime. This argument makes little sense. If the Legislature intended enhancements (both under the same subsection) to run consecutively when they applied to a single crime, its intent would apply a fortiori to multiple crimes.<sup>7</sup> The trial court properly imposed the enhancements consecutively. This contention should be rejected.

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<sup>7</sup> Even if Roark were correct, she should still receive two consecutive enhancements by her logic. The jury specifically found that each drug offense was committed within 1000 feet of a school and within 1000 feet of a separate school bus stop. CP 76-79.

**IV. CONCLUSION**

For the foregoing reasons, Roark's conviction and sentence should be affirmed.

DATED January 21, 2015.

Respectfully submitted,  
TINA R. ROBINSON  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RAS', with a long horizontal flourish extending to the right.

RANDALL A. SUTTON  
WSBA No. 27858  
Deputy Prosecuting Attorney

# **APPENDIX A**

**NOTE: The information on this page is current as of 10:16 AM Pacific Time on 1/22/2014, but is subject to change.**

**Check online for the latest information.**

**HISTORY OF BILL: SB 6239  
Wednesday, January 22, 2014 10:15 AM**

**Changing provisions relating to crimes.**

**Revised for 2nd Substitute: Changing provisions relating to controlled substances.**

Sponsors: Senators Hargrove, Johnson, Doumit, Oke, Stevens, Esser  
By Request: Attorney General  
Companion Bill: HB 2712

**2006 REGULAR SESSION**

Jan 6 Prefiled for introduction.  
Jan 9 First reading, referred to Human Services & Corrections.  
Jan 16 Public hearing in the Senate Committee on Human Services & Corrections at 10:00 AM.  
Feb 1 Executive action taken in the Senate Committee on Human Services & Corrections at 7:00 PM.  
Feb 3 **HSC - Majority; 1st substitute bill be substituted, do pass.**  
And refer to Ways & Means.  
Referred to Ways & Means.  
Feb 7 Executive action taken in the Senate Committee on Ways & Means at 1:30 PM.  
**WM - Majority; 2nd substitute bill be substituted, do pass.**  
Passed to Rules Committee for second reading.  
Feb 9 Made eligible to be placed on second reading.  
Feb 10 Placed on second reading by Rules Committee.  
**2nd substitute bill substituted (WM 06).**  
Floor amendment(s) adopted.  
Rules suspended. Placed on Third Reading.  
Third reading, passed; yeas, 42; nays, 0; absent, 1; excused, 6.

**IN THE HOUSE**

Feb 11 First reading, referred to Criminal Justice & Corrections.  
Feb 21 Public hearing in the House Committee on Criminal Justice & Corrections at 1:30 PM.  
Feb 23 Executive action taken in the House Committee on Criminal Justice & Corrections at 8:00 AM.  
CJC - Executive action taken by committee.  
CJC - Majority; do pass with amendment(s).  
Feb 24 Referred to Appropriations.  
Feb 27 Public hearing and executive action taken in the House Committee on Appropriations at 1:30 PM.  
APP - Executive action taken by committee.  
APP - Majority; do pass with amendment(s) but without amendment(s) by Criminal Justice & Corrections.  
Minority; do not pass.  
Passed to Rules Committee for second reading.  
Mar 2 Placed on second reading.

Mar 3 Committee amendment adopted as amended.  
Rules suspended. Placed on Third Reading.  
Third reading, passed; yeas, 98; nays, 0; absent, 0; excused, 0.

**IN THE SENATE**

Mar 7 Senate concurred in House amendments.  
Passed final passage; yeas, 48; nays, 0; absent, 0; excused, 1.

Mar 8 President signed.

**IN THE HOUSE**

Speaker signed.

**OTHER THAN LEGISLATIVE ACTION**

Delivered to Governor.

Mar 30 Governor signed.  
Chapter 339, 2006 Laws.  
Effective date 6/7/2006\*\*\*.

# **APPENDIX B**

# FINAL BILL REPORT

## E2SSB 6239

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C 339 L 06  
Synopsis as Enacted

**Brief Description:** Changing provisions relating to controlled substances.

**Sponsors:** Senate Committee on Ways & Means (originally sponsored by Senators Hargrove, Johnson, Doumit, Oke, Stevens and Esser; by request of Attorney General).

Senate Committee on Human Services & Corrections  
Senate Committee on Ways & Means  
House Committee on Criminal Justice & Corrections  
House Committee on Appropriations

**Background:** Methamphetamine (meth) is an addictive stimulant drug. A task force convened by the Attorney General in 2005, which included legislators, law enforcement officers, prosecutors, treatment providers, and other stakeholders, assessed the extent of the meth problem in Washington State.

The task force recommended changes to Washington laws in the areas of substance abuse reduction including: 1) drug-free workplace provisions, pilot programs and task forces; 2) cleanup of contaminated property; and 3) criminal penalties and procedures.

Drug Task Force Funding. Previously, two federal grant programs, the Byrne Formula Grant Program and the Local Law Enforcement Block Grant, provided federal funding for local drug task forces. These grants were administered by the Department of Community, Trade, and Economic Development (CTED). In Fiscal Year (FY) 2004, CTED allocated \$4.163 million in federal funding for local drug task forces. Since then, the federal government combined these two programs into the Justice Assistance Grant (JAG), also administered by CTED. The total amount of funding available was reduced by approximately 40 percent in FY 2006 and is projected to be reduced another 40 percent in FY 2007. The current estimate of federal funding for local drug task forces is \$2.343 million for FY 2007. Counties may receive JAG money either by applying for funding through CTED or applying directly to the Department of Justice. While most Washington counties have been part of a federally funded drug task force, 10 counties have not been included. They are Columbia, Island, Jefferson, Kittitas, Klickitat, Lincoln, Mason, Pacific, Pend Oreille, San Juan, Stevens, and Walla Walla.

Chemical Dependency Treatment at the Department of Corrections. The Department of Corrections (DOC) currently limits chemical dependency treatment for inmates to priority inmates. Inmates prioritized for treatment include those determined to be at high risk for violent reoffending and those sentenced under the Drug Offender Sentencing Alternative (DOSA). In fiscal year 2004, DOC admitted 3,800 inmates to treatment while in prison, out of a total average daily prison population of 16,700.

Senate Bill 5763. Last year the Legislature passed SB 5763. One of the provisions in the legislation provided county governments the authority to impose a 1/10 of 1 percent sales tax

dedicated to new and expanded therapeutic drug courts for dependency proceedings, and a new and expanded mental health and chemical dependency treatment services.

Cleanup of Contaminated Property. The chemicals which are used in the manufacture of meth can contaminate structural materials, furnishings, wastewater systems, and soils. Decontamination of the property is necessary to reduce the public health risks of injuries and hazardous exposures associated with those chemicals.

The State Board of Health and the Department of Health (DOH) establish standards, procedures, and responsibilities for regulating the occupancy and use of property where hazardous chemicals or chemical residues commonly associated with the manufacture of controlled substances are or may be present. DOH Clandestine Drug Lab Program ensures that contaminated sites are cleaned to public health standards. DOH also certifies contractors to decontaminate properties, and provides technical assistance and training to local health jurisdictions, government agencies, and community organizations.

Local health jurisdictions assess properties to determine the degree and extent of contamination due to chemical residues and other biohazards. The local health officers are also responsible for: 1) providing notice regarding the property to occupants and owners; 2) reporting contaminated property to DOH; 3) determining whether a contractor is required for decontamination; 4) verifying that decontamination has occurred; and 5) recording the decontamination with the county auditor.

The Washington State Model Toxics Control Act (MTCA). MTCA outlines the liabilities and responsibilities of the owner or operator of a site that has been contaminated by a hazardous substance or substances. The cleaning of these contaminated sites can be the responsibility of a broad range of individuals.

Drug Offender Sentencing Alternative (DOSA). Offenders convicted of drug offenses, for which the standard range sentence is over 12 months in prison, may be eligible for the drug offense sentencing alternative (DOSA). In addition to the prison-based DOSA sentencing alternative, the 2005 Legislature enacted a residential treatment DOSA. If the court elects to impose a prison-based DOSA sentence, the term of incarceration is one-half of the midpoint of the standard range during which DOC is required to provide an assessment and appropriate drug treatment. The offender must serve the remainder of the midpoint of the standard range in community custody which must include outpatient drug treatment.

Summary: Substance Abuse Reduction. Counties that impose the tax authorized in SB 5763 are eligible to seek up to \$100,000 from the Legislature for additional mental health or substance abuse treatment programs for persons addicted to methamphetamine, beginning in fiscal year 2008 and ending in fiscal year 2010. Three pilot projects are established to provide rural drug task forces to the three parts of the state. Each pilot project will receive four additional deputy sheriffs, two deputy prosecutors, and one clerk. Legislative intent is declared to provide the pilot projects with \$1.6 million in funding, and to provide a minimum of \$4 million in funding for multijurisdictional task forces currently in operation. The definition of "neglect" of vulnerable adults and children is amended to include exposure to meth or ingredients of meth when there is intent to manufacture meth. CTED will review funding sources for local meth action teams through the Washington State meth initiative and

drug task forces to determine their adequacy and report its findings to the Legislature by November 2006.

Authority and Discretion of Local Health Officers. When they have probable cause, local health officers (LHOs), in consultation with law enforcement officers, are granted the authority to seek a warrant to conduct inspections of property. LHOs are granted the authority to issue emergency, seventy-two-hour orders when they determine the order is necessary to protect the public health, safety, or the environment.

In addition to condemning or demolishing contaminated property, city or county officials may take additional actions such as prohibiting the use, occupancy, or removal of property, or ordering its decontamination. These actions are appealable; however, restrictions on use, occupancy, or removal of property are enforceable while the appeal is pending. City and county personnel, and their cleanup contractors, must comply with the local health officer's orders.

It is a misdemeanor for anyone to enter property after an order declaring it to be unfit has been issued. Exceptions are provided for governmental officials performing their duties, occupants recovering uncontaminated property, and for others as authorized by a public health officer or superior court.

In addition to decontamination, the owners or authorized contractors are required to submit written work plans for demolition or disposal activities. Property owners are responsible for: 1) the costs of any property testing which may be required to demonstrate the presence or absence of hazardous chemicals; and 2) the costs of the property's decontamination, demolition, and disposal expenses, as well as costs incurred by the local health officer. Within 30 days of issuing an order of unfitness, the local health officer must establish a time period in which decontamination, demolition, and disposal will be completed and fines or legal actions may be taken upon failure to meet the deadline.

Modification to Certification Requirements for Cleanup Workers. DOH authority to deny, suspend, revoke, or place restrictions on certificates is expanded to include: 1) failing to perform decontamination, demolition, or disposal work using department certified decontamination personnel; 2) failing to perform work that meets the requirements of the local health officers; 3) failing to properly dispose of contaminated property; 4) failing to cooperate with DOH or the local health officer; or 5) failing the evaluation and inspection of decontamination projects. Additionally certified workers' fraudulent acts or acts of misrepresentation are expanded to include: 1) applying for, or obtaining a certification, recertification, or reinstatement; 2) seeking approval of a work plan; and 3) documenting completion of work to DOH or local health officer.

Department of Health Cleanup Evaluations. DOH must modify its rules to include methods for the testing of porous and nonporous surfaces. DOH must also adopt rules about independent third party sampling to verify satisfactory decontamination of property.

DOH may annually evaluate a number of the property decontamination projects performed by licensed contractors to determine the adequacy of the decontamination work. If a project fails the evaluation and inspection, the contractor is subject to a civil penalty and license suspension and is prohibited from performing additional work until deficiencies have been corrected.

Department of Ecology. Department of Ecology (DOE), in consultation with local health jurisdictions and their corresponding city or county governments, will conduct a pilot program to demonstrate application of existing MTCA and other available resources to cleanup methamphetamine contaminated property for public purpose. DOE will report to the Legislature on the effects of the pilot program by January 1, 2007.

Sentencing Modifications. Sentence enhancements for ranked drug offenses are to be served consecutively. Drug Offender Sentencing Alternative offenders will serve 12 months or up to the half point of a sentence, whichever is greater. When the court determines that chemical dependency contributed to the felony offense, the offender, not just drug offenders, must receive a chemical dependency screening report prior to sentencing.)

Washington State Institute for Public Policy. Washington State Institute for Public Policy (WSIPP) must conduct two studies and report its findings to the Legislature by January 1, 2007. First, WSIPP will study neighboring states criminal sentencing provisions related to methamphetamine to determine if these provisions provide an incentive for traffickers and manufacturers to relocate to Washington. Second, the WSIPP will study DOSA's impact on recidivism rates for offenders participating in DOSA relative to offenders receiving community treatment or no treatment at all.

**Votes on Final Passage:**

Senate	42	0	
House	98	0	(House amended)
Senate	48	0	(Senate concurred)

**Effective: June 7, 2006**

January 1, 2007 (Section 108)

# **APPENDIX C**

# HOUSE BILL REPORT

## E2SSB 6239

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As Passed House - Amended:  
March 3, 2006

**Title:** An act relating to the impact of controlled substances, primarily methamphetamine.

**Brief Description:** Changing provisions relating to controlled substances.

**Sponsors:** By Senate Committee on Ways & Means (originally sponsored by Senators Hargrove, Johnson, Doumit, Oke, Stevens and Esser; by request of Attorney General).

**Brief History:**

**Committee Activity:**

Criminal Justice & Corrections: 2/21/06, 2/23/06 [DPA];  
Appropriations: 2/27/06 [DPA(APP w/o CJC)s].

**Floor Activity:**

Passed House - Amended: 3/3/06, 98-0.

**Brief Summary of Engrossed Second Substitute Bill  
(As Amended by House)**

- Authorizes counties imposing the sales and use tax for mental health services to be eligible for \$100,000 annually to provide for mental health or substance abuse treatment for persons with methamphetamine addiction.
- Provides that the Legislature intends to provide 100 additional placements for therapeutic drug and alcohol treatment in prisons until June 30, 2010.
- Establishes pilot enforcement areas in three regions of the state for the purpose of the enforcement of illegal drug laws.
- Expands the term "drug court" to include juvenile drug courts.
- Expands the definition of *neglect* under the state's abuse of children statute and the vulnerable adults statute to include the crime of endangerment with a controlled substance.
- Requires the Department of Community, Trade, and Economic Development to review various funding sources to determine whether funding is adequate to accomplish the mission of methamphetamine action teams.

- Requires the Department of Social and Health Services (DSHS) to consult with faith-based organizations to discuss their appropriate role in providing support services to persons with chemical dependency disorders.
- Requires the Agency Council on Coordinated Transportation to adopt a plan to provide recovering addicts with increased access to existing special need transportation services.
- Requires the DSHS and the Office of the Attorney General to report to the Legislature on the status of ongoing state multimedia campaigns relating to chemical dependency prevention and treatment.
- Provides that personal property is covered by the contaminated property statutes, in addition to real property.
- Allows a court to issue administrative search warrants so that property suspected of methamphetamine contamination can be inspected.
- Permits a local health officer to issue an emergency order forbidding occupancy of a contaminated property.
- Establishes new requirements for the owners of contaminated properties, including decontaminated time-lines set by a local health officer.
- Provides new conditions under which a contractor for the decontamination of property may have his or her certification suspended.
- Establishes third-party sampling of decontamination sites.
- Creates a pilot clean-up project to examine funding sources, and a study to assess options to encourage landlords to rent housing to recovering substance abusers.
- Clarifies that all sentence enhancements relating to violations of the Uniform Controlled Substance Act in drug-free zones are to be run consecutively (instead of concurrently) to all other sentencing provisions.
- Expands the prison confinement time for an offender serving a prison-based Drug Offender Sentencing Alternative (DOSA) sentence to one-half of the midpoint of the standard sentencing range or 12 months, whichever is greater.

- Requires the courts to request chemical dependency screening reports before imposing a sentence upon a defendant that has been convicted of "any" type of a felony where it is found that the offender has a chemical dependency that contributed to his or her offense.
- Requires the Washington State Institute for Public Policy (WSIPP) to study criminal sentencing provisions in other states for all crimes involving methamphetamine.
- Requires the WSIPP to conduct a study of the DOSA program.

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#### HOUSE COMMITTEE ON CRIMINAL JUSTICE & CORRECTIONS

**Majority Report:** Do pass as amended. Signed by 7 members: Representatives O'Brien, Chair; Darneille, Vice Chair; Pearson, Ranking Minority Member; Ahern, Assistant Ranking Minority Member; Kirby, Strow and Williams.

**Staff:** Yvonne Walker (786-7841), Amy Van Horn (786-7168), Elisabeth Frost (786-5793), Sarah Dylag (786-7109), and Sydney Forrester (786-7120).

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#### HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** Do pass as amended by Committee on Appropriations and without amendment by Committee on Criminal Justice & Corrections. Signed by 29 members: Representatives Sommers, Chair; Fromhold, Vice Chair; Alexander, Ranking Minority Member; Anderson, Assistant Ranking Minority Member; McDonald, Assistant Ranking Minority Member; Armstrong, Bailey, Buri, Chandler, Clements, Cody, Darneille, Dunshee, Grant, Haigh, Hunter, Kagi, Kenney, Kessler, Linville, McDermott, McIntire, Miloscia, Pearson, Priest, Schual-Berke, P. Sullivan, Talcott and Walsh.

**Minority Report:** Do not pass. Signed by 1 member: Representative Hinkle.

**Staff:** Bernard Dean (786-7130).

**Background:**

I. Sales and Use Tax. In 2005, the Legislature passed an omnibus Mental and Substance Abuse Disorder Treatment bill that authorized a local option sales and use tax of 0.1 of 1 percent to provide new or expanded chemical dependency or mental health services. Moneys were to be used solely for the purpose of providing new or expanded chemical dependency or mental health treatment services and for the operation of new or expanded therapeutic court programs.

As of January 1, 2006, no county has imposed the new authorized tax.

**II. Therapeutic Drug and Substance Treatment.** The Department of Corrections (DOC) currently limits chemical dependency treatment to certain inmates. Inmates prioritized for treatment include those determined to be at high risk for violent re-offending and those sentenced under the Drug Offender Sentencing Alternative (DOSA). On January 1, 2006, the DOC had a therapeutic community capacity of 475 beds.

**III. Multijurisdictional Narcotics Task Forces.** The Department of Community, Trade, and Economic Development (DCTED) provides technical and financial assistance to local governments and community-based organizations. Among other responsibilities, the DCTED solicits and allocates federal funding for local narcotics task forces. The vast majority of federal funding for multijurisdictional narcotics task forces is allocated to local governments by the DCTED, which receives the funding through the Justice Assistance Grant (JAG), a federal grant program. However, some counties receive a small amount of federal funding for narcotics enforcement directly through the JAG program.

In Fiscal Year (FY) 2004, the DCTED allocated approximately \$5.5 million in federal funding to support multijurisdictional narcotics task forces. Approximately \$3.5 million of this funding was allocated to local units of government to continue multijurisdictional narcotics task forces, and \$611,177 was allocated to the DCTED to continue the Drug Prosecution Assistance Program in support of multijurisdictional narcotics task forces.

In FY 2006, the total amount of federal funding available was reduced, and the DCTED allocated \$2.4 million in federal funding to support multijurisdictional narcotics task forces, with approximately \$2 million allocated to local units of government to continue multijurisdictional narcotics task forces, and \$330,000 to the DCTED to continue the Drug Prosecution Assistance Program in support of multijurisdictional narcotics task forces.

While most Washington counties have been part of a federally funded narcotics task force, 12 counties (Columbia, Lincoln, Pacific, Pend Oreille, Stevens, Walla Walla, Island, Jefferson, Kittitas, Klickitat, Mason, and San Juan) have not been members of a federally funded narcotics task force.

**IV. Drug Courts.** Drug courts, unlike traditional courts, divert non-violent drug offenders into court-ordered treatment programs rather than jail or prison. The program allows defendants arrested for drug possession to choose an intensive, heavily supervised rehabilitation program in lieu of incarceration and a criminal record. The term "drug court" is defined as a court that has special calendars or dockets designed to achieve a reduction in recidivism and substance abuse among non-violent, substance-abusing offenders by increasing their likelihood for successful rehabilitation through early, continuous, and intense judicially supervised treatment; mandatory periodic drug testing; and the use of appropriate sanctions and other rehabilitation services.

In 2002, the Legislature passed 2SHB 2338 (Chapter 290, Laws of 2002) that created a Criminal Justice Treatment Account (Account) in the state treasury. In 2003, the Legislature passed ESSB 5990 (Chapter 379, Laws of 2003) which appropriated a total of \$8.9 million to the Account. Funds in the Account may be spent solely for substance abuse treatment and

support services for adult offenders with a chemical dependency problem against whom charges are filed by a prosecuting attorney in Washington and for non-violent adult offenders participating in drug courts. No more than 10 percent of the funds may be spent for support services.

**V. Children and Vulnerable Adults.** State laws relating to abuse and neglect of children and vulnerable adults include provisions for mandatory reporting and investigation of allegations of neglect or abuse of these populations. A child means any person under the age of 18 years. A vulnerable adult includes a person who: (1) is age 60 years and over who has a functional, physical, or mental inability for self-care; (2) has been found to be incapacitated; (3) has a developmental disability; (4) resides in a nursing home, adult family home, residential habilitation center, or other licensed facility; or (5) is receiving hospice or home health services.

For the purposes of mandatory reporting, investigation, and protective services, *abuse and neglect* of a child means the injury, sexual abuse, sexual exploitation, negligent treatment, or maltreatment of a child. Under the vulnerable adults statute, *neglect* means, conduct by a caregiver that: (1) fails to provide goods and services to maintain physical or mental health or that fails to prevent or avoid physical or mental harm to the vulnerable adult; or (2) demonstrates a serious disregard of consequences constituting a clear and present danger to the vulnerable adult's health, welfare, or safety.

***Endangerment with a controlled substance.***

The offense of endangerment with a controlled substance (a seriousness level IV, class B felony) occurs when a person knowingly or intentionally permits a dependent child or dependent adult to be exposed to, ingest, inhale, or have contact with (1) methamphetamine; or (2) ephedrine, pseudoephedrine, or anhydrous ammonia, including their salts, isomers, and salts of isomers that are being used in the manufacture of methamphetamine.

**VI. The Department of Community, Trade, and Economic Development.** The DCTED is responsible for assisting in community and economic development in the state; providing technical and financial assistance to local governments, businesses, and community-based organizations; soliciting private and federal grants for economic and community development programs; and conducting research and analysis to support economic and community development efforts.

**VII. Faith-Based Organizations.** Residential and outpatient chemical dependency treatment programs may choose to be regulated by the Division of Alcohol and Substance Abuse (DASA) of the Department of Social and Health Services (DSHS). Certification of programs is voluntary. In addition, residential chemical dependency treatment programs must meet licensing requirements established by the Department of Health (DOH).

State and federal treatment funding currently is limited to programs certified by the DASA. To be certified, programs that include a religious component must make participation in that aspect of the program voluntary.

VIII. Agency Council on Coordinated Transportation. In 1998, the Legislature created the Agency Council on Coordinated Transportation (Council), declaring its intent to coordinate transportation services and programs that provide those transportation services to achieve increased efficiencies and to provide a greater number of persons with special transportation needs.

The Council consists of nine voting members and eight non-voting legislative members. The nine voting members include the Secretary of Transportation, who serves as chair; the Secretary of the DSHS; the Superintendent of Public Instruction; and six members appointed by the Governor, representing consumers of special needs transportation, pupil transportation, the Community Transportation Association of the Northwest, the Community Action Council Association, and the State Transit Association. The eight non-voting legislative members include four members of the House of Representatives and four members of the Senate (representing each caucus) and the House and Senate Transportation Committees, House Appropriations, and Senate Ways and Means Committee.

The Council is responsible for: (1) developing standards and strategies for coordinating special needs transportation; (2) identifying, developing, funding (as resources are available), and monitoring demonstration projects; (3) identifying barriers to coordinated transportation; (4) recommending statutory changes to the Legislature to assist in coordinated transportation; and (5) working with the Office of Financial Management to make necessary changes for identification of transportation costs in executive agency budgets.

IX. Anti-Methamphetamine Campaigns. The DASA of the DSHS promotes strategies that support healthy lifestyles by preventing the misuse of alcohol, tobacco, and other drugs, and support recovery from the disease of chemical dependency.

The Office of the Attorney General (AG) is responsible for defending state laws. In 2005, the AG formed an education program partnered with community-based organizations and industry associations to increase the awareness and prevention of the use of methamphetamine.

X. Contaminated Property. State law describes how properties that have been contaminated by the manufacture or use of illegal drugs are to be handled. The provisions involve reporting of the contaminated property, notice of the property being unfit for use, decontamination requirements, and contractor certification.

*Reporting and notice of a contaminated property.*

A law enforcement officer that discovers a property that has been contaminated to the point where it is unfit for human habitation must notify the local health officer. The local health officer must then post a written notice on the property and conduct an inspection of the property within 14 days. Notice of contamination can also be submitted by the property's owner or be discovered by the local health officer directly. If the local health officer suspects a property is contaminated, the officer may enter and inspect the property.

*Determining a property unfit for use.*

The local health officer may determine if a property is unfit for use due to chemical contamination. If this determination is made, the local health officer must prohibit use of the

property. Notice of this prohibition must be delivered to the property's owner and posted on the actual property itself. The property owner may request a hearing to dispute the finding that the property is unfit. In the hearing, the property owner has the burden of showing that the property is not contaminated or has already been cleaned to an acceptable level.

*Actions upon finding of contamination.*

Cities and counties have the option of condemning or demolishing contaminated properties. The local government must wait until all hearings have been exhausted before a demolition can occur. Alternatively, the owner of the property can pay to have the property decontaminated. If the owner chooses this course, then he or she must hire a contractor certified by the DOH. The contractor must present a decontamination plan to the local health officer, and upon its successful execution, the unfit for use determination may be lifted. The local health officer may charge the property owner fees for reviewing the plan and reinspecting the property.

*Contractor certification.*

A property owner may only hire a contractor for decontamination work if the contractor has been approved by the DOH. The DOH maintains performance standards and standards for training and testing contractors to ensure that they are capable of dealing with the contamination left behind from illegal drug manufacturing. Contractors can lose their certification if they violate certain standards set by the DOH.

XI. Drug-Free School Zones. If an offender is sentenced for committing certain violations of the Uniform Control Substance Act (UCSA) in a drug-free protected zone, a two-year sentence enhancement may be added to the offender's sentence. A person is subject to enhanced sentencing if he or she manufactures, sells, delivers, or possesses with intent to manufacture, sell, or deliver, a controlled substance in public areas such as schools, school buses, school bus stops, school grounds, public parks, public housing projects designated as drug-free zones, public transit vehicles, public transit stop shelters, or civic centers designated as drug-free zones. In addition, the maximum imprisonment sentence and fine may be increased up to double the amount imposed for the underlying conviction (up to the statutory maximum penalty imposed for the offense).

In *State v. Jacobs*, 120 Wn. App. 1059 (2004), the defendants challenged the statutory language regarding the sentence enhancements for violations of the UCSA on the grounds that they believed multiple sentence enhancements should be applied concurrently instead of consecutively. The courts concluded that the statutory language appeared ambiguous and as a result, under the rule of lenity, it was ruled that sentencing courts should apply multiple sentencing enhancements concurrently to each other.

XII. Prison-Based Special Drug Offender Sentencing Alternative. The prison-based DOSA is an alternative sentencing program that allows a court to waive imposition of an offender's sentence within the standard sentencing range. However, the standard sentence range for the offender's current offense must be greater than one year for the offense that he or she is being charged with. If the court determines that a prison-based DOSA sentence is appropriate for an offender, then it may impose an alternative sentence that includes confinement in a state

facility for one-half of the midpoint of the standard sentencing range. While in confinement, the offender must complete a substance abuse assessment and receive, within available resources, substance abuse treatment and counseling.

The offender must spend the remainder of the midpoint of the standard sentencing range in community custody following incarceration. The community custody portion of the sentence must include alcohol and substance abuse treatment. Offenders may also be required to adhere to crime related prohibitions and affirmative conditions as part of their sentence, as well as pay a \$30 per month fee while on community custody to offset the cost of monitoring.

**XIII. Chemical Dependency Screening Reports.** Before imposing a sentence upon a defendant, the court must conduct a sentencing hearing. As part of that sentencing hearing, the court must order the DOC to complete a chemical dependency screening report before imposing a sentence. These reports are only completed if the defendant has been convicted of a violation (or a criminal solicitation to commit a violation) of the UCSA, where the court finds that the offender has a chemical dependency that contributed to his or her offense.

**XIV. Washington State Institute for Public Policy (WSIPP).** The WSIPP carries out non-partisan research at the direction of the Legislature. Various studies over the years have centered around the following issues: education, criminal justice, welfare, children and adult services, health, utilities, and general government. Fiscal and administrative services for the WSIPP are provided by The Evergreen State College.

**Summary of Amended Bill:**

**I. Sales and Use Tax.** Any county imposing the sales and use tax for new or expanded mental health services is eligible to seek a state appropriation of \$100,000 annually in FYs 2008, 2009, and 2010. The funds must be used to provide additional mental health or substance abuse services for persons with methamphetamine addiction. Local governments receiving appropriated funds are prohibited from supplanting existing funding.

Any county receiving funding must: (1) provide an expenditure plan prior to funds being awarded; (2) report annually to the appropriate committees of the Legislature regarding the number of clients served, services provided, and a statement of expenditures; and (3) spend no more than 10 percent for administrative or information technology costs.

**II. Therapeutic Drug and Substance Treatment.** The Legislature intends to provide 100 additional placements above the level of treatment placements provided on January 1, 2006, for therapeutic drug and alcohol treatment in prisons until June 30, 2010. The statutory language authorizing this legislative intent expires on June 30, 2010.

**III. Multijurisdictional Narcotics Task Forces.** The Legislature further intends to provide assistance for jurisdictions enforcing illegal drug laws who have historically been underserved by federally funded state narcotics task forces and are considered to be major transport areas of narcotic traffickers.

*Pilot enforcement areas.*

Beginning July 1, 2006, three pilot enforcement areas are established for a period of four fiscal years. The pilot enforcement areas will work together to establish and implement a regional strategy to enforce illegal drug laws. The pilot enforcement areas are to be comprised of the following groups of counties:

- Pacific, Wahkiakum, Lewis, Grays Harbor and Cowlitz counties;
- Walla Walla, Columbia, Garfield, and Asotin counties; and
- Stevens, Ferry, Pend Oreille, and Lincoln counties.

Any funding provided by the Legislature must be divided equally among the three pilot enforcement areas. This funding is intended to provide at the minimum, for each of the pilot areas, four additional sheriff deputies, two deputy prosecutors, a court clerk, and clerical staff. The Legislature intends that those counties that have not previously received significant federal narcotics task force funding must be allocated funding for at least one additional sheriff's deputy.

Counties are encouraged to utilize drug courts and treatment programs and to share resources that operate in the region through the use of interlocal agreements. Funding appropriated must be used for the enforcement of illegal drug laws and cannot be used to supplant existing funding.

Funds will be allocated as follows: the Criminal Justice Training Commission will allocate funds to the Washington Association of Prosecuting Attorneys (WAPA) and the Washington Association of Sheriffs and Police Chiefs (WASPC). The WAPA is responsible for the administration of the funding and programs for the prosecution of crimes and court proceedings. The WASPC is responsible for the administration of the funds provided for law enforcement.

The WAPA, the WASPC, and the Washington Association of County Officials must jointly develop measures to determine the efficacy of the pilot programs. They must present their findings regarding these measures to the Legislature by December 1, 2008. These measures must include a comparison of arrest rates before and after the implementation of the pilot program, the reduction of recidivism, and any other factors that are determined to be relevant to evaluating the programs.

**IV. Drug Courts.** The definition of "drug court" is expanded to include juvenile drug courts in addition to adult drug courts. As a result, in addition to funding substance abuse treatment and support services for adult offenders with a chemical dependency problem, revenues to the Criminal Justice Treatment Account may also be spent for juvenile offenders participating in drug courts.

**V. Children and Vulnerable Adults.** The definition of *neglect* within both the vulnerable adults statute and the abuse of children statute is expanded to include the crime of endangerment with a controlled substance.

**VI. The Department of Community, Trade, and Economic Development.** The DCTED is charged with reviewing federal, state, and local funding sources and levels available to local methamphetamine action teams through the Washington State Methamphetamine Initiative to

determine whether funding is adequate to accomplish the mission of the methamphetamine action teams. The DCTED must also review the funding levels for individual drug task forces in Washington to determine if they require additional resources to successfully interdict drug trafficking organizations and clandestine labs statewide. A report on their findings and recommendations must be submitted to the Legislature by November 1, 2006.

The requirement for the DCTED to review the funding sources for the methamphetamine action teams is null and void unless funded in the Omnibus Appropriations Act.

**VII. Faith-Based Organizations.** The DSHS must consult with faith-based organizations to discuss the appropriate role that such organizations may have in filling support service delivery needs for persons with chemical dependency disorders. The DSHS' findings and recommendations must be submitted to the Legislature by November 1, 2006.

**VIII. Agency Council on Coordinated Transportation (Council).** As part of its strategic plan, the Council must adopt a plan to provide recovering addicts with increased access to existing special needs transportation services already provided by Medicaid brokerages and local transportation coalitions. The Council is authorized to implement an awareness campaign to focus helping recovering addicts use special need transportation services, the Council website, and the statewide trip planner. The Council must submit a report to the Legislature regarding the implementation of these strategies by November 1, 2006.

**IX. Anti-Methamphetamine Campaigns.** The DSHS, in consultation with the AG, must submit a report to the Legislature by January 15, 2007, on the status of ongoing multimedia campaigns for the prevention of methamphetamine use, underage drinking, and the promotion of chemical dependency treatment within Washington.

**X. Contaminated Property.** Two definitions are expanded. The definition of "hazardous chemical" is expanded to include the final product of drug manufacturing, and not just the precursor elements needed to manufacture illegal drugs. In addition, the definition of "property" is expanded to include personal property (in addition to real property), and a clarification is added that real property includes motels, hotels, and storage sheds. *Reporting and notice of a contaminated property.*

If a local health officer is denied access to a property he or she reasonably suspects is contaminated due to the manufacture of illegal drugs, the officer, in consultation with law enforcement, may seek an administrative warrant from a court in order to perform administrative inspections and to seize property. The court must determine that probable cause exists that the property is contaminated.

In an instance, where a local health officer has been notified that a hotel or motel has been contaminated by hazardous chemicals, the officer must post a written warning on the premises. If the property includes a hotel or motel holding a current license, the warning posting must be limited to being placed inside the room or on the door of the contaminated room. Written warning postings cannot be placed in the lobby of the facility. *Determining a property unfit for use.* Local health officers may issue emergency orders that a property is unfit for use if immediate action is necessary to protect public health, safety, or the

environment. Affected persons must comply with emergency orders immediately, and the orders may remain in place for up to 72 hours. If the local health officer believes the property is still unfit for use after this time, the non-emergency procedures for declaring a property unfit for use must be followed *Actions upon finding of contamination*. The local city and county authority is expanded beyond condemning or demolishing the property. The local government can also prohibit use of the property, remove personal property, or act to decontaminate the property. Demolition and condemnation must still wait until after all appeals have been heard, but prohibition of use can occur immediately. Any person violating an order to not enter a contaminated property may be prosecuted for a misdemeanor. The property owner is permitted to contract for more than just the decontamination of the property. The owner may also contract for the property to be demolished. Demolition, like decontamination, must still be done by a certified contractor. The local health officer has 30 days to establish a time-line for the decontamination or demolition of the property, which property owners may appeal. Property owners are responsible for the costs of property testing, all costs of decontamination, and all costs incurred by the local health officer as a result of enforcing the decontamination law. *Contractor Certification*. The training and testing requirements that decontamination contractors must satisfy are expanded to include the workers of contractors. In addition, the DOH is given the authority to place restrictions on the certification of contractors, instead of only being able to suspend or revoke a certification. The list of infractions that may result in the conditioning or revoking of a contractor's certification are expanded to include failure to properly dispose of contaminated property, committing fraud or misrepresentation, failure to properly complete the decontamination work, failure to cooperate with the local health officer, or failing ongoing evaluations and inspections. In addition to contractors, supervisors and workers may also be fined \$500 for violations of this law. Contractors must pay for their own training, certification, and background checks, according to a fee schedule set by the DOH. *Third-Party Sampling*. The DOH is given the authority to hire third parties to annually evaluate a sample of decontamination projects. The evaluations must be done by independent environmental contractors or a state or local agency. The State Board of Health is required to adopt rules governing independent third-party sampling, including rules for background checks and certification of third-party samplers. If a contractor's decontamination work does not satisfy the third-party inspection, the contractor may be subject to a license suspension and a fine of up to \$500. *Study on Providing Housing to Recovering Substance Abusers*. The DCTED must study the feasibility of providing incentives and protections to landlords to encourage them to rent housing to recovering substance abusers or convicted drug offenders. The DOH must make a final report to the Legislature by January 1, 2007. *Cleanup Pilot Project*. The Department of Ecology (DOE), in partnership with local governments and health departments, must conduct a pilot program to demonstrate contamination clean-up under existing legal frameworks and grant programs under the Model Toxics Control Act, and other available authorities and funds to clean up property for a public purpose. The pilot will include sites with soil or groundwater contamination and structure and solid waste contamination. The DOE must issue a report to the Legislature by January 1, 2007.

**XI. Drug-Free School Zones.** Statutory language is clarified to specify that all sentence enhancements relating to violations of the UCSA in drug-free zones are to be run consecutively to all other sentencing provisions for all sentences under the Sentencing Reform Act.

**XII. Prison-Based Special Drug Offender Sentencing Alternative.** The prison confinement time for an offender serving a prison-based DOSA sentence is expanded. If the court determines that a prison-based DOSA sentence is appropriate for an offender, then it may impose the alternative sentence that includes confinement in a state facility for one-half of the midpoint of the standard sentencing range or 12 months, whichever is greater.

**XIII. Chemical Dependency Screening Reports.** In addition to those offenders that have been convicted of a drug crime, the court must order the DOC to complete a chemical dependency screening report before imposing a sentence upon a defendant that has been convicted of "any" type of a felony where the court finds that the offender has a chemical dependency that contributed to his or her offense.

**XIV. Washington State Institute for Public Policy.** The WSIPP must conduct a study of criminal sentencing provisions of neighboring states for all crimes involving methamphetamine. The report must include any criminal sentencing increases necessary under Washington law to reduce or remove any incentives methamphetamine traffickers and manufacturers may have to locate in Washington. The report must be completed and submitted to the Legislature by January 1, 2007.

The WSIPP must also conduct a study of the DOSA program. The WSIPP must study recidivism rates for offenders who received substance abuse treatment while in confinement as compared to offenders who received treatment in the community or received no treatment. The WSIPP must report its findings to the Legislature by January 1, 2007.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date of Amended Bill:** The bill takes effect 90 days after the adjournment of the session in which the bill is passed, except for section 108, the expansion of the definition of neglect in the abuse of children statute, which takes effect January 1, 2007. Each section of the bill is null and void unless specific funding for each section of the bill is provided in the budget.

**Testimony For:** (Criminal Justice & Corrections) (In support) Meth use is truly a deadly disease. The good news is that since 2001 the number of meth labs in the state has decreased. But reducing meth labs is not the same as reducing meth use. There continues to be an increase in meth addiction in this state. This is an omnibus bill that takes a comprehensive look at not only meth issues but all drugs in general. The issues surrounding treatment, housing, transportation, and employment are all necessary for ensuring that offenders do not continuously cycle in and out of the system. Although the state has tried to solve Washington

drug problems in a piecemeal approach in the past, this bill is a way to address the meth issue in a comprehensive way.

This bill is a bi-partisan review of the challenges faced by law enforcement and local health officers in responding to drug contaminated properties. Many times they are asked to search certain properties but the owners will not allow them to do that. The section of the bill that allows for administrative warrants to be issued will help local health officials to do their job easier. The bill will help to place certain statutes relating to local health officers' authority presently residing in other statutes in their rightful place. It will also make it easier for the health officials to work with local prosecutors and local law enforcement officers to carry out the intent of this bill.

The Justice Assistance Grant (also known as the Byrne Grant) is administrated through the DCTED. Currently, the President's budget will eliminate the state's grant funding altogether. Historically, this money has funded a variety of programs. The sections of E2SSB 6239 allocating \$4 million to local jurisdiction will help to backfill that money. In addition, the sections that give localities up to \$100,000 for drug treatment and adds 100 beds to the DOC are also a good addition to expand drug treatment availability throughout the state. This bill will help to backfill the federal funding that was cut for drug task forces.

The drug-free work place provisions of the bill are almost identical to some provisions that went into place back in 1966 through 2000. Since eligible employers are required to have health insurance and employee assistance programs, businesses saw the benefits of this program radiate out to the worker, the family, the community, and to the neighborhoods. This bill is a good anti-meth, anti-drug, and pro-employee bill. Although, the bill provides opportunity for rehabilitation, in the past when employees have tested positive for drugs, 40 percent turned down the opportunity for getting help and keeping their jobs. This is a good bill for small businesses since most of the large companies already have a program like the one listed in the bill.

This bill takes a three-pronged approach at addressing the challenges around addiction, the environment, and law enforcement.

(Neutral with concerns) Although many of the areas identified for pilots have a disproportionate rate of people having a chemical dependency problem, many of the rural counties are border counties to Canada and they would like to be part of the pilot meth enforcement areas proposed in the bill. The definition of real property should also be expanded to include land, parcel of land, and plots of land.

This bill is a way for the entire state to deal with meth in a proactive way.

**Testimony For: (Appropriations) (In support)** This bill is dramatically important to rural counties in the state. We need a statewide strategy to combat methamphetamine. We've seen some success in the I-5 corridor, but it's been driven into the rural counties. Property crime is often an indicator of meth activity. Many of these indicators have increased since 2001. In Pacific County, burglaries have gone up 31 percent, shoplifting has increased by 70 percent, theft has increased by 30 percent, vehicle prowls have increased by 76 percent, and motor

vehicle thefts have gone up 149 percent. Drug task forces work and put the responsibility on local law enforcement where it belongs. For many years Washington ranked second in the nation for meth. We need legislative support to maintain task forces. This bill was funded in the Senate budget. It would restore the level of funding from 2004. Without drug task forces in place, there will be far-reaching consequences.

This bill is a request bill from the Attorney General (AG) and is a direct product of the AG's Methamphetamine Task Force. It addresses treatment, prevention, law enforcement, public health, and drug courts. The change to the definition of drug courts to include juvenile drug courts wasn't intended to allow those courts to access Criminal Justice Treatment Account funding. The change was designed to clarify the legal authority to establish juvenile drug courts.

(Support with concerns) We have concerns with the Criminal Justice and Corrections Committee striker. It contains an exemption for hotels and motels and changes Part III of the bill. This language should be restored and the hotel/motel language should be stricken.

(Concerns) It is alarming that SB 6239 would require the Department of Health to post a notice of contamination at a hotel or motel, if such contamination is suspected by local law enforcement or others. The Department of Health wouldn't even inspect the property for another 14 days.

**Testimony Against: (Criminal Justice & Corrections)** There will be an amendment offered to exempt hotels and motels from this bill. As an industry they already work with the DOH and there have not been any issues regarding the industry not cooperating. If a hotel had to post a notice on its front door for 45 days about it having a meth-lab, then it would literally kill their business.

In addition, businesses go through a rate setting process every year which is difficult and contentious. Employers and workers who contribute to the worker compensation system are always concerned about what their rates are going to be. Superimposing a 5 percent reduction in the premiums that are being paid would create a crisis in terms of the funding of the 608 and 609 funds. There was no consultation with the stakeholders in putting together this portion of the bill. You are giving a 5 percent windfall to companies that already have drug-free work environments. They would get a rebate for doing nothing. This causes a cost shift to other employers who would have to deal with the worker's compensation system.

It is not a good strategy to use worker compensation premiums for drug-free work places, especially since most employers have already created them.

Section 111 of the bill is a problem to the DSHS. It eliminates the non-entitlement language relating to provisions of voluntary services to parents in neglect cases as an alternative to filing dependency petitions. Since these services are voluntary, the DSHS wants to be sure that these services are available when needed and are available within legislatively appropriated amounts.

**Testimony Against: (Appropriations)** None.

**Persons Testifying:** (Criminal Justice & Corrections) (In support) Senator Hargrove, prime sponsor; Senator Johnson; Rob McKenna, Attorney General; Sandra Fangen Ross, Clallam County Meth Action Team and Clallam County Sheriff's Office; Tom Pool, Drug-Free Business; Henry Govert, Drug-Free Training; Tony Barrett, Washington State Association of Local Public Health Officials; Seth Dawson and Paul Billeci, CiviGenics, Inc., Janice Ellis, Snohomish County Prosecuting Attorney; John Flood, Snohomish Regional Drug Task Force; Jonelle Fenton-Wallace, Snohomish Health District; Don Pierce, Washington Association of Sheriffs and Police Chiefs; Mike Whelan, Grays Harbor County Sheriff; John Didion, Pacific County Sheriff; and Marie Sullivan and Paul Perz, Department of Community, Trade, and Economic Development.

(Neutral with concerns) Robert Malody, Department of Labor & Industries.

(Opposed) Sandra Miller, Ramada Inn Governor House; Robert Stern, Washington State Labor Council; Mike Ryhard, Teamsters; and David Del Villar Fox, Department of Social and Health Services.

**Persons Testifying:** (Appropriations) (In support) Larry Taylor, Benton County Sheriff and Washington Association of Sheriffs and Police Chiefs; John Didion, Pacific County Sheriff; and Chris Johnson, Office of the Attorney General.

(Support with concerns) Vicki Kirkpatrick, Association of Local Public Health Officials.

(Concerns) T.K. Bentler, Washington State Hotel and Lodging Association.

**Persons Signed In To Testify But Not Testifying:** (Criminal Justice & Corrections) Steve Whybark, Mason County Sheriff; Melanie Roberts, Department of Corrections; Kris Tefft, Association of Washington Businesses; T. K. Bentler, Washington State Hotel and Lodging Association; John Woodring, Rental Housing Association and Manufactured Housing Communities of Washington; and Maryanne Guichard, Department of Health.

**Persons Signed In To Testify But Not Testifying:** (Appropriations) None.

# **APPENDIX D**

**Criminal Justice & Corrections  
Committee**

**E2SSB 6239**

**Brief Description:** Changing provisions relating to controlled substances.

**Sponsors:** Senate Committee on Ways & Means (originally sponsored by Senators Hargrove, Johnson, Doumit, Oke, Stevens and Esser; by request of Attorney General).

**Brief Summary of Engrossed Second Substitute Bill**

- Authorizes counties imposing the sales and use tax for mental health services to be eligible for \$100,000 annually to provide for mental health or substance abuse treatment for persons with methamphetamine addiction.
- Provides that the Legislature intends to provide 100 additional placements for therapeutic drug and alcohol treatment in prisons until June 30, 2010.
- Establishes pilot enforcement areas in three regions of the state for the purpose of the enforcement of illegal drug laws.
- Expands the term "drug court" to include juvenile drug courts.
- Expands the definition of *neglect* under the state's abuse of children statute and the vulnerable adults statute to include the crime of endangerment with a controlled substance.
- Requires the Department of Community, Trade, and Economic Development to review various funding sources to determine whether funding is adequate to accomplish the mission of methamphetamine action teams.
- Requires the Department of Social and Health Services (DSHS) to consult with faith-based organizations to discuss their appropriate role in providing support services to persons with chemical dependency disorders.
- Requires the Agency Council on Coordinated Transportation to adopt a plan to provide recovering addicts with increased access to existing special need transportation services.

- Requires the DSHS and the Office of the Attorney General to report to the Legislature on the status of ongoing state multimedia campaigns relating to chemical dependency prevention and treatment.
- Provides a 5 percent workers' compensation premium discount to employers, except public employers, that establish a qualified Drug-Free Workplace Program.
- Clarifies that property affected by the law includes personal property, motels, and hotels.
- Allows a court to issue administrative search warrants so that property suspected of methamphetamine contamination can be inspected.
- Permits a local health officer to issue an emergency order forbidding occupancy of a contaminated property.
- Establishes new requirements for the owners of contaminated properties, including decontamination timelines set by a local health officer.
- Provides new conditions under which a contractor for the decontamination of property may have his or her certification suspended.
- Establishes third-party sampling of decontamination sites.
- Creates a pilot clean-up project to examine funding sources, and a study to assess options to encourage landlords to rent housing to recovering substance abusers.
- Clarifies that all sentence enhancements relating to violations of the Uniform Controlled Substance Act in drug-free zones are to be run consecutively (instead of concurrently) to all other sentencing provisions.
- Expands the prison confinement time for an offender serving a prison-based Drug Offender Sentencing Alternative (DOSA) sentence to one-half of the midpoint of the standard sentencing range or 12 months, whichever is greater.
- Requires the courts to request chemical dependency screening reports before imposing a sentence upon a defendant that has been convicted of "any" type of a felony where it is found that the offender has a chemical dependency that contributed to his or her offense.
- Requires the Washington State Institute for Public Policy (WSIPP) to study criminal sentencing provisions in other states for all crimes involving methamphetamine.
- Requires the WSIPP to conduct a study of the DOSA program.

**Hearing Date:** 2/21/06

Staff: Yvonne Walker (786-7841), Amy Van Horn (786-7168), Elisabeth Frost (786-5793), Sarah Dylag (786-7109), and Sydney Forrester (786-7120).

**Background:**

**I. Sales and Use Tax.** In 2005, the Legislature passed an omnibus Mental and Substance Abuse Disorder Treatment bill that authorized a local option sales and use tax of one-tenth of 1 percent to provide new or expanded chemical dependency or mental health services. Moneys must be used solely for the purpose of providing new or expanded chemical dependency or mental health treatment services and for the operation of new or expanded therapeutic court programs.

As of January 1, 2006, no county has imposed the new authorized tax.

**II. Therapeutic Drug and Substance Treatment.** The Department of Corrections (DOC) currently limits chemical dependency treatment to certain inmates. Inmates prioritized for treatment include those determined to be at high-risk for violent reoffending and those sentenced under the Drug Offender Sentencing Alternative (DOSA). On January 1, 2006, the DOC had a therapeutic community capacity of 475 beds.

**III. Multijurisdictional Narcotics Task Forces.** The Department of Community, Trade, and Economic Development (DCTED) provides technical and financial assistance to local governments and community-based organizations. Among other responsibilities, the DCTED solicits and allocates federal funding for local narcotics task forces. The vast majority of federal funding for multijurisdictional narcotics task forces is allocated to local governments by the DCTED, which receives the funding through the Justice Assistance Grant (JAG), a federal grant program. However, some counties receive a small amount of federal funding for narcotics enforcement directly through the JAG program.

In Fiscal Year (FY) 2004, the DCTED allocated approximately \$5.5 million in federal funding to support multijurisdictional narcotics task forces. Approximately \$3.5 million of this funding was allocated to local units of government to continue multijurisdictional narcotics task forces, and \$611,177 was allocated to the DCTED to continue the Drug Prosecution Assistance Program in support of multijurisdictional narcotics task forces.

In FY 2006, the total amount of federal funding available was reduced, and the DCTED allocated \$2.4 million in federal funding to support multijurisdictional narcotics task forces, with approximately \$2 million allocated to local units of government to continue multijurisdictional narcotics task forces, and \$330,000 to the DCTED to continue the Drug Prosecution Assistance Program in support of multijurisdictional narcotics task forces.

While most Washington counties have been part of a federally funded narcotics task force, 12 counties (Columbia, Lincoln, Pacific, Pend Oreille, Stevens, Walla Walla, Island, Jefferson, Kittitas, Klickitat, Mason, and San Juan) have not been members of a federally funded narcotics task force.

**IV. Drug Courts.** Drug courts, unlike traditional courts, divert non-violent drug offenders into court-ordered treatment programs rather than jail or prison. The program allows defendants arrested for drug possession to choose an intensive, heavily supervised rehabilitation program in lieu of incarceration and a criminal record. The term "drug court" is defined as a court that has special calendars or dockets designed to achieve a reduction in recidivism and substance abuse

among non-violent, substance-abusing offenders by increasing their likelihood for successful rehabilitation through early, continuous, and intense judicially supervised treatment; mandatory periodic drug testing; and the use of appropriate sanctions and other rehabilitation services.

In 2002, the Legislature passed 2SHB 2338 (Chapter 290, Laws of 2002) that created a Criminal Justice Treatment Account (Account) in the state treasury. In 2003, the Legislature passed ESSB 5990 (Chapter 379, Laws of 2003) which appropriated a total of \$8.9 million to the Account. Funds in the Account may be spent solely for substance abuse treatment and support services for adult offenders with a chemical dependency problem against whom charges are filed by a prosecuting attorney in Washington and for non-violent adult offenders participating in drug courts. No more than 10 percent of the funds may be spent for support services.

**V. Children and Vulnerable Adults.** State laws relating to abuse and neglect of children and vulnerable adults include provisions for mandatory reporting and investigation of allegations of neglect or abuse of these populations. A child means any person under the age of 18 years. A vulnerable adult includes a person who: (1) is age 60 years and over who has a functional, physical, or mental inability for self-care; (2) has been found to be incapacitated; (3) has a developmental disability; (4) resides in a nursing home, adult family home, residential habilitation center, or other licensed facility; or (5) is receiving hospice or home health services.

For the purposes of mandatory reporting, investigation, and protective services *abuse and neglect* of a child means the injury, sexual abuse, sexual exploitation, negligent treatment, or maltreatment of a child. Under the vulnerable adults statute, *neglect* "means conduct by a caregiver that: (1) fails to provide goods and services to maintain physical or mental health or that fails to prevent or avoid physical or mental harm to the vulnerable adult; or (2) demonstrates a serious disregard of consequences constituting a clear and present danger to the vulnerable adult's health, welfare, or safety."

***Endangerment with a Controlled Substance.***

The offense of endangerment with a controlled substance (a seriousness level IV, class B felony) occurs when a person knowingly or intentionally permits a dependent child or dependent adult to be exposed to, ingest, inhale, or have contact with (1) methamphetamine; or (2) ephedrine, pseudoephedrine, or anhydrous ammonia, including their salts, isomers, and salts of isomers that are being used in the manufacture of methamphetamine.

**VI. The Department of Community, Trade, and Economic Development.** The DCTED is responsible for assisting in community and economic development in the state; providing technical and financial assistance to local governments, businesses, and community-based organizations; soliciting private and federal grants for economic and community development programs; and conducting research and analysis to support economic and community development efforts.

**VII. Faith-Based Organizations.** Residential and outpatient chemical dependency treatment programs may choose to be regulated by the Division of Alcohol and Substance Abuse (DASA) of the Department of Social and Health Services (DSHS). Certification of programs is voluntary. In addition, residential chemical dependency treatment programs must meet licensing requirements established by the Department of Health (DOH).

State and federal treatment funding currently is limited to programs certified by the DASA. To be certified, programs that include a religious component must make participation in that aspect of the program voluntary.

**VIII. Agency Council on Coordinated Transportation.** In 1998, the Legislature created the Agency Council on Coordinated Transportation (Council), declaring its intent to coordinate transportation services and programs that provide those transportation services to achieve increased efficiencies and to provide a greater number of persons with special transportation needs.

The Council consists of nine voting members and eight non-voting legislative members. The nine voting members include the Secretary of Transportation, who serves as chair; the Secretary of the DSHS; the Superintendent of Public Instruction; and six members appointed by the Governor, representing consumers of special needs transportation, pupil transportation, the Community Transportation Association of the Northwest, the Community Action Council Association, and the State Transit Association. The eight non-voting legislative members include four members of the House of Representatives and four members of the Senate (representing each caucus) and the House and Senate Transportation Committees, House Appropriations, and Senate Ways and Means Committee.

The Council is responsible for: (1) developing standards and strategies for coordinating special needs transportation; (2) identifying, developing, funding (as resources are available), and monitoring demonstration projects; (3) identifying barriers to coordinated transportation; (4) recommending statutory changes to the Legislature to assist in coordinated transportation; and (5) working with the Office of Financial Management to make necessary changes for identification of transportation costs in executive agency budgets.

**IX. Anti-Methamphetamine Campaigns.** The DASA of the DSHS promotes strategies that support healthy lifestyles by preventing the misuse of alcohol, tobacco, and other drugs, and support recovery from the disease of chemical dependency.

The Office of the Attorney General (AG) is responsible for protecting consumers and defending state laws. In 2005, the AG formed an education program partnered with community-based organizations and industry associations to increase the awareness and prevention of the use of methamphetamine.

**X. Drug-Free Workplace Program.** Industrial insurance is a no-fault state workers' compensation program that provides medical and partial wage replacement benefits to covered workers who are injured on the job or who develop an occupational disease. Employers who are not self-insured must insure with the state fund operated by the Department of Labor and Industries (L&I). Employers that insure with the state fund pay premiums to the L&I. While the L&I has several premium discount programs, the L&I does not have a program that gives premium discounts for employers who maintain drug-free workplaces.

In 1996, the Legislature enacted a law that established a 5 percent workers' compensation premium discount for employers who mandated a drug-free workplace. The legislation expired in 2001.

**XI. Contaminated Property.** There is a chapter of state law that describes how properties that have been contaminated by the manufacture or use of illegal drugs must be handled (Chapter RCW

64.44). The provisions involve reporting of the contaminated property, notice of the property being unfit for use, decontamination requirements, and contractor certification.

*Reporting and notice of a contaminated property.*

A law enforcement officer that discovers a property that has been contaminated to the point where it is unfit for human habitation must notify the local health officer. The local health officer must then post a written notice on the property and conduct an inspection of the property within 14 days. Notice of contamination can also be submitted by the property's owner or be discovered by the local health officer directly. If the local health officer suspects a property is contaminated, the officer may enter and inspect the property.

*Determining a property unfit for use.*

The local health officer may determine if a property is unfit for use due to chemical contamination. If this determination is made, the local health officer must prohibit use of the property. Notice of this prohibition must be delivered to the property's owner and posted on the actual property itself. The property owner may request a hearing to dispute the finding that the property is unfit. In the hearing, the property owner has the burden of showing that the property is not contaminated or has already been cleaned to an acceptable level.

*Actions upon finding of contamination.*

Cities and counties have the option of condemning or demolishing contaminated properties. The local government must wait until all hearings have been exhausted before a demolition can occur. Alternatively, the owner of the property can pay to have the property decontaminated. If the owner chooses this course, then he or she must hire a contractor certified by the DOH. The contractor must present a decontamination plan to the local health officer, and upon its successful execution, the "unfit for use determination" may be lifted. The local health officer may charge the property owner fees for reviewing the plan and reinspecting the property.

*Contractor certification.*

A property owner may only hire a contractor for decontamination work if the contractor has been approved by the DOH. The DOH maintains performance standards and standards for training and testing contractors to ensure that they are capable of dealing with the contamination left behind from illegal drug manufacturing. Contractors can lose their certification if they violate certain standards set by the DOH.

XII. Drug-Free School Zones. If an offender is sentenced for committing certain violations of the Uniform Control Substance Act (UCSA) in a drug-free protected zone, a two-year sentence enhancement may be added to the offender's sentence. A person is subject to enhanced sentencing if he or she manufactures, sells, delivers, or possesses with intent to manufacture, sell, or deliver, a controlled substance in public areas such as schools, school buses, school bus stops, school grounds, public parks, public housing projects designated as drug-free zones, public transit vehicles, public transit stop shelters, or civic centers designated as drug-free zones. In addition, the maximum imprisonment sentence and fine may be increased up to double the amount imposed for the underlying conviction (up to the statutory maximum penalty imposed for the offense).

In *State v. Jacobs*, 120 Wn. App. 1059 (2004), the defendants challenged the statutory language regarding the sentence enhancements for violations of the UCSA on the grounds that they believed multiple sentence enhancements should be applied concurrently instead of consecutively. The courts concluded that the statutory language appeared ambiguous and as a

result, under the rule of lenity, it was ruled that sentencing courts should apply multiple sentencing enhancements concurrently to each other.

**XIII. Prison-Based Special Drug Offender Sentencing Alternative.** The prison-based DOSA is an alternative sentencing program that allows a court to waive imposition of an offender's sentence within the standard sentencing range. However, the standard sentence range for the offender's current offense must be greater than one year for the offense that he or she is being charged with. If the court determines that a prison-based DOSA sentence is appropriate for an offender then it may impose an alternative sentence that includes confinement in a state facility for one-half of the midpoint of the standard sentencing range. While in confinement, the offender must complete a substance abuse assessment and receive, within available resources, substance abuse treatment and counseling.

The offender must spend the remainder of the midpoint of the standard sentencing range in community custody following incarceration. The community custody portion of the sentence must include alcohol and substance abuse treatment. Offenders may also be required to adhere to crime related prohibitions and affirmative conditions as part of their sentence, as well as pay a \$30 per month fee while on community custody to offset the cost of monitoring.

**XIV. Chemical Dependency Screening Reports.** Before imposing a sentence upon a defendant, the court must conduct a sentencing hearing. As part of that sentencing hearing, the court must order the DOC to complete a chemical dependency screening report before imposing a sentence only if the defendant has been convicted of a violation (or a criminal solicitation to commit a violation) of the UCSA. Generally the reports are ordered any time the court finds that the offender has a chemical dependency that contributed to his or her offense.

**XV. Washington State Institute for Public Policy (WSIPP).** The WSIPP carries out non-partisan research at the direction of the Legislature. Various studies over the years have centered around the following issues: education, criminal justice, welfare, children and adult services, health, utilities, and general government. Fiscal and administrative services for the WSIPP are provided by The Evergreen State College.

#### **Summary of Bill:**

**I. Sales and Use Tax.** Any county imposing the sales and use tax for new or expanded mental health services is eligible to seek a state appropriation of \$100,000 annually in Fiscal Years 2008, 2009, and 2010. The funds must be used to provide additional mental health or substance abuse services for persons with methamphetamine addiction. Local governments receiving appropriated funds are prohibited from supplanting existing funding.

Any county receiving funding must: (1) provide an expenditure plan prior to funds being awarded; (2) report annually to the appropriate committees of the Legislature regarding the number of clients served, services provided, and a statement of expenditures; and (3) spend no more than 10 percent for administrative or information technology costs.

**II. Therapeutic Drug and Substance Treatment.** The Legislature intends to provide 100 additional placements above the level of treatment placements provided on January 1, 2006, for therapeutic drug and alcohol treatment in prisons until June 30, 2010. The statutory language authorizing this legislative intent expires on June 30, 2010.

**III. Multijurisdictional Narcotics Task Forces.** The Legislature intends to provide a minimum of \$4 million for an annual combined level of state and federal funding for multijurisdictional drug task forces and local government drug prosecution assistance.

The Legislature further intends to provide assistance for jurisdictions enforcing illegal-drug laws who have historically been under-served by federally funded state narcotics task forces and are considered to be major transport areas of narcotic traffickers.

***Pilot enforcement areas***

Beginning July 1, 2006, three pilot enforcement areas are established for a period of four fiscal years. The pilot enforcement areas will work together to establish and implement a regional strategy to enforce illegal drug laws. The pilot enforcement areas are to be comprised of the following groups of counties:

- Pacific, Wahkiakum, Lewis, Grays Harbor and Cowlitz counties;
- Walla Walla, Columbia, Garfield, and Asotin counties; and
- Stevens, Ferry, Pend Oreille, and Lincoln counties.

The Legislature intends to provide a minimum of \$1.575 million annually, to be divided equally among the three pilot enforcement areas. This funding is intended to provide at the minimum, for each of the pilot areas, four additional sheriff deputies, two deputy prosecutors, a court clerk, and clerical staff. The Legislature intends that those counties that have not previously received significant federal narcotics task force funding must be allocated funding for at least one additional sheriff's deputy.

Counties are encouraged to utilize drug courts and treatment programs and to share resources that operate in the region through the use of interlocal agreements. Funding appropriated must be used for the enforcement of illegal drug laws and cannot be used to supplant existing funding.

Funds will be allocated as follows: the Criminal Justice Training Commission will allocate funds to the Washington Association of Prosecuting Attorneys (WAPA) and the Washington Association of Sheriffs and Police Chiefs (WASPC). The WAPA is responsible for the administration of the funding and programs for the prosecution of crimes and court proceedings. The WASPC is responsible for the administration of the funds provided for law enforcement.

The WAPA, the WASPC, and the Washington Association of County Officials shall jointly develop measures to determine the efficacy of the pilot programs. They shall present their findings regarding these measures to the Legislature by December 1, 2008. These measures shall include a comparison of arrest rates before and after the implementation of the pilot program, the reduction of recidivism, and any other factors that are determined to be relevant to evaluating the programs.

**IV. Drug Courts.** The definition of "drug court" is expanded to include juvenile drug courts in addition to adult drug courts. As a result, in addition to funding substance abuse treatment and support services for adult offenders with a chemical dependency problem, revenues to the Criminal Justice Treatment Account may also be spent for juvenile offenders participating in drug courts.

**V. Children and Vulnerable Adults.** The definition of *neglect* within both the vulnerable adults statute and the abuse of children statute and is expanded to include the crime of endangerment with a controlled substance.

"Language is removed from the child abuse and neglect statute that will take effect January 1, 2007, regarding: (1) no entitlement to services; and (2) no judicial authority to order the provision of services."

**VI. The Department of Community, Trade, and Economic Development.** The DCTED is charged with reviewing federal, state, and local funding sources and levels available to local methamphetamine action teams through the Washington State Methamphetamine Initiative to determine whether funding is adequate to accomplish the mission of the methamphetamine action teams. The DCTED must also review the funding levels for individual drug task forces in Washington to determine if they require additional resources to successfully interdict drug trafficking organizations and clandestine labs statewide. A report on their findings and recommendations must be submitted to the Legislature by November 1, 2006.

The requirement for the DCTED to review the funding sources for the methamphetamine action teams is null and void unless funded in the Omnibus Appropriations Act.

**VII. Faith-Based Organizations.** The DSHS must consult with faith-based organizations to discuss the appropriate role that such organizations may have in filling support service delivery needs for persons with chemical dependency disorders. The DSHS recommendations and findings must be submitted to the Legislature by November 1, 2006.

**VIII. Agency Council on Coordinated Transportation (Council).** As part of its strategic plan, the Council must adopt a plan to provide recovering addicts with increased access to existing special needs transportation services already provided by Medicaid brokerages and local transportation coalitions. The Council is authorized to implement an awareness campaign to focus helping recovering addicts use special need transportation services, the Council website, and the statewide trip planner. The Council must submit a report to the Legislature regarding the implementation of these strategies by November 1, 2006.

**IX. Anti-Methamphetamine Campaigns.** The DSHS, in consultation with the AG, must submit a report to the Legislature by January 15, 2007, on the status of ongoing multimedia campaigns for the prevention of methamphetamine use, underage drinking, and the promotion of chemical dependency treatment within Washington.

**X. Drug-Free Workplace Program.** Employers, except public employers, that establish a Drug-Free Workplace Program qualify for a 5 percent workers' compensation premium discount. The premium discount does not apply to self-insured employers. However, L&I must inform self-insured employers of the value of Drug-Free Workplace Programs and encourage them to implement these programs.

Under the Drug-Free Workplace Program, an employer must establish a written policy and conduct drug testing on job applicants who receive an employment offer and on employees who contribute to workplace injuries. Employers must also establish an employee assistance program, employee education, and supervisor training.

***Industrial Insurance Premium Discount***

An employer that establishes and maintains a Drug-Free Workplace program is eligible for a 5 percent workers' compensation premium discount if the employer meets the following requirements:

- the employer is certified by the DASA as maintaining a Drug-Free Workplace program;

- the employer is in good standing and remains in good standing with the L&I with respect to workers' compensation obligations; and
- the employer has medical insurance available to its full time employees through an employer, union, or jointly sponsored medical plan.

The premium discount is effective as long as the employer is certified by the DSHS. Total premium discounts must not exceed \$5 million in any one fiscal year.

An employer that already has a Drug-Free Workplace program in place on July 1, 2006, is generally not eligible for the 5 percent discount. However, an employer that has had a Drug-Free Workplace program in place for two years prior to July 1, 2006, may be eligible for a 2 percent premium discount if the employer adds a provision to the existing Drug-Free Workplace program to allow, after a first verified positive alcohol or drug test, job continuation through a last chance agreement.

An employer may not receive premium discounts from L&I under more than one premium discount program. If participating in another premium discount program, the employer is entitled only to the premium discount that is the highest. The retrospective rating program is not considered a premium discount.

***Drug-Free Workplace Program***

To receive the workers' compensation premium discount, the Drug-Free Workplace program must contain the following five elements.

1) *Written Policy Statement*- An employer must maintain a written substance abuse policy statement that includes the following:

- notice to employees that use or being under any influence is prohibited;
- notice to employees that use, purchase, possession, transfer of drugs, or having drugs in one's system is prohibited, except for prescription or nonprescription medication;
- identification of the types of testing that an employee or job applicant may be required to submit to, the actions the employer may take against an employee on the basis of a verified positive test result, and the consequences of refusing to submit to a test;
- notification to employees of the law, including federal Drug-Free Workplace Act, if applicable;
- notification that the employer has an employee assistance program;
- notification of an employee's or applicant's right to contest or explain a verified positive test result; and
- notification that an employer may discipline an employee for failing to report an injury in the workplace.

Unless the employer had a substance abuse testing program in place before July 1, 2006, an employer implementing a program must allow 60 days to elapse between giving a general one-time notice to all employees of the program and beginning actual testing.

Notice of substance abuse testing must be given to all job applicants, and the policy must be posted in an appropriate and conspicuous location on the employer's premises. Copies of the policy must be available for inspection by employees or job applicants. An employer with employees or job applicants who have trouble communicating in English must make reasonable efforts to help the employees understand the policy statement.

2) *Substance Abuse Testing Program*- An employer's substance abuse testing program must:

- Require job applicants to submit to a drug test after extending an offer. A refusal to submit can be basis for not hiring.
- Investigate workplace injuries and require employees to submit to a drug and alcohol test if the employer reasonably believes the employee contributed to an injury that resulted in the need for off-site medical attention, with some exceptions.
- Require an employee to submit to drug and alcohol testing in conjunction with rehabilitation if the employee is referred to the employee assistance program by the employer as the result of a positive alcohol or drug test or an alcohol or drug-related incident in violation of employer rules. A positive follow-up test will normally result in termination of the employee.
- Conduct specimen collection in accordance with regulations and procedures approved by the United States Department of Health and Human Services and the United States Department of Transportation. Procedures must include due regard for privacy and the prevention of substitution or contamination of the specimen, labeling of the specimen, an opportunity for the employee or job applicant to provide information, and conducting the test in a laboratory approved by the Substance Abuse and Mental Health Administration or the College of American Pathologists, using specified procedures.

Testing may include tests for amphetamines, cannabinoids, cocaine, phencyclidine (PCP), methadone, methaqualone, opiates, barbiturates, benzodiazepines, propoxyphene, or a metabolite of any such substances. Testing must include tests for marijuana, cocaine, amphetamines, opiates, and PCP.

Under the substance abuse testing program, a first-time verified positive drug test must not be the basis for termination of an employee, but the employee must be given an opportunity to keep his or her job through an employee assistance program. In addition, an employer must notify an employee or job applicant, in writing, of a verified positive test result within five working days after receiving the positive result. If the employee or job applicant requests a copy of the test result, the employer must provide a copy. Any initial test having a positive test result must be verified by a confirmation test. An employee must pay the costs of all tests required by the employer.

An employer following the substance abuse testing program requirements is not prohibited from conducting other drug or alcohol testing, including upon reasonable suspicion or on a random basis.

3) *Employee Assistance Program*- The employer must have an employee assistance program to deal with employees whose job performances are declining due to unresolved problems, including alcohol or other drug-related problems, marital problems, or legal or financial problems. A list of approved employee assistance programs must be provided by the DSHS according to recognized program standards.

The employer must notify employees of the benefits and services, including publication in conspicuous places, and of the procedures to use the program. The primary focus of employee assistance programs must be rehabilitation of employees suffering from alcohol or drug addiction.

Employees must be given a chance to keep their job after a first-time verified positive drug test, through the use of a "last chance agreement." A last chance agreement must require the

employee, after a first-time verified positive drug test, to submit to an employee assistance program evaluation for chemical dependency, comply with treatment recommendations, be subject to follow-up testing for two years, meet regular performance standards, and authorize the employer to receive information about the employee's treatment.

If substance abuse treatment is necessary, the employee must use a program approved by the DSHS. The employee assistance program will monitor progress in treatment and notify the employer when the employee is not complying with the program's treatment recommendations.

An employer may terminate an employee for refusal to submit to a drug test, refusal to agree or comply with a last-chance agreement, for a second verified positive test result, and for a violation of the employer's rules pertaining to alcohol or drugs.

4) *Annual Employee Education*- Employers must establish an annual employee education program on substance abuse that explains: (a) the "disease model of addiction," (b) the effects and dangers of commonly abused substances, and (c) employer policies and procedures regarding substance abuse and opportunities for treatment.

5) *Supervisor Training*- Employers must provide supervisors with at least two hours of training, including how to recognize signs of employee substance abuse, how to document and collaborate signs of employee substance abuse, how to refer employees to the employee assistance program or proper treatment providers, and circumstances and procedures for post injury testing.

#### ***Confidentiality Provisions***

Information, interviews, reports, statements, memoranda, and test results under the substance abuse testing program are confidential communications, and may not be used as evidence in a civil or administrative proceeding, except an employer is not prohibited from using information concerning an employee or job applicant's substance abuse test results in a lawful manner, and other entities are not prohibited from disclosing or using the information in a lawful manner as part of a matter relating to the test, the test result, or an employer action with respect to the employee or applicant.

Release of information must be done pursuant to a written consent form that is voluntarily signed by the employee or job applicant, unless the release is compelled by the DSHS or a court. The consent form must contain the name of the person authorized to obtain the information, the purpose of the disclosure, the precise information to be disclosed, the duration of the consent, and the signature of the person authorizing release of the information.

Information on test results is inadmissible as evidence against the employee or job applicant in a criminal proceeding.

#### ***Other***

A physician-patient relationship is not created between the employee or job applicant and the employer or person evaluating a drug or alcohol test solely by the implementation of a drug or alcohol testing program.

An employer following the requirements of the Drug-Free Workplace program still has a right to conduct medical screening or other test required, permitted, or not disallowed by a statute or rule for the purpose of monitoring exposure of employees to toxic materials. The screening must be

limited to the specific material identified in statute or rule unless prior written consent of the employee is obtained.

A legal duty for employers to conduct alcohol or drug tests is not established. The provisions do not operate retroactively and do not abrogate the employer's right to implement drug and alcohol testing programs under state or federal law.

A cause of action may not arise based on the failure of an employer to establish a substance abuse testing program or to conduct a program in conformance with the statutory standards. The substance abuse testing program requirements may be enforced only by denial of the workers' compensation premium discount.

These provisions do not create or alter an obligation to bargain with a collective bargaining representative of employees.

#### ***Rules and Reporting Requirements***

The DSHS must adopt rules for the certification and decertification of employers who establish and maintain a Drug-Free Workplace program. Certification of an employer is required for each year in which a premium discount is granted. The DSHS may charge a fee for certification in an amount reflecting administrative costs. The DSHS must also conduct an evaluation to determine costs and benefits of the law. If the DSHS contracts out for the evaluation, no more than 10 percent of the contract amount may be used to cover indirect expenses. The DSHS is required to report preliminary findings to the Legislature on September 1, 2007 and 2008, and must issue a final report on December 1, 2009.

The L&I may adopt rules for implementation, including penalties and rules relating to repayment of premium discounts by decertified employers. The L&I must conduct an evaluation of the effect of the premium discount on workplace safety and on the industrial insurance fund. The L&I is required to report preliminary findings to the Legislature on September 1, 2007 and 2008, and must issue a final report on December 1, 2009.

**XI. Contaminated Property- Definitions.** Two definitions are expanded. The definition of "hazardous chemical" is expanded to include the final product of drug manufacturing, and not just the precursor elements needed to manufacture illegal drugs. In addition, the definition of "property" is expanded to include personal property (in addition to real property), and a clarification is added that real property includes motels, hotels, and storage sheds.

#### ***Reporting and notice of a contaminated property.***

If a local health officer is denied access to a property he or she reasonably suspects is contaminated due to the manufacture of illegal drugs, the officer, in consultation with law enforcement, may seek an administrative warrant from a court in order to perform administrative inspections and to seize property. The court must determine that probable cause exists that the property is contaminated.

#### ***Determining a property unfit for use.***

Local health officers may issue emergency orders that a property is unfit for use if immediate action is necessary to protect public health, safety, or the environment. Affected persons must comply with emergency orders immediately, and the orders may remain in place for up to 72 hours. If the local health officer believes the property is still unfit for use after this time, the non-emergency procedures for declaring a property unfit for use must be followed.

*Actions upon finding of contamination.*

The local city and county authority is expanded beyond condemning or demolishing the property. The local government can also prohibit use of the property, remove personal property, or act to decontaminate the property. Demolition and condemnation must still wait until after all appeals have been heard, but prohibition of use can occur immediately. Any person violating an order to not enter a contaminated property may be prosecuted for a misdemeanor.

The property owner is permitted to contract for more than just the decontamination of the property. The owner may also contract for the property to be demolished. Demolition, like decontamination, must still be done by a certified contractor.

The local health officer has 30 days to establish a time-line for the decontamination or demolition of the property, which property owners may appeal. Property owners are responsible for the costs of property testing, all costs of decontamination, and all costs incurred by the local health officer as a result of enforcing the decontamination law.

*Contractor Certification.*

The training and testing requirements that decontamination contractors must satisfy are expanded to include the workers of contractors. In addition, the DOH is given the authority to place restrictions on the certification of contractors, instead of only being able to suspend or revoke a certification. The list of infractions that may result in the conditioning or revoking of a contractor's certification are expanded to include failure to properly dispose of contaminated property, committing fraud or misrepresentation, failure to properly complete the decontamination work, failure to cooperate with the local health officer, or failing ongoing evaluations and inspections.

In addition to contractors, supervisors and workers may also be fined \$500 for violations of this law. Contractors must pay for their own training, certification, and background checks, according to a fee schedule set by the DOH.

*Third-Party Sampling.*

The DOH is given the authority to hire third parties to annually evaluate a sample of decontamination projects. The evaluations must be done by independent environmental contractors or a state or local agency. The State Board of Health is required to adopt rules governing independent third-party sampling, including rules for background checks and certification of third-party samplers. If a contractor's decontamination work does not satisfy the third-party inspection, the contractor may be subject to a license suspension and a fine of up to \$500.

*Study on Providing Housing to Recovering Substance Abusers.*

The DOH must study the feasibility of providing incentives and protections to landlords to encourage them to rent housing to recovering substance abusers or convicted drug offenders. The DOH must make a final report to the Legislature by January 1, 2007.

*Cleanup Pilot Project.*

The Department of Ecology (DOE), in partnership with local governments and health departments, must conduct a pilot program to demonstrate contamination clean-up under existing legal frameworks and grant programs under the Model Toxics Control Act, and other available authorities and funds to clean up property for a public purpose. The pilot will include sites with

soil or groundwater contamination and structure and solid waste contamination. The DOE must issue a report to the Legislature by January 1, 2007.

**XII. Drug-Free School Zones.** Statutory language is clarified to specify that all sentence enhancements relating to violations of the UCSA in drug-free zones are to be run consecutively to all other sentencing provisions for all sentences under the Sentencing Reform Act.

**XIII. Prison-Based Special Drug Offender Sentencing Alternative (DOSA).** The prison confinement time for an offender serving a prison-based DOSA sentence is expanded. If the court determines that a prison-based DOSA sentence is appropriate for an offender then it may impose an alternative sentence that includes confinement in a state facility for one-half of the midpoint of the standard sentencing range or 12 months, whichever is greater.

**XIV. Chemical Dependency Screening Reports.** In addition to those offenders that have been convicted of a drug crime, the court must order the DOC to complete a chemical dependency screening report before imposing a sentence upon a defendant that has been convicted of "any" type of a felony where the court finds that the offender has a chemical dependency that contributed to his or her offense.

**XV. Washington State Institute for Public Policy (WSIPP).** The WSIPP must conduct a study of criminal sentencing provisions of neighboring states for all crimes involving methamphetamine. The report must include any criminal sentencing increases necessary under Washington law to reduce or remove any incentives methamphetamine traffickers and manufacturers may have to locate in Washington. The report must be completed and submitted to the Legislature by January 1, 2007.

The WSIPP must also conduct a study of the DOSA program. The WSIPP must study recidivism rates for offenders who received substance abuse treatment while in confinement as compared to offenders who received treatment in the community or received no treatment. The WSIPP must report its findings to the Legislature by January 1, 2007.

**Appropriation:** None.

**Fiscal Note:** Preliminary fiscal note available.

**Effective Date:** The bill takes effect 90 days after adjournment of session in which bill is passed, except for sections 110 and 111, which takes effect January 1, 2007. However, section 113, of the bill is null and void unless funded in the budget.

# **APPENDIX E**

# SENATE BILL REPORT

## E2SSB 6239

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As Passed Senate, February 10, 2006

**Title:** An act relating to the impact of controlled substances, primarily methamphetamine.

**Brief Description:** Changing provisions relating to controlled substances.

**Sponsors:** Senate Committee on Ways & Means (originally sponsored by Senators Hargrove, Johnson, Doumit, Oke, Stevens and Esser; by request of Attorney General).

**Brief History:**

**Committee Activity:** Human Services & Corrections: 1/16/06 1/16/06, 2/1/06 [DPS-WM].

Ways & Means: 2/6/06, 2/7/06 [DP2S].

Passed Senate: 2/10/06, 42-0.

### Brief Summary of Bill

- Declares Legislative intent to provide funding for multijurisdictional task forces and establishes a pilot project for task forces in three rural areas of the state.
- Establishes a drug free workplace program. Qualifying employers will receive a discount on worker's compensation insurance premiums.
- Makes a variety of changes to local health department and department of health provisions related to methamphetamine cleanup.
- Modifies the drug offender sentencing alternative (DOSA) statutes and sentencing enhancements for ranked drug offenses.

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### SENATE COMMITTEE ON HUMAN SERVICES & CORRECTIONS

**Majority Report:** That Substitute Senate Bill No. 6239 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Hargrove, Chair; Regala, Vice Chair; Stevens, Ranking Minority Member; Brandland, Carrell, McAuliffe and Thibaudeau.

**Staff:** Indu Thomas (786-7459)

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### SENATE COMMITTEE ON WAYS & MEANS

**Majority Report:** That Second Substitute Senate Bill No. 6239 be substituted therefor, and the second substitute bill do pass.

Signed by Senators Prentice, Chair; Doumit, Vice Chair, Operating Budget; Zarelli, Ranking Minority Member; Brandland, Fairley, Parlette, Pflug, Rasmussen, Regala, Roach, Rockefeller and Schoesler.

Staff: Paula Faas (786-7449)

**Background:** Methamphetamine (meth) is an addictive stimulant drug. A task force convened by the Attorney General in 2005, which included legislators, law enforcement officers, prosecutors, treatment providers, and other stakeholders, assessed the extent of the meth problem in Washington State.

The task force recommended changes to Washington laws in the areas of substance abuse reduction including: 1) drug-free workplace provisions, pilot programs and task forces; 2) cleanup of contaminated property; and 3) criminal penalties and procedures.

**Drug Task Force Funding:** Previously, two federal grant programs, the Byrne Formula Grant Program and the Local Law Enforcement Block Grant, provided federal funding for local drug task forces. These grants were administered by the Department of Community, Trade, and Economic Development (CTED). In Fiscal Year (FY) 2004, CTED allocated \$4.163 million in federal funding for local drug task forces. Since then, the federal government combined these two programs into the Justice Assistance Grant (JAG), also administered by CTED. The total amount of funding available was reduced by approximately 40 percent in FY 2006 and is projected to be reduced another 40 percent in FY 2007. The current estimate of federal funding for local drug task forces is \$2.343 million for FY 2007. Counties may receive JAG money either by applying for funding through CTED or applying directly to the Department of Justice. While most Washington counties have been part of a federally funded drug task force, 10 counties have not been included. They are Columbia, Island, Jefferson, Kittitas, Klickitat, Lincoln, Mason, Pacific, Pend Oreille, San Juan, Stevens, and Walla Walla.

**Chemical Dependency Treatment at the Department of Corrections:** The Department of Corrections (DOC) currently limits chemical dependency treatment for inmates to priority inmates. Inmates prioritized for treatment include those determined to be at high risk for violent reoffending and those sentenced under the Drug Offender Sentencing Alternative (DOSA). In fiscal year 2004, the DOC admitted 3,800 inmates to treatment while in prison, out of a total average daily prison population of 16,700.

**Senate Bill 5763:** Last year the Legislature passed SB 5763. One of the provisions in the legislation provided county governments the authority to impose a 1/10 of 1 percent sales tax dedicated to new and expanded therapeutic drug courts for dependency proceedings, and a new and expanded mental health and chemical dependency treatment services.

**Drug-Free Workplace Provisions:** In Washington all covered employers, except those self-insured, are required to satisfy their workers' compensation obligations by purchasing insurance from the Department of Labor and Industries (L&I). L&I has several premium discount programs, but does not have a program that gives premium discounts for employers who maintain drug-free workplaces.

In 1996, the Legislature enacted a substantially similar law, which established a premium discount for employers who mandated a drug-free workplace. The legislation terminated automatically in 2001. The 1996 law required L&I to report on the effect of the premium

discount provided in the bill on workplace safety. In the report, L&I concluded that the workers' compensation premium discounts had little measurable effect on workplace safety in most industries.

Cleanup of Contaminated Property: The chemicals which are used in the manufacture of meth can contaminate structural materials, furnishings, wastewater systems, and soils. Decontamination of the property is necessary to reduce the public health risks of injuries and hazardous exposures associated with those chemicals.

The State Board of Health and the Department of Health (DOH) establish standards, procedures, and responsibilities for regulating the occupancy and use of property where hazardous chemicals or chemical residues commonly associated with the manufacture of controlled substances are or may be present. DOH Clandestine Drug Lab Program ensures that contaminated sites are cleaned to public health standards. DOH also certifies contractors to decontaminate properties, and provides technical assistance and training to local health jurisdictions, government agencies, and community organizations.

Local health jurisdictions assess properties to determine the degree and extent of contamination due to chemical residues and other biohazards. The local health officers are also responsible for: 1) providing notice regarding the property to occupants and owners; 2) reporting contaminated property to DOH; 3) determining whether a contractor is required for decontamination; 4) verifying that decontamination has occurred; and 5) recording the decontamination with the county auditor.

The Washington State Model Toxics Control Act (MTCA): MTCA outlines the liabilities and responsibilities of the owner or operator of a site that has been contaminated by a hazardous substance or substances. The cleaning of these contaminated sites can be the responsibility of a broad range of individuals.

Drug Offender Sentencing Alternative (DOSA): Offenders convicted of drug offenses, for which the standard range sentence is over 12 months in prison, may be eligible for the drug offense sentencing alternative (DOSA). In addition to the prison-based DOSA sentencing alternative, the 2005 Legislature enacted a residential treatment DOSA. If the court elects to impose a prison-based DOSA sentence, the term of incarceration is one-half of the midpoint of the standard range during which the Department of Corrections is required to provide an assessment and appropriate drug treatment. The offender must serve the remainder of the midpoint of the standard range in community custody which must include outpatient drug treatment.

Summary of Bill: Substance Abuse Reduction: Counties who impose the tax authorized in SB 5763 are eligible to seek up to \$100,000 from the Legislature for additional mental health or substance abuse treatment programs for persons addicted to methamphetamine, beginning in fiscal year 2008 and ending in fiscal year 2010. The bill declares legislative intent to provide funding to add 100 treatment beds to DOC facilities, to be available through fiscal year 2010. Three pilot projects are established to provide rural drug task forces to the three parts of the state. Each pilot project will receive four additional deputy sheriffs, two deputy prosecutors, and one clerk. Legislative intent is declared to provide the pilot projects with \$1.6 million in funding, and to provide a minimum of \$4 million in funding for multijurisdictional task forces currently in operation. The definition of "neglect" of vulnerable adults and children is

amended to include exposure to meth or ingredients of meth when there is intent to manufacture meth. CTED will review funding sources for local meth action teams through the Washington State meth initiative and drug task forces to determine their adequacy and report its findings to the Legislature by November 2006. However, if funding is not provided for the CTED study, the section is null and void.

Drug-Free Workplace Provisions: A program is established for state-fund employers, excluding public employers, to implement certified drug-free workplace programs and receive a five percent discount on certain industrial insurance premiums for up to three years. Employers with programs in place two years prior to the effective date of this legislation may qualify for a 2 percent premium worker discount. To qualify for a premium discount, a drug-free workplace program must include a written policy statement, substance abuse testing protocol, an employee assistance program, employee and supervisor training and confidentiality requirements. L&I is allowed to charge fees to administer the program. The total amount in premium discounts cannot exceed \$5 million per year.

The Department of Social and Health Services will conduct an evaluation to determine the costs and benefits of the program, and L&I will evaluate the effect of the premium discount on workplace safety and the state fund. Preliminary findings must be reported to the Legislature on September 1, 2007 and 2008, with final reports on December 1, 2009.

Authority and Discretion of Local Health Officers: When they have probable cause, local health officers (LHOs) in consultation with law enforcement officers are granted the authority to seek a warrant to conduct inspections of property. LHOs are granted the authority to issue emergency, seventy-two-hour orders when they determine the order is necessary to protect the public health, safety, or the environment.

In addition to condemning or demolishing contaminated property, city or county officials may take additional actions such as prohibiting use, occupancy, or removal of property, or order its decontamination. These actions are appealable; however, restrictions on use, occupancy, or removal of property are enforceable while the appeal is pending. City and county personnel, and their cleanup contractors, must comply with the local health officer's orders.

It is a misdemeanor for anyone to enter property after an order declaring it to be unfit has been issued. Exceptions are provided for governmental officials performing their duties, occupants recovering uncontaminated property, and for others as authorized by a public health officer or superior court.

In addition to decontamination, the owners or authorized contractors are required to submit written work plans for demolition or disposal activities. Property owners are responsible for: 1) the costs of any property testing which may be required to demonstrate the presence or absence of hazardous chemicals; and 2) the costs of the property's decontamination, demolition, and disposal expenses, as well as costs incurred by the local health officer. Within 30 days of issuing an order of unfitness, the local health officer must establish a time period in which decontamination, demolition, and disposal will be completed and fines or legal actions may be taken upon failure to meet the deadline.

Modification to Certification Requirements for Cleanup Workers: The DOH authority to deny, suspend, revoke, or place restrictions on certificates is expanded to include: 1) failing to

perform decontamination, demolition, or disposal work using department certified decontamination personnel; 2) failing to perform work that meets the requirements of the local health officers; 3) failing to properly dispose of contaminated property; 4) failing to cooperate with the DOH or the local health officer; or 5) failing the evaluation and inspection of decontamination projects pursuant to section 208 of this act. Additionally certified workers' fraudulent acts or acts of misrepresentation are expanded to include: 1) applying for, or obtaining a certification, recertification, or reinstatement; 2) seeking approval of a work plan; and 3) documenting completion of work to the DOH or local health officer.

Department of Health Cleanup Evaluations: The DOH must modify its rules to include methods for the testing of porous and nonporous surfaces. The DOH must also adopt rules about independent third party sampling to verify satisfactory decontamination of property.

The DOH may annually evaluate a number of the property decontamination projects performed by licensed contractors to determine the adequacy of the decontamination work. If a project fails the evaluation and inspection, the contractor is subject to a civil penalty and license suspension and is prohibited from performing additional work until deficiencies have been corrected.

Department of Ecology: DOE, in consultation with local health jurisdictions and their corresponding city or county governments, will conduct a pilot program to demonstrate application of existing MTCA and other available resources to cleanup methamphetamine contaminated property for public purpose. DOE will report to the Legislature on the effects of the pilot program by January 1, 2007.

Sentencing Modifications: Sentence enhancements for ranked drug offenses are to be served consecutively. Drug Offender Sentence Alternative offenders will serve 12 months or up to the half point of a sentence, whichever is greater. When the court determines that chemical dependency contributed to the felony offense, the offender, not just drug offenders, must receive a chemical dependency screening report prior to sentencing.)

Washington State Institute for Public Policy: WSIPP must conduct two studies and report its findings to the Legislature by January 1, 2007. First, WSIPP will study neighboring states criminal sentencing provisions related to methamphetamine to determine if these provisions provide an incentive for traffickers and manufacturers to relocate to Washington. Second, the WSIPP will study DOSA's impact on recidivism rates for offenders participating in DOSA relative to offenders receiving community treatment or no treatment at all.

**Appropriation:** None.

**Fiscal Note:** Available.

**Committee/Commission/Task Force Created:** Yes.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Testimony For (Human Services & Corrections):** A multi-disciplinary task force, including representatives from the Legislature and law enforcement, met and proposed this comprehensive approach to reducing methamphetamine use and the criminal behavior that

results from such use. This bill also addresses the significant impact that meth use has on productivity in the workplace and the clean-up of properties contaminated by meth labs.

This bill could be improved by adding a provision to increase the number of treatment beds available in correctional facilities. The drug-free workplace aspects of the bill are a meaningful and effective way of addressing the problem of meth. The bill could be improved if extended to civil drug courts and judicial costs are included in the computation of costs. In order to avoid the potential for evidentiary problems in these cases, the law should require a team approach between law enforcement and the local health officials. The inclusion of juvenile drug courts will have a fiscal impact. The bill could be improved by using consistent terminology and definitions.

**Testimony Against (Human Services & Corrections):** This bill focuses more funding on creating task forces and too little on treatment. Employer drug testing provisions appear to encourage discrimination. The change to the definition of physical abuse is too broad. The sentence enhancements and reduction of good time provisions create a situation which is a disincentive to participation in DOSA. The Model Toxics Control Act has fair and even liability provisions which should not be modified.

**Who Testified (Human Services & Corrections):** PRO: Rob McKenna, Attorney General; Henry Govert, Drug Free Training and Consultation; Martha Harden Cesar, Superior Court Judges Association; Sophia Byrd McSherry, Association of Counties; John Didion, Pacific County Sheriff; Mike Whelan, Grays Harbor County Sheriff; and Steve Whybark, Mason County Sheriff; Sharon Case, Association of Alcoholism and Addiction Programs; Tom McBride, Washington Association of Prosecuting Attorneys; Mo McBroom, Washington Environmental Council.

CON: Jennifer Shaw, American Civil Liberties Union.

**Testimony For (Ways & Means):** This is a balanced bill that deals with treatment, clean-up, and enforcement related to methamphetamine production and usage. The JAG/ Bryne Grant has eroded over the years. When one county or task force targets meth production, the problem is pushed into rural areas of the state. This bill allows for a statewide strategy to combat the problems.

**Testimony Against (Ways & Means):** None.

**Who Testified (Ways & Means):** PRO: Don Pierce, Washington Association of Sheriffs and Police Chiefs; Ken Irwin, Yakima County Sheriff; Chris Johnson, Office of the Attorney General.

**House Amendment(s):** The Striking Amendment removes appropriations language from the intent sections of the bill. The provisions regarding the drug-free work-place program are stricken. The change to the definition of "abuse and neglect" is moved to "negligent treatment or maltreatment." The repeal of RCW 26.44.195(6) is eliminated. The provisions on clean-up of contaminated property are amended to remove the specific reference to hotels and motels. An additional modification indicates that warning postings in hotels and motels must be on the door of the contaminated room not in the lobby of the hotel. Finally, the House amendments require that the Department of Community, Trade, and Economic Development rather than the

Department of Health report to the Legislature on the feasibility of providing incentives to landlords.

# KITSAP COUNTY PROSECUTOR

**January 21, 2015 - 2:49 PM**

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Case Name: Roark, Heather

Court of Appeals Case Number: 46015-7

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Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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# KITSAP COUNTY PROSECUTOR

**January 21, 2015 - 2:50 PM**

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Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: \_\_\_\_\_

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: Appendix for Brief of Respondent

### Comments:

No Comments were entered.

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