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CLERK OF SUPREME COURT
STATE OF WASHINGTON

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LEAA-ESOLA UNGA,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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SUPREME COURT
STATE OF WASHINGTON

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A. ISSUES PRESENTED

1. A confession is not "coerced" unless, based on the totality of the circumstances, a defendant's will was overborne. At a pretrial hearing, Unga admitted that he had understood his rights, waived his rights, and voluntarily talked with a detective when asked about threats made against a school resource officer. Did the trial court correctly find that Unga's changed story during the interview was not the result of coercion that overbore Unga's ability to voluntarily exercise his rights?

2. A defendant may be punished for an act that violates two criminal statutes unless the Legislature has expressed otherwise, the statutes meet the "same evidence" double jeopardy test or proof of one crime necessarily elevates the degree of the other crime. Unga was convicted of vehicle prowl and taking a motor vehicle without permission. Should this Court reject Unga's double jeopardy claim because (1) his convictions were not based upon the same act, (2) the crimes fail the "same evidence" test, and (3) vehicle prowl does not elevate the crime of taking a motor vehicle without permission?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Leaa-Esola Unga was charged with second degree taking a motor vehicle without permission ("taking a motor vehicle"), and second degree vehicle prowl ("vehicle prowl"). CP 20-21. Tried by the bench, Unga was found guilty as charged. RP 119 (10/17/05).

2. SUBSTANTIVE FACTS

Jean Layer is a kindergarten teacher at Madrona Elementary School. RP 11-12. On February 7, 2005, Layer discovered that her Honda Civic had been stolen from the school parking lot. RP 12. Police recovered her car two days later. RP 16. The ignition was damaged, and someone had scrawled "Fuck Officer Gillette [sic] 4rm c-loc, bear, bam bam, don't trip" on the dashboard. CP 45; RP 16. Officer Gillette is a school resource officer. RP 27. During this time period, someone had been making threats against him. RP 27.

Almost four months later, Officer Gillette arrested Unga on an unrelated warrant. RP 27. Believing Unga had information about the many threats against him, Officer Gillette asked Detective Ryan Mikulcik to talk with Unga about the threats. RP 27. Mikulcik knew Unga and had a friendly relationship with him. RP 31.

Detective Mikulcik brought Unga to an interview room to discuss the matter. RP 31-32. The room had a table, a couple of chairs, and a window; the door was left open. RP 32. Unga was not handcuffed. RP 34. The detective was dressed in civilian clothing and was unarmed. RP 33.

Detective Mikulcik read Unga his constitutional rights and provided him with a rights form. RP 28; CP __, Ex 2.¹ Unga verbally acknowledged that he understood his rights, and signed the rights form acknowledging the same. RP 27-28. Unga also agreed to talk with the detective, and signed the waiver portion of the form acknowledging the same. RP 29, 34. It is undisputed that Unga understood his rights and knowingly, intelligently and voluntarily waived his rights and agreed to talk with the detective.

The detective showed Unga a photo of the graffiti and asked if Unga wrote it. RP 37. Unga said no. RP 37. The detective asked Unga to write some of the same words used in the graffiti. RP 37. Believing that the writing looked similar, the detective asked again if Unga wrote the graffiti and some other graffiti. RP 37, 57. Again Unga denied writing it. RP 37. The detective told

¹ The form contains the standard constitutional rights, waiver of rights, and Unga's written statement. The parties inadvertently did not designate the exhibit below. This Court granted the State's motion to supplement the record.

Unga that he was interested in other crimes--who was making the other threats against Officer Gillette--and that he would not charge him with the graffiti "if he would tell me about another crime."² RP 38, 45. Unga admitted that he wrote the graffiti. RP 39. He added that he had been riding in the car and had known it was stolen, but claimed he could not remember who was driving. CP __, Ex. 2; CP 45. At the end of the interview, the detective wrote out Unga's statement, had him review it and agree that it was accurate, and then had Unga sign it. RP 40, 42, 45. The interview lasted only 30 minutes and was not hostile in nature. RP 37. To the contrary, the detective stated that he treated Unga as a friend during the course of the interview. RP 44.

Unga, a 17-year-old high school student, testified that he had understood his constitutional rights when he was interviewed and understood that he had the right to remain silent, but decided to waive his rights and speak with the detective. RP 55. Unga did not say that he was coerced into talking, or that his will was overborne; rather, he said simply that he denied writing the graffiti

² The detective kept his word. When the case was sent to the prosecutor's office for charging, the detective referred the case only on the charge of taking a motor vehicle. CP 2-3; RP 44.

until the detective made the offer not to charge him with the graffiti. RP 53. Unga also did not dispute that the detective limited his offer to saying he would not be "charged with the graffiti." RP 54. Still, Unga claimed that he made his statement because he thought "when he meant graffiti, it meant the whole car, the whole charge of the car." RP 56. When asked if he felt the detective had made him a promise, Unga responded, "kind of." RP 54. Unga could not recall if the detective mentioned that the car was stolen. RP 57.

At trial, Unga claimed that he had lied and given a false confession. He testified that he never rode in the car and did not write the graffiti. RP 95-96, 99.

The trial court found that Unga knowingly, intelligently, and voluntarily waived his right to remain silent, and that Detective Mikulcik's offer not to charge Unga with the graffiti "was not so overbearing as to overcome the respondent's will to resist." CP 46.

C. ARGUMENT

1. UNGA UNDERSTOOD AND WAIVED HIS CONSTITUTIONAL RIGHTS; WHEN HE CHANGED HIS STORY, IT WAS NOT THE RESULT OF COERCION.

Unga contends that when he changed his story while being interviewed by Detective Mikulcik, he did so as a result of police

coercion--a promise of leniency--and that his free will was thus overborne. This claim should be rejected. Substantial evidence supports the trial court's credibility and legal finding that Unga's decision to change his story was not the result of coercion; i.e., that Unga's ability to decide whether to speak and what to say was not overborne.

The Fifth Amendment requires that "[n]o person...shall be compelled in any criminal case to be a witness against himself." Chavez v. Martinez, 538 U.S. 760, 766, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003). This phrase has been interpreted as prohibiting the use of coerced confessions against a defendant at trial. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). It is rooted in the recognition that "coerced confessions" or "confessions forced from the mind" are untrustworthy, but that a confession freely given "is deserving of the highest credit." Dickerson v. United States, 530 U.S. 428, 433, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

A "confession is coerced, i.e., not voluntary, if based on the totality of the circumstances the defendant's will was overborne."³

³ The terms "coerced confession" and "involuntary confession" are synonymous. Arizona v. Fulminante, 499 U.S. 279, 287 n. 3, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

State v. Burkins, 94 Wn. App. 677, 694, 973 P.2d 15, rev. denied, 138 Wn.2d 1014 (1999). The use of deception or a promise does not make a statement inadmissible as a matter of law. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997).⁴ The inquiry remains the same, the deception or promise being simply a factor in the "totality of the circumstances" test. Fulminante, 499 U.S. at 285; Burkins, at 695. Where such a situation exists, the question is "whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined."⁵ Burkins at 695. The determination depends upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. Dickerson, 530 U.S. at 434; United States v. Walton, 10 F.3d 1024, 1028 (3rd Cir. 1993); United States v. Fraction, 795 F.2d 12, 14 (3rd Cir. 1986) (citing cases holding that promise to

⁴ This Court has recognized that in 1991 the United States Supreme Court overruled Bram v. United States to the extent that Bram implied that any promise or deception, however slight, rendered a confession inadmissible. Broadaway, 113 Wn.2d at 131-32 (referring to Fulminante, 499 U.S. at 285, overruling Bram v. United States, 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568 (1897)). Some of the cases cited by Unga apply the overruled standard from Bram.

⁵ This question is answered with complete disregard for whether or not the officer in fact spoke the truth. Burkins, at 695; see also Rogers v. Richmond, 365 U.S. 534, 544, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961) (voluntary confession where

bring cooperation to the attention of authorities do not suffice to render confession involuntary); United States v. Robinson, 698 F.2d 448, 455 (D.C. Cir. 1983) (promise to inform the prosecutor of cooperation and to delay arrest do not render confession involuntary).

"But for" causation is not the test, for "it can almost always be said that the interrogation caused the confession." Miller v. Fenton, 796 F.2d 598, 605 (3rd Cir.), cert. denied, 479 U.S. 989 (1986). The inquiry is "whether [the agent's] statements were so manipulative or coercive that they deprived [the defendant] of his ability to make an unconstrained, autonomous decision to confess." Id. (insertions in original). A trial court's determination of voluntariness will not be disturbed on appeal if there is substantial evidence in the record from which the trial court could have found by a preponderance of the evidence that the confession was voluntary. State v. Ng, 110 Wn.2d 32, 37, 750 P.2d 632 (1988).

Unga does not allege that his physical condition, age, mental abilities, or physical experience affected his decision to confess. Unga relies solely on the detective's offer of leniency. Unga also

police falsely told suspect polygraph examination showed deception, and where suspect was falsely told co-suspect had named him as the triggerman).

has not challenged any of the trial court's findings; thus, the findings are verities on appeal. Broadaway, at 131. The sole question on review is whether the unchallenged findings support the conclusion that Unga's will was not overborne by the promise of leniency. See Burkins, at 695; Broadaway, at 132.

The trial court made this finding, both a factual and a legal determination, based in part upon the court's determination of credibility: "Having observed both the officer and the respondent, I don't believe that the conduct of the officer was over-bearing," or that Unga's "will to resist" was overborne. RP 83-84.

Trial courts have broad discretion to weigh evidence and determine credibility because of their unique opportunity to observe the witnesses. State v. Glenn, 115 Wn. App. 540, 62 P.3d 921, rev. denied, 149 Wn.2d 1007 (2003). Credibility determinations are not reviewable on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); In re Palmer, 81 Wn.2d 604, 606, 503 P.2d 464 (1972). The court's duty on review is to determine whether there exists the necessary quantum of proof to support the trial court's findings. In re Sego, 82 Wn.2d 736, 740, 513 P.2d 831 (1973).

There is nothing in the record here that shows the trial court's credibility determination was incorrect, or should not be

given the deference the law requires. To the contrary, Unga admitted that he fully understood his rights and that he agreed to talk with the detective. The interview was friendly, short in duration, and did not involve badgering, threats or any other interrogation tactic intended to break Unga's will. Unga himself never said he felt fear, or that he was intimidated or pressured into changing his statement. He was not threatened with the death penalty and promised that it would not be imposed if he talked. There was no pressure exerted upon Unga to accept the offer. As the court noted, Unga merely tried to take advantage of the detective's statement.⁶ RP 83-84. Unga just as easily could have continued to deny having any knowledge of the graffiti. He was not "compelled" to change his story and his "will to resist" was not overborne. He made a calculated decision to change his story, and from the beginning of the interview, he continued to be able to freely exercise his will. And he certainly was not compelled to confess to riding in a stolen vehicle when the issue was never raised by the

⁶ The Supreme Court "has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." Oregon v. Elstad, 470 U.S. 298, 316, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985). A promise by police to drop charges, without the involvement of the prosecutor, cannot be enforced as a contract. State v. Reed, 75 Wn. App. 742, 879 P.2d 1000 (1994), rev. denied, 125 Wn.2d 1016 (1995).

detective. The trial court's determination is supportable and should not be overturned.

2. AS CHARGED AND PROVEN, SECOND DEGREE TAKING A MOTOR VEHICLE AND SECOND DEGREE VEHICLE PROWL DO NOT VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY.

Unga argues that his convictions for taking a motor vehicle and vehicle prowl constitute a single offense for double jeopardy purposes. They do not. As charged and proven here, (1) Unga's convictions are not based upon the same facts, (2) the offenses require proof of different facts and elements, and (3) taking a motor vehicle is not elevated by proof of vehicle prowl.

a. The History Of Double Jeopardy/Merger.

In beginning an analysis of an alleged double jeopardy/merger violation,⁷ the first step is to look at what the double jeopardy clause is intended to protect against. Subject to constitutional constraints, the Legislature has the absolute power to define criminal conduct and assign punishment. State v. Calle, 125

⁷ As used herein, "merger" refers to a doctrine of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act that violates several statutory provisions. State v. Vladovic, 99 Wn.2d 413, 419 n. 2, 662 P.2d 853 (1983). The "merger doctrine belongs squarely within the third prong of the Calle double jeopardy analysis." State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996) (referring to, State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995)).

Wn.2d 769, 776. In many cases, a defendant's single act may violate more than one criminal statute, yet he may permissibly receive multiple punishments for that act. Calle, at 776 (finding no double jeopardy violation where a single act of intercourse violated both the rape and incest statutes).

It is not enough that the same facts may be used to prove two charges. See State v. Vladovic, 99 Wn.2d 413, 419-20, 662 P.2d 853 (1983) (same facts used to prove kidnapping and robbery, but because neither statute requires proof of the other offense, merger does not apply). Double jeopardy is only implicated when the court exceeds its legislative authority by imposing multiple punishments where multiple punishments are not authorized. Calle, at 776. Thus, "[w]here a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005).

In Calle, this Court set forth a three-part test for determining whether multiple punishments were intended by the Legislature.⁸

⁸ Calle represented an affirmation of the rejection of the fact-based analysis used by some courts prior to the 1990's. In 1993, the United States Supreme Court specifically overruled the "same conduct" fact-based analysis for determining

The first step is to review the language of the statutes to determine whether the language expressly permits or disallows multiple punishments. Calle, at 776. Should this step not result in a definitive answer, the court turns to the two-part "same evidence" or "Blockburger" test.⁹ This test asks whether the offenses are the same "in law" and "in fact." Calle, at 777. Failure under either prong creates a strong presumption in favor of multiple punishments, a presumption that can be overcome only where there is "clear evidence" that the Legislature did not intend for the crimes to be punished separately. Calle, at 778-80.

b. The Offenses As Charged And Proven.

Unga was convicted under the "voluntarily rides" prong of the taking a motor vehicle statute. CP 20-21, 47-50. The State was thus required to prove that, without the permission of the

double jeopardy. United States v. Dixon, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). Two years later, this Court did the same, recognizing that the state double jeopardy clause did not provide broader protection than its federal counterpart. State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995). This rejection of a fact-based analysis makes sense when considering that the question is one of legislative intent, of which the facts of a particular case tell us nothing. State v. Vaughn, 83 Wn. App. 669, 924 P.2d 27 (1996), rev. denied, 131 Wn.2d 1018 (1997) (recognizing rejection of the "same conduct" test in finding no double jeopardy for kidnap and rape); Calle, 125 Wn.2d 769 (single act of intercourse used to prove two charges, not violative of double jeopardy).

⁹ Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

owner, Unga voluntarily rode in a motor vehicle with knowledge that it had been unlawfully taken. RCW 9A.56.075; CP 49.

Unga was also convicted of vehicle prowling. CP 20-21, 50.

The State was thus required to prove that Unga unlawfully entered a motor vehicle with the intent to commit a crime against a person or property therein. RCW 9A.52.100; CP 50. The court found that the crime Unga intended to commit when he entered the vehicle was malicious mischief. CP 50. Specifically, the court found that, "[w]hen the respondent entered the Honda Civic, his intent was to commit a crime against property therein, namely, to write graffiti on the dashboard of the car."¹⁰ CP 50.

c. The Gatekeeper: The Same Act Does Not Support Both Convictions.

The question raised in a double jeopardy claim is whether two criminal convictions constitute but a single offense for double jeopardy purposes. Calle, at 771-72. As an initial matter, in order to raise a colorable double jeopardy claim, the two convictions must be based upon the same act. Freeman, at 771. For example, convictions for first-degree rape and assault may violate double jeopardy (see Vladovic, *supra*), but if the two crimes occur on

¹⁰ Writing, painting or drawing on the property of another without permission constitutes third degree malicious mischief. RCW 9A.48.090(b).

different days, the convictions do not arise out of the same act, and therefore, double jeopardy is not implicated.

Here, Unga seems to assume that his two convictions were based upon the same act. Specifically, he seems to assume that he was convicted of vehicle prowl for entering the stolen vehicle with the intent to ride in it. He was not. Unga's conviction for vehicle prowl was based upon entering the vehicle with the intent to vandalize it by writing graffiti on the dashboard. CP 50. Thus, Unga's convictions for riding in the stolen vehicle and for entering the vehicle with the intent to vandalize it were not based upon the same act; therefore, he cannot raise a double jeopardy claim.

d. The Statutes Do Not Expressly Allow Nor Expressly Disallow Multiple Punishments.

Neither the taking a motor vehicle nor the vehicle prowl statute expressly allows or expressly disallows multiple punishments for an act that violates both statutes.

e. The Offenses Fail The Same Evidence Test.

As the statutes do not expressly indicate that taking a motor vehicle and vehicle prowl cannot be punished separately, the court next turns to the "same evidence" or "Blockburger" test. This test asks whether the offenses are the same "in law" and "in fact."

Calle, 125 Wn.2d at 777. Offenses are the same "in fact" when

they arise from the same act. Offenses are the same "in law" when proof of one offense would always prove the other offense. Calle, at 777. If each offense includes elements not included in the other, the offenses are considered different and multiple convictions can stand. Calle, at 777.

Here, Unga's convictions are the same neither "in law" nor "in fact." They are not the same "in law" because each requires the State to prove elements not included in the other. They are not the same "in fact" because different facts were used to prove each charge.

As charged and convicted here, vehicle prowl required the State to prove (1) that Unga unlawfully entered a vehicle, and (2) that at the time he entered the vehicle he had an intent to commit a crime therein. WPIC 61.04; CP 50.

As charged and convicted here, taking a motor vehicle required the State to prove (1) that Unga voluntarily rode in a vehicle, (2) that the vehicle belonged to another person, (3) that the vehicle had been taken from that other person without her permission, and (4) that at the time Unga was riding in the vehicle, he knew it was stolen. WPIC 74.04; CP 49.

As charged and proven here, taking a motor vehicle required proof of a stolen vehicle; vehicle prowl does not. Taking a motor vehicle required proof that Unga voluntarily rode in the vehicle; vehicle prowl does not require that the vehicle even move. Taking a motor vehicle required proof that Unga knew the vehicle was stolen when he rode in it; vehicle prowl has no similar element.

Conversely, vehicle prowl required proof that Unga had the intent to commit a crime inside the vehicle at the time he entered it; taking a motor vehicle does not require intent to commit a crime (knowingly only), and does not require that any *mens rea* exist at the time of entering the vehicle. Vehicle prowl requires that the entry into the vehicle be unlawful; taking a motor vehicle does not require unlawful entry--only knowledge that the vehicle was stolen at the time of riding in it.

With each charged crime having elements not contained in the other, the two offenses fail the "same in law" prong of the "same evidence" test. It makes no difference if they are the same "in fact."¹¹ Because the offenses are not the same "in law," Unga's

¹¹ As stated in subsection 2(c) above, as charged and convicted, Unga's two convictions are not the same "in fact."

convictions must be punished separately unless "there is a clear indication of contrary legislative intent." Calle, at 780.

f. There Is No Evidence That The Legislature Intended To Prohibit Multiple Punishments.

There is no evidence that the Legislature intended vehicle prowl, contained in the burglary and trespass chapter of the RCW, to be considered the same offense as taking a motor vehicle, contained in the theft and robbery chapter of the RCW.

g. The Merger Doctrine Does Not Apply.

Another tool used to determine legislative intent is the merger doctrine, but the doctrine is not applicable here. The merger doctrine:

only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first degree rape) the State must prove not only that a defendant committed that crime (e.g., rape) but that the crime was accompanied by an act [that] is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).^[12]

State v. Eaton, 82 Wn. App. 723, 730, 919 P.2d 116 (1996) (citing Vladovic, 99 Wn.2d 413) (emphasis added). Merger applies only

¹² The first-degree rape statute requires that the perpetrator engage in sexual intercourse by forcible compulsion where the perpetrator either (1) kidnaps or (2) inflicts serious injury upon the victim. RCW 9A.44.040. It is the statutory kidnap and assault requirements that elevate second-degree rape to first-degree rape.

when one crime is elevated by proof of another crime. Freeman, at 772-73. The premise is that this shows that the Legislature intended the elevated crime to constitute the sole punishment for the single act. Id; State v. Esparza, 135 Wn. App. 54, 60, 143 P.3d 612 (2006).

Vehicle prowl does not elevate the crime of taking a motor vehicle to a higher degree. Therefore, the merger doctrine does not apply.

Unga relied upon State v. Lass, 55 Wn. App. 300, 777 P.2d 539 (1989) and the merger doctrine in his argument below. The court in Lass acknowledged that the merger doctrine applies only when proof of one offense elevates another offense to a higher degree. Lass, 55 Wn. App. at 308. However, the court then concluded that vehicle prowl and taking a motor vehicle merge because "no additional steps were necessary to complete both charges." Lass, at 308. In rejecting the conclusion drawn by the court in Lass, the Court of Appeals here properly noted that this is not the test for merger, and because neither crime elevates the other crime to a higher degree, the merger doctrine does not

apply.¹³ State v. L.U., 137 Wn. App. 410, 416-17, 153 P.3d 894 (2007).

h. An Exception To Merger.

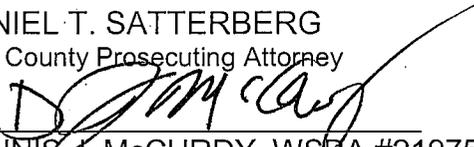
The Court of Appeals here also appropriately noted that an exception to merger would apply in this case. When there is some injury to the person or property of the victim that is separate and distinct from, and not merely incidental to, the crime of which it forms an element, both convictions can stand. Freeman, at 773, 778. Here, the act of damaging the victim's property--the dashboard--was "not merely incidental to the crime of taking a motor vehicle without permission." L.U., at 417. It was a separate and distinct act. Thus, even were the two crimes to merge, both convictions would be allowed to stand.

D. CONCLUSION

For the reasons cited above, this Court should affirm Unga's convictions and sentence.

DATED this 6 day of March, 2008.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

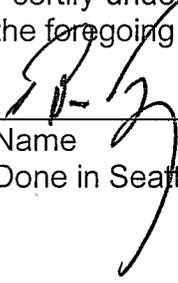
By: 
DENNIS J. McCURDY, WSBA #21975
Senior Deputy Prosecuting Attorney

¹³ In his petition, Unga seems to have abandoned his merger claim. Instead, he now seems to argue that Lass was really applying the "same evidence" test.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana Lind, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Brief of Respondent, in STATE V. UNGA, Cause No. 80020-1, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

03/11/08

Date