

NO. 78984-3

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DEMETRIUS WILLIAMS,

Petitioner.

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

PETITIONER'S SUPPLEMENTAL BRIEF

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A. ISSUES FOR WHICH REVIEW HAS BEEN GRANTED.

The prosecution must charge and prove all essential elements of an offense. Essential elements are defined as all facts that increase punishment, other than the fact of a prior conviction. The maximum punishment that may be imposed for bail jumping varies widely, ranging from life imprisonment to 90 days in jail, depending upon the classification of the offense for which the accused person failed to appear in court. In the case at bar, Mr. Williams was charged with bail jumping but neither the charging document nor jury instructions alleged the classification of offense for which Mr. Williams failed to appear. Is the classification of the offense for which the accused person failed to appear an essential element of bail jumping that must be charged in the information and proven to the jury beyond a reasonable doubt?

B. STATEMENT OF THE CASE.

The prosecution originally charged Demetrius Williams with possession of "a controlled substance, to wit: cocaine; proscribed by RCW 69.50.401(d), a felony," on April 11, 2003. CP 102. Ten days after Mr. Williams filed a motion to suppress unlawfully seized physical evidence, the State added a second count, charging Mr. Williams with bail jumping for failing to appear for a court hearing

on December 4, 2003. CP 92-99. Shortly thereafter, Mr. Williams prevailed in his motion to suppress evidence and the prosecution dismissed the charge relating to possession of a controlled substance. CP 29-31 (Findings of Fact Suppressing Evidence); CP 88 (Order of Dismissal).

On May 18, 2004, the prosecution filed a second amended information, charging Mr. Williams with one count of bail jumping. CP 86. The two charging documents that included the bail jumping allegation alleged that Mr. Williams had been charged with “possession of a controlled substance, a felony.” CP 86, 92.<sup>1</sup>

Mr. Williams was convicted of bail jumping after a jury trial. CP 69. On appeal, he challenged the adequacy of the information and the jury instructions, which required the prosecution to prove that Mr. Williams was charged with “possession of a controlled substance” without any reference to the nature or classification of the offense. In a published decision, the Court of Appeals ruled that the classification of the underlying offense for which the accused person fails to appear is a matter pertinent to punishment but is not an essential element of the offense and it need not be

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<sup>1</sup> The second amended information is attached as Appendix A. Both documents used identical charging language.

alleged in the information or proven to the jury. State v. Williams, 133 Wn.App. 174, 136 P.3d 792 (2006), rev. granted, \_\_ Wn.2d \_\_, 2007 Wash. LEXIS 215 (2007).

C. ARGUMENT.

BECAUSE THE CLASSIFICATION OF THE UNDERLYING FELONY IS AN ESSENTIAL ELEMENT OF BAIL JUMPING, THE FAILURE TO PROVIDE ADEQUATE NOTICE OF THIS ELEMENT IN THE INFORMATION AND ITS OMISSION FROM THE JURY INSTRUCTIONS REQUIRES REVERSAL

1. The essential elements of a crime include all facts that are necessary for punishment. Any factor that increases the available punishment for an offense becomes an element of a greater offense. Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). A criminal offense is defined by every fact or circumstance that provides for or increases punishment. Ring, 536 U.S. at 602; Apprendi v. New Jersey, 530 U.S. 466, 478, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). "Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed [a]re by definition 'elements' of a separate legal offense." Apprendi, 530 U.S. at 483 n.10; see Blakely v. Washington, 542 U.S. 296, 302 n.5, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004) ("every fact which is legally essential to the

punishment must be charged in the indictment and proved to a jury.”).

When a person is charged with murder along with aggravating circumstances that permit a death penalty sentence, the offense for which the person stands accused is not simply murder, but instead, murder with aggravating circumstances. Ring, 536 U.S. at 609; Sattazahn v. Pennsylvania, 537 U.S. 101, 111-12, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). Likewise, when a person is charged with possession of a controlled substance, the identity of the controlled substance is a critical component of the punishment that will be imposed and it is an essential element of the charge. State v. Goodman, 150 Wn.2d 774, 785, 83 P.3d 410 (2004).

The jury trial protections and guarantees that attach upon a prosecution are enforced equally for every element of the offense. Apprendi, 530 U.S. at 476-77; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). These fundamental rights include the presumption of innocence, the requirement of notice in the charging document, a unanimous jury verdict for each necessary element, and proof beyond a reasonable doubt. Apprendi, 530 U.S. at 477. It is a violation of the rights to trial by

jury and due process of law to dilute the constitutional protections that apply to any fact that increases punishment.<sup>2</sup> Apprendi, 530 U.S. at 489, 497.

As Justice Scalia memorably explained, “all facts essential to imposition of the level of punishment that the defendant receive - - whether the statute calls them elements of the offense, sentencing factors, or Mary Jane” are elements of an offense. Ring, 536 U.S. at 609, (J. Scalia, concurring); see State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003) (adopting the elements analysis in Ring).

2. The essential elements of bail jumping include the classification of the offense for which the accused failed to appear.

Bail jumping is defined in RCW 9A.76.170, in pertinent part:

(1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, . . . and who fails to appear . . . as required is guilty of bail jumping.

. . . .

(3) Bail jumping is:

(a) A class A felony if the person was held for, charged with, or convicted of murder in the first degree;

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<sup>2</sup> Facts of prior convictions are not at issue in the instant case and the discussions herein are not intended to apply to issues involving prior convictions. See State v. Jones, 159 Wn.2d 231, 240, 149 P.3d 636 (2006); State v. Oster, 147 Wn.2d 141, 147, 52 P.3d 26 (2002).

- (b) A class B felony if the person was held for, charged with, or convicted of a class A felony other than murder in the first degree;
- (c) A class C felony if the person was held for, charged with or convicted of a class B or class C felony;
- (d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

The punishment imposed upon a conviction for bail jumping requires proof that the accused person failed to appear for a particular classification of offense. For example, in State v. Pope, 100 Wn.App. 624, 629, 999 P.2d 51, rev. denied, 141 Wn.2d 1018 (2000), the jury was instructed only to find that the defendant failed to appear “regarding a felony matter.” The court reversed Pope’s conviction based on the prosecution’s failure to prove the classification of the underlying felony. Id.; see also State v. DeRyke, 149 Wn.2d 906, 911, 73 P.3d 1000 (2003) (“Pope stands for the principle that ‘to convict’ instructions must provide a correct statement of all the necessary elements.”).

In the case at bar, the Court of Appeals stated that “we hold the class of either crime is not an element of bail jumping . . . .” 133 Wn.App. at 718. According to the Court of Appeals, essential elements are only “those necessary to establish ‘the very illegality’ of the crime itself.” Id. (citing State v. Ward, 148 Wn.2d 803, 811,

64 P.3d 640 (2003),<sup>3</sup> which quoted State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). The Court of Appeals reasoned that since the portion of the bail jumping statute that lists the conduct which constitutes bail jumping, RCW 9A.76.170(1), “does not include or even reference the penalty classes of bail jumping set forth in section (3),” then factors listed in section (3) are not elements of the offense. Williams, 133 Wn.App. at 719.

The Court of Appeals analysis is directly contrary to the plain terms of Ring and Apprendi. This analysis is equally unsupported by this Court’s rulings applying Apprendi and its progeny.

In Goodman, the prosecution argued that the identity of a controlled substance is not a statutory element of possession of a controlled substance with intent to deliver. 150 Wn.2d at 785. This Court found this argument “wholly inconsistent with” Supreme Court precedent. Id. Because the identity of the controlled substance is relevant to the punishment imposed, “it is clear that

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<sup>3</sup> Ward interpreted a portion of the violation of a no-contact order statute that made it a felony to assault another in violation of a no contact order where the assault “does not amount to assault in the first or second degree.” Ward rejected the argument that the jury must find the assault did not amount to a first or second degree assault, instead construing the statutory language as a legislative explanation as to how assaults would be prosecuted under the assault or no contact order statutes. Id. at 813. The discussion of “essential elements” in Ward must be viewed in light of the peculiar legislative language it was interpreting and the awkwardness of requiring the State to prove an assault was

under Apprendi, the identity of the controlled substance is an element of the offense when it aggravates the maximum sentence. . . .” Id.

As another example, a statute elevates misdemeanor violation of a no contact order to a felony offense when the offender has two prior convictions for violation of a no contact order. Oster, 147 Wn.2d at 146. The existence of prior convictions “functions as an element” of the offense and must be proven to the jury beyond a reasonable doubt. Id. Even though the court may determine threshold evidentiary questions such as whether the prior convictions were obtained under the appropriate statute, the jury must still determine and the State must prove these convictions to the jury in order to establish the felony crime. State v. Miller, 156 Wn.2d 23, 27, 31, 123 P.3d 827 (2006).

By statute, the punishment for bail jumping varies widely depending upon the nature of the underlying offense for which the accused person failed to appear in court. RCW 9A.76.170. Failing to appear for a gross misdemeanor prosecution results in punishment for a maximum of 90 days in jail as a misdemeanor,

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not a first or second degree assault.

but failing to appear for a first degree murder charge results in punishment for a class A felony, including a maximum of life imprisonment. RCW 9A.76.170(3)(a); RCW 9A.20.021. The facts establishing the maximum punishment for bail jumping are defined in the substantive portion of the criminal law, and not in the sentencing laws. See State v. Crawford, 159 Wn.2d 86, 93, 147 P.3d 1288 (2006) (distinguishing Persistent Offender Accountability Act (POAA) from usual notice requirements for charging documents on grounds that POAA is solely sentencing statute). Since the bail jumping statute states that nature of the underlying charge controls the available punishment, and the range of punishment varies widely depending upon the underlying offense, the classification of the underlying charge is a critical and essential element of bail jumping. See Goodman, 150 Wn.2d at 785.

3. The charging document must provide notice of all elements of the offense. Washington has long required a complete

and comprehensive charging document.<sup>4</sup> U.S. Const. amend. 6;<sup>5</sup> Wash. Const. art. I, section 22.<sup>6</sup> A charging document must contain, “[a]ll essential elements of a crime.” State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); see CrR 2.1(a)(1) (charging document “shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged.”).

The information must contain the statutory and non-statutory elements of the crime. Kjorsvik, 117 Wn.2d at 101. The “essential elements” necessary in the charging document are not only the elements of the crime but also “the conduct of the defendant which is alleged to have constituted that crime.” Id. (citing Leach, 113 Wn.2d at 689).

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<sup>4</sup> See e.g., Leonard v. Territory, 2 Wash.Terr. 381, 392, 7 P. 872 (1885) (“Under our laws an indictment must be direct and certain, both as regards the crime charged and as regards the particular circumstances thereof, when they are necessary to constitute a complete crime.”); State v. Unosawa, 29 Wn.2d 578, 588-89, 188 P.2d 104 (1948) (each count must independently include all essential facts unless it incorporates allegations in other counts by “clear, specific” reference); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989) (“essential elements” rule requires that “a charging document *allege facts supporting every element of the offense*, in addition to adequately identifying the crime charged.” (emphasis in original)).

<sup>5</sup> The Sixth Amendment provides in pertinent part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . .”

<sup>6</sup> Wash. Const. art. I, section 22 provides in pertinent part, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, . . . .”

When challenged for the first time on appeal, a charging document is construed liberally. State v. Ibsen, 98 Wn.App. 214, 216, 989 P.2d 1184 (1989). This liberal construction requires the court to first determine whether the necessary facts appear in any form in the charging document. Id. at 216. Only if the court finds the necessary information could be inferred from the face of the charging document will the court require the defendant to show he or she had been actually prejudiced from the inartful language. Id.

Courts have addressed the requirements of a charging document in a bail jumping prosecution on numerous occasions. In Ibsen, the charging document alleged the defendant was “admitted to bail,” required to appear in court, and “did knowingly fail to appear.” 98 Wn.App. at 215. It contained no reference to the nature of the underlying prosecution or the classification of the underlying offense. Id.

The Ibsen Court ruled that under either the liberal post-verdict, or stricter pre-verdict, standards of review, the information was insufficient. Id. at 216. By ignoring the statutory section that “defines the degree and therefore the penalty for bail jumping,” the charging document failed to include an essential element of bail jumping. Id. at 217-18.

Similarly, in State v. Green, 101 Wn.App. 885, 887, 6 P.3d 53 (2000), rev. denied, 142 Wn.2d 1018 (2001), the charging document accused the defendant of having failed to appear for a court hearing in “Mason County Superior Court Cause No. 98-1-00123-2, contrary to RCW 9A.76.170.” The information did not otherwise refer to the underlying offense, although Green was charged with two felonies in the cause number referenced in the information. Id. at 888.

The Green Court held that the requirements of notice are not met when the accused person must search for the nature of the underlying charge, as courts “have repeatedly said that defendants should not have to search for the rules or regulations they are accused of violating.” Id. at 891 (quoting City of Auburn v. Brooke, 119 Wn.2d 623, 635, 836 P.2d 212 (1992) and Kjorsvik, 117 Wn.2d at 101). Green reversed the bail jumping conviction due to the charging document’s failure to include all essential elements. Id.

In Pope, the court instructed the jury that to convict the defendant, it must find he failed to appear “regarding a felony

matter.” 100 Wn.App. at 629.<sup>7</sup> The Pope Court ruled that “a particular crime” for which the defendant is charged or convicted, is an element of bail jumping. Id. The court reversed the conviction based on the failure to require the State to prove the particular crime being prosecuted when the defendant failed to appear.

On the other hand, the Court of Appeals found the defendant received adequate notice when the charging document alleged he failed to appear for a “class B or C felony.” State v. Spiers, 119 Wn.App. 85, 89-91, 79 P.3d 30 (2003). Additionally, the court found adequate notice when the charging document asserted the defendant failed to appear having been charged with “attempted first degree child molestation.” State v. Gonzalez-Lopez, 132 Wn.App. 622, 132 P.3d 1128 (2006).

The court in Gonzalez-Lopez reasoned that “attempted first degree child molestation” sufficiently apprised the defendant of the class of the underlying offense since it was unquestionably a particular class of felony. Id. at 633. Although the holding in Gonzalez-Lopez is limited to the adequacy of the notice in that case, where the offense named in the information could only be

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<sup>7</sup> In Pope, the charging document apparently accused the defendant of failing to appear for a class B felony but this element was omitted from the jury

one particular class of felony, the Court of Appeals in the case at bar relied on Gonzalez-Lopez as authority for the proposition that the classification of the underlying offense is not an essential element of bail jumping. 133 Wn.App. at 719-22; Gonzalez-Lopez, 132 Wn.App. at 635.<sup>8</sup>

Since the classification of the underlying offense is a critical component of bail jumping, the charging document must allege sufficient facts to support this element. Leach, 113 Wn.2d at 684 (charging document's failure to specify whether offense is misdemeanor or gross misdemeanor and omission of essential element of gross misdemeanor offense renders charging document constitutionally defective). Here, the charging document did not provide adequate notice of the facts essential to punishment necessary to enable Mr. Williams to prepare a defense.

4. The charging document provided insufficient notice of the underlying charge and penalty. In the instant case, the charging document alleged,

That the defendant, on or about the 4<sup>th</sup> day of December 2003, being charged with Possession of a Controlled Substance, a felony, and having been

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instructions. 100 Wn.App. at 626.

<sup>8</sup> The defendant in Gonzalez-Lopez did not seek review of the Court of Appeals decision in this Court.

released by court order, . . . did fail to appear as required, proscribed by RCW 9A.76.170(1), a felony.

CP 86 (App. A); CP 92.<sup>9</sup> Neither of the informations alleging bail jumping mentioned RCW 9A.76.170(3), which contains the class of bail jumping alleged. CP 86, 92.

Controlled substance violations are defined in Title 69.50 RCW, but at the time of the instant offense, this chapter did not specify any particular class of felony for possession of a controlled substance.<sup>10</sup> RCW 69.50.401 describes a list of prohibited behavior and sets different maximum prison terms and fines based on the nature of the behavior and type of controlled substance possessed. See RCW 69.50.401 (full text of version in effect at time of offense attached as App. B). RCW 69.50.401 does not provide the final word on the maximum punishment that may be imposed for violating RCW 69.50.401. Under RCW 69.50.408, the maximum sentence is doubled when the defendant has a prior conviction for a controlled substances violation history. RCW

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<sup>9</sup> The information was amended when the prosecution dismissed the charge that Mr. William unlawfully possessed a controlled substance after the court ruled that the evidence was unlawfully seized. He was ultimately prosecuted only for bail jumping and not for any other offense.

<sup>10</sup> All citations to Title 69 RCW refer to the version in effect at the time of the offense, as the statute has since been re-written and now expressly states the classification of felony offenses. See Current RCW 69.50.401 (2007)

69.50.408;<sup>11</sup> In re Pers. Restraint of Cruz, 157 Wn.2d 83, 89, 134 P.3d 1166 (2003) (“RCW 69.50.408 doubles the maximum sentence.”). RCW 69.40.435 also doubles the maximum sentence if the controlled substance violation occurred within 1000 feet of a school zone.

Not all instances of “possession of a controlled substance” are felonies; marijuana is a “controlled substance” yet possession of it is a misdemeanor when the quantity is less than 40 grams. RCW 69.50.401(1)(e).<sup>12</sup> On the other hand, possession of a controlled substance with the intent to deliver is punishable by up to twenty years of imprisonment if the offender has a prior controlled substance conviction. Cruz, 157 Wn.2d at 89. Based on the nuances of Title 69.50 RCW, a person could possess a controlled substance and have a maximum sentence as high as 20 years, the equivalent of a class A felony, or as low as a non-prison misdemeanor. See RCW 9A.20.021 (setting forth classification of offenses defined in Title 9A RCW).

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<sup>11</sup> RCW 69.50.408(1) provides, Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

RCW 9A.20.040 provides classifications for offenses not defined in Title 9A RCW.<sup>13</sup> Under RCW 9A.20.040, the class of an offense depends upon the maximum sentence. An offense is a class A felony if the “maximum sentence authorized by law upon conviction” is 20 years or more imprisonment; class B if the maximum sentence authorized is eight or more years and less than 20 years; and class C if the maximum is less than eight years. RCW 9A.20.040.

Based on the intricacies in determining the maximum sentence for a person accused of possession of a controlled substance, merely listing this offense by name or as a felony does not describe the statutory maximum or its classification. For example, Mr. Williams has two prior convictions for violating the uniformed controlled substances act and thus, the maximum punishment authorized by law is double that otherwise listed in RCW 69.50.401. See Cruz, 157 Wn.2d at 89; CP 7 (Judgment and Sentence).

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<sup>12</sup> The current version of RCW 69.50.401 no longer contains any reference to misdemeanor marijuana violations.

Since Mr. Williams did not object to the charging document prior to the verdict, it is construed liberally on appeal. Under a liberal construction, the court first looks only to the face of the document and determines whether “the necessary facts appear in any form, or by fair construction they can be found, in the charging document.” Kjorsvik, 117 Wn.2d at 105-06. Only if the court finds the missing element may be inferred does the court look to whether the accused person was actually prejudiced by the inartful language that caused a lack of notice. Id.

Here, the charging document did not mention the classification of the offense, and stated Mr. Williams was charged with “possession of a controlled substance, a felony.” The information did not refer to RCW 9A.76.170(3), which sets for the penalty classes of bail jumping, but instead only cited to RCW 9A.76.170(1). The charging document did not specify the identity of the offense possessed, the section of the statute violated, or other facts that could increase punishment such as possession with the intent to deliver.

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<sup>13</sup> As part of the Sentencing Reform Act (SRA), RCW 9.94A.035 also classifies offenses that are not defined in Title 9A. Since RCW 9A.20.040 specifically applies to Title 9A offenses, such as bail jumping, where the classification turns on the class of an offense that is not defined in Title 9A, this

Washington courts have long held, in unambiguous terms, that the charging document must contain “all allegations necessary to state the offense sought to be charged” for each count.

Unosawa, 29 Wn.2d at 589; see Goodman, 150 Wn.2d at 785.

Here, the charging document did not “definitely” charge the offense of bail jumping as the range of punishment sought was entirely absent from the charging document. Leonard, 2 Wash. Terr. at 381; Leach, 113 Wn.2d at 688. Because of its failure to specify either the nature or classification of the underlying offense, or the degree of bail jumping alleged, the charging document fails to state an element of the crime and is constitutionally defective.

5. The to-convict instruction similarly ignored the critical element that the prosecution was required to prove beyond a reasonable doubt. Fundamental to the right to due process of law is that the prosecution must prove each essential element of the crime charged beyond a reasonable doubt. Mullaney v. Wilber, 421 U.S. 684, 698, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 53 L.Ed.2d 187 (1970); Apprendi, 530 U.S. at 490; State v. Byrd, 125 Wn.2d 707, 713-14,

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statute appears the most specifically applicable to the case at bar.

887 P.2d 396 (1995); U.S. Const. 14<sup>th</sup> amend.; Wash. Const. art. I, sections 3 & 22.

A jury verdict in Washington is defined by the “to convict” instruction. State v. Emmanuel, 42 Wn.2d 799, 820-21, 259 P.2d 845 (1953). This instruction purports to list the essential elements of the charged crime and thereby serves as the yardstick, directing the jury to the essential elements of the charge. Id.; State v. Smith, 131 Wn.2d 258, 262-63, 931 P.2d 156 (1997) (jury has the “right” to rely on the “to convict” as “complete statement of the law” and a violation is a “constitutional defect” requiring automatic reversal).

In the case at bar, the “to convict” instruction only required the prosecution to prove, in pertinent part, that Mr. Williams “was charged with Possession of a Controlled Substance . . . .” CP 75 (Instruction 3, attached as App. C). It did not mention the classification of the offense, its felony status, or any other facts identifying this charge with specificity.

The prosecution urged the Court of Appeals to find that the error was invited, although the Court of Appeals did not do so. See Reply Brief, p. 3-8 (addressing State’s invited error argument). The invited error doctrine operates to deny relief when a party proposes an instruction and then complains on appeal “that the requested

instruction was given.” State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). On the other hand, failing to except to an instruction does not constitute invited error. Id.

Mr. Williams did not “set up” the error he complains of on appeal, because the trial court did not provide the jury instruction he proposed. CP 107. In fact, he objected to the court’s proposed instruction, albeit on different grounds than argued on appeal. 5/18/04RP 81. Mr. Williams’ proposed instruction may have suffered from the same flaw as the court’s instruction, but he did not propose the instruction given by the court and he objected to the court’s instruction. As a manifest constitutional error, he is entitled to raise the court’s failure to instruct the jury on the essential elements of the offense for the first time on appeal.

Moreover, since the failure to instruct the jury that the prosecution must prove an essential element is a critical component of the right to a jury trial and due process of law, the judicially created prudential doctrine of invited error should not preclude a defendant from asserting a violation of these essential rights. See e.g., In re the Pers. Restraint of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000) (doctrine of invited error “appears to require affirmative actions by the defendant” in setting up error);

Apprendi, 530 U.S. at 476-77, 490 (explaining fundamental nature of jury finding on every essential elements).

The “to convict” instruction suffers from the fatal flaw in the information to an even greater degree, as the “to convict” instruction merely identifies the underlying charge as “possession of a controlled substance.” CP 75. Accordingly, the prosecution was relieved of its burden of establishing the Mr. Williams faced a felony prosecution.

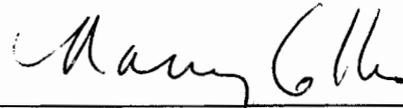
Under the rationale of the Court of Appeals, the range of punishment available upon Mr. Williams’ conviction could have been anywhere from a maximum of 90 days in jail to twenty years imprisonment, without notice to Mr. Williams of the facts underlying the range of punishment. Yet the state and federal constitutions require the prosecution to allege all facts pertinent to punishment in the charging document and prove such facts to the jury beyond a reasonable doubt. The information and “to convict” instructions were constitutionally defective in the case at bar as they do not apprise Mr. Williams of the facts critical to the maximum punishment to be imposed, thus requiring reversal of the conviction. Goodman, 150 Wn.2d at 785; Pope, 100 Wn.App. at 629.

F. CONCLUSION.

For the foregoing reasons, Mr. Williams respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 4<sup>th</sup> day of May 2007.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Nancy Collins", written in black ink.

---

NANCY P. COLLINS (WSBA 28806)  
Washington Appellate Project (91052)  
Attorneys for Appellant

## **APPENDIX A**

Filed in Open Court

5-18 2004

PAM L. DANIELS

COUNTY CLERK

By S. B. B.

Deputy Clerk

SUPERIOR COURT OF WASHINGTON  
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

WILLIAMS, DEMETRIUS TRE

Defendant.

No. 03-1-00829-4

SECOND AMENDED INFORMATION

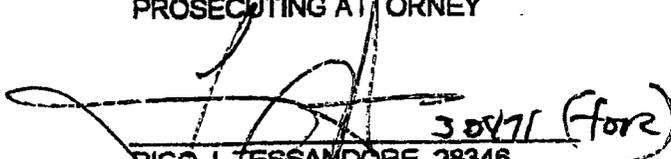
Aliases: CONRAD DEMETRIUS WILLIAMS ,

Other co-defendants in this case:

Comes now JANICE E. ELLIS, Prosecuting Attorney for the County of Snohomish, State of Washington, and by this, her information, in the name and by the authority of the State of Washington, charges and accuses the above-named defendant(s) with the following crime(s) committed in the State of Washington:

**Court I:** BAIL JUMPING, committed as follows: That the defendant, on or about the 4th day of December, 2003, being charged with Possession of a Controlled Substance, a felony, and having been released by court order with the requirement of a subsequent personal appearance before Snohomish County Superior Court, a court of the State of Washington, for Omnibus Hearing on December 4, 2003, and knowing of the requirement of the subsequent personal appearance, did fail to appear as required, proscribed by RCW 9A.76.170(1), a felony.

JANICE E. ELLIS  
PROSECUTING ATTORNEY

  
RICO J. TESSANDORE, 28346  
Deputy Prosecuting Attorney

AA  
78

**APPENDIX B**

ANNOTATED REVISED CODE OF WASHINGTON  
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\*\*\* ARCHIVE DATA \*\*\*

\*\*\* STATUTES CURRENT THROUGH THE 2003 THIRD SPECIAL SESSION \*\*\*

TITLE 69. FOOD, DRUGS, COSMETICS, AND POISONS  
CHAPTER 69.50. UNIFORM CONTROLLED SUBSTANCES ACT  
ARTICLE IV OFFENSES AND PENALTIES

*Rev. Code Wash. (ARCW) § 69.50.401 (2004)*

§ 69.50.401. Prohibited acts: A -- Penalties. (Effective until July 1, 2004.)

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

(1) Any person who violates this subsection with respect to:

(i) a controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam classified in Schedule IV, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, or (A) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (B) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine;

(ii) amphetamine or methamphetamine, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, or (A) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (B) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine. Three thousand dollars of the fine may not be suspended. As collected, the first three thousand dollars of the fine must be deposited with the law enforcement agency having responsibility for cleanup of laboratories, sites, or substances used in the manufacture of the methamphetamine. The fine moneys deposited with that law enforcement agency must be used for such clean-up cost;

(iii) any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(iv) a substance classified in Schedule IV, except flunitrazepam, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(v) a substance classified in Schedule V, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both.

(b) Except as authorized by this chapter, it is unlawful for any person to create, deliver, or possess a counterfeit substance.

(1) Any person who violates this subsection with respect to:

## Rev. Code Wash. (ARCW) § 69.50.401 (This section has multiple versions)

(i) a counterfeit substance classified in Schedule I or II which is a narcotic drug, or flunitrazepam classified in Schedule IV, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, fined not more than twenty-five thousand dollars, or both;

(ii) a counterfeit substance which is methamphetamine, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, fined not more than twenty-five thousand dollars, or both;

(iii) any other counterfeit substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(iv) a counterfeit substance classified in Schedule IV, except flunitrazepam, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(v) a counterfeit substance classified in Schedule V, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both.

(c) It is unlawful, except as authorized in this chapter and chapter 69.41 RCW, for any person to offer, arrange, or negotiate for the sale, gift, delivery, dispensing, distribution, or administration of a controlled substance to any person and then sell, give, deliver, dispense, distribute, or administer to that person any other liquid, substance, or material in lieu of such controlled substance. Any person who violates this subsection is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both.

(d) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter. Any person who violates this subsection is guilty of a crime, and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both, except as provided for in subsection (e) of this section.

(e) Except as provided for in subsection (a)(1)(iii) of this section any person found guilty of possession of forty grams or less of marihuana shall be guilty of a misdemeanor.

(f) It is unlawful to compensate, threaten, solicit, or in any other manner involve a person under the age of eighteen years in a transaction unlawfully to manufacture, sell, or deliver a controlled substance. A violation of this subsection shall be punished as a class C felony punishable in accordance with RCW 9A.20.021.

This section shall not apply to offenses defined and punishable under the provisions of RCW 69.50.410.

**HISTORY:** 1998 c 290 § 1; 1998 c 82 § 2; 1997 c 71 § 2; 1996 c 205 § 2; 1989 c 271 § 104; 1987 c 458 § 4; 1979 c 67 § 1; 1973 2nd ex.s. c 2 § 1; 1971 ex.s. c 308 § 69.50.401.

**NOTES:**

REVISER'S NOTE: This section was amended by 1998 c 82 § 2 and by 1998 c 290 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

APPLICATION -- 1998 C 290: "This act applies to crimes committed on or after July 1, 1998." [1998 c 290 § 9.]

EFFECTIVE DATE -- 1998 C 290: "This act takes effect July 1, 1998." [1998 c 290 § 10.]

SEVERABILITY -- 1998 C 290: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1998 c 290 § 11.]

APPLICATION -- 1989 C 271 §§ 101-111: See note following RCW 9.94A.510.

SEVERABILITY -- 1989 C 271: See note following RCW 9.94A.510.

SEVERABILITY -- 1987 C 458: See note following RCW 48.21.160.

CROSS REFERENCES.

## APPENDIX C

INSTRUCTION NO. 3

To convict the defendant of the crime of bail jumping as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That the defendant was charged with Possession of a Controlled Substance;
- (2) That the defendant had been released by court order or admitted to bail with the requirement of a subsequent personal appearance before that court;
- (3) That on or about the 4<sup>th</sup> of December, 2003, the defendant knowingly failed to appear as required by a court; and
- (4) That the acts occurred in the State of Washington

If you find from the evidence that each of these elements has been proved beyond <sup>a</sup> reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	SUPREME CT. NO. 78984-3
	)	
DEMETRIUS WILLIAMS,	)	
	)	
PETITIONER.	)	

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**DECLARATION OF SERVICE**

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 4<sup>TH</sup> DAY OF MAY, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITIONER'S SUPPLEMENTAL BRIEF** TO BE SERVED ON THE PARTY/PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL:

[X] SNOHOMISH COUNTY PROSECUTING ATTORNEY  
3000 ROCKEFELLER AVENUE, M/S#- 504  
EVERETT, WA 98201-4046

**SIGNED** IN SEATTLE, WASHINGTON THIS 4<sup>TH</sup> DAY OF MAY, 2006.

x \_\_\_\_\_ *Amel*

2007 MAY - 4 PM 4:49  
COURT REPORTER  
STATE OF WASHINGTON