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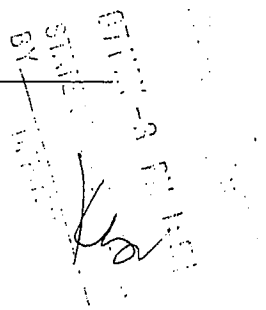

STATE OF WASHINGTON,

Respondent,

vs.

THOMAS HARRY EATON

Appellant.

BRIEF OF APPELLANT

ANNE CRUSER/WSBA #27944
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pm 4/30/07

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A. ASSIGNMENTS OF ERROR

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C. STATEMENT OF FACTS

1. PROCEDURAL HISTORY

The Clark County Prosecuting Attorney charged Appellant, Thomas Harry Eaton, with Possession of Methamphetamine and Driving Under the Influence, alleged to have occurred on September 22nd, 2005. CP 14. By Amended Information, the State charged Mr. Eaton with a

statutory penalty enhancement alleging that he committed the possession of methamphetamine while in a county jail pursuant to RCW 9.94A.533 (5). CP 14. A jury trial commenced on May 1st, 2006. Report of Proceedings. Mr. Eaton was convicted on both counts, and the jury answered "yes" on the penalty enhancement. CP 75-77. This timely appeal followed. CP 102.

2. FACTUAL HISTORY

On September 22nd, 2005 Appellant Thomas Eaton was traveling westbound on McLoughlin Boulevard in Vancouver when he was stopped by Officer Starks of the Vancouver Police Department because his headlights were not on. I RP 79-80. As a result of this traffic stop Mr. Eaton was subsequently arrested for DUI. I RP 92. Mr. Eaton was apparently not searched at the time of his arrest. I RP 77-131 (testimony of Officer Starks). When brought to the jail, Mr. Eaton was searched by the jail staff. I RP 97. During this search, a baggie of methamphetamine was found in Mr. Eaton's sock. I RP 99.

The State charged Mr. Eaton with DUI and with possession of methamphetamine with an enhancement alleging that he committed the offense while in a county jail per RCW 9.94A.533 (5). CP 14. At trial, counsel for Mr. Eaton moved to dismiss the special allegation that Mr. Eaton committed the crime of possession of methamphetamine while in a

county jail. Defense counsel argued that Mr. Eaton could not be convicted of this enhancement where the State would be unable to prove he had knowledge he was going to be taken to the jail when he made the choice to possess methamphetamine, and that a conviction of this enhancement would violate the Fifth Amendment to the United States Constitution because the only way he could have avoided possessing methamphetamine in the county jail, once he was arrested, would have been to offer evidence against himself by notifying Officer Starks that he was carrying methamphetamine. II RP 159-60. The court denied the motion, stating that it was without authority to interpret law but merely required to apply it as written. II RP 159.

The jury returned a verdict of guilty to both charges, and answered "yes" to the special verdict as to Count I—that Mr. Eaton committed the crime in of possession of methamphetamine while in a county jail. CP 75-77. The standard range on Count I would have been zero to six months based upon Mr. Eaton's lack of criminal history, but was reset to twelve to eighteen months based upon the jury's answer of "yes" on the special verdict form. CP 88. Mr. Eaton was given a standard range sentence. CP 91. This timely appealed followed. CP 102. After the notice of appeal was filed the State filed an ex-parte motion and order to correct the judgment and sentence at the request of the Department of Corrections.

CP 116-117, Appendix C. The court granted the motion. CP 118. Mr. Eaton was in the custody of the Department of Corrections at this time (Appendix C) and no hearing was held on this motion according to the clerk's notes in the Superior Court file.

D. ARGUMENT

I. THE DEFENDANT'S CONVICTION FOR THE STATUTORY ENHANCEMENT OF COMMITTING THE CRIME OF POSSESSION OF METHAMPHETAMINE IN A COUNTY JAIL VIOLATES DUE PROCESS AND THE TRIAL COURT ERRED IN DENYING HIS MOTION TO DISMISS THE ENHANCEMENT.

RCW 9.94A.533 (5) (c) provides that where an offender or an accomplice commits the crime of possession of methamphetamine in a county jail or state correctional facility, an additional twelve months will be added to the offender's standard range. The imposition of the statutory enhancement for committing the crime of possession of methamphetamine in a county jail violates due process in Mr. Eaton's case because he did not commit a voluntary act when he entered the jail.

Principles of criminal liability impose two requirements for culpability: Actus reus and mens rea. *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159 (2000); *City of Seattle v. Hill*, 72 Wn.2d 786, 794, 435 P.2d 692 (1967) (criminal liability requires volitional conduct); *State v. Lindberg*, 125 Wash. 51, 215 Pac. 41 (1923) (strict liability, or

mala prohibita, crimes comport with due process so long as one acts voluntarily).

> There are two components of every crime. One is objective—the actus reus; the other subjective—the mens rea. The actus reus is the culpable act itself, the mens rea is the criminal intent with which one performs the criminal act. However, the mens rea does not encompass the entire mental process of one accused of a crime. There is a certain minimal mental element required in order to establish the actus reus itself. This is the element of volition.

State v. Utter, 4 Wn. App. 137, 139, 479 P.2d 946 (1971).

Appellant found no case law authority addressing whether one can be subjected to this enhancement in the situation where he/she did not enter the jail voluntarily but rather was taken there against his will while under arrest by a law enforcement officer. The legislative history of this provision was equally unhelpful to this question. After many hours spent by Appellate counsel searching the legislature's website and with assistance from legislative information center and the Sentencing Guidelines Commission, it appears that this provision was enacted in 1989 as Senate Bill 5040, chapter 124, and was originally codified as RCW 9.94A.310 (5). It was recodified via House Bill 2338 as RCW 9.94A.533 (5). Counsel for Appellant found no statement relating to the legislature's specific purpose for enacting this enhancement. In the preamble to HB 2338, it appears the legislature's intent in enacting this bill, which made numerous changes to drug offender sentencing, was to increase the

effective use of substance abuse treatment and to ensure that sentences for drug offenses accurately reflect the adverse impact of substance abuse and addiction on public safety. (See Appendix B). In any event, if the legislature had indicted an intent to have this enhancement apply to persons who are taken to the jail involuntarily while in possession of a controlled substance, as the trial court was interested in knowing, it would not change Appellant's position that the application of this enhancement to Mr. Eaton in this case violated his right to due process.

The Oregon Court of Appeals has addressed this question in numerous cases, consistently holding that one cannot be held criminally liable for an involuntary act. Oregon Revised Statutes 162.185 (1) (b) is the comparable statute to our RCW 9.94A.533 (5). It provides: "(1) A person commits the crime of supplying contraband if: (b) Being confined in a correctional facility, youth correction facility or state hospital, the person knowingly makes, obtains, or **possesses** any contraband."

In *State v. Tippetts*, 180 Or.App. 350, 43 P.3d 455 (2002), the defendant was arrested at his home following the execution of a search warrant. He was taken to the Washington County Jail where he was turned over to the custody of a corrections officer who searched the defendant and found marijuana in his pants pocket. Id. at 352. The State charged Mr. Tippetts with supplying contraband under ORS 162.185 and

he was convicted. Id. at 352-353. At trial, and again on appeal, he argued that proof of a voluntary act was a "necessary prerequisite to proving criminal liability and that he did not voluntarily introduce marijuana into the jail." Id. at 353. Mr. Tippetts relied upon ORS 161.095 (1), which codifies the common law requirement of actus reus in statutory form and states: "The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which the person is capable of performing." *Tippetts* at 353. The trial court denied his motion, holding that Mr. Tippetts could have avoided commission of the crime by confessing to the possession of marijuana before it was discovered. Id.

The Court of Appeals rejected the trial court's reasoning and agreed with Mr. Tippetts, holding that Mr. Tippetts did not cause the marijuana to be introduced into the jail, but rather the marijuana was only introduced into the jail "because the police took defendant (and the contraband) there against his will." Id. at 354. Following *Tippetts*, the Oregon Court of Appeals consistently reversed convictions for defendants who were charged with supplying contraband when they were taken to a jail involuntarily while under a lawful arrest and found to have drugs on their person. See *State v. Gotchall*, 180 Or.App. 458, 43 P.3d 1121 (2002); *State v. Becker*, 187 Or.App. 274, 66 P.3d 584 (2003); *State v.*

Delaney, 187 Or.App. 717, 71 P.3d 93 (2003); *State v. Gonzales*, 188 Or.App. 430, 71 P.3d 573 (2003); *State v. Getzinger*, 189 Or.App. 431, 76 P.3d 148 (2003); *State v. Thaxton*, 190 Or.App. 351, 79 P.3d 897 (2003); *State v. Ortiz-Valdez*, 190 Or.App. 511, 79 P.3d 371 (2003).

Here, there similarly was no proof that Mr. Eaton voluntarily possessed methamphetamine in a county jail. Mr. Eaton did not, for example, attempt to introduce methamphetamine into the county jail by smuggling it in while residing there, or attempt to transfer it to another who was residing there. He had no intention of going to the county jail on September 22nd, 2005 and was taken there against his will. Furthermore, it is a denial of due process to allow the State to decide that the commission of this offense occurred not at the scene of the traffic stop, but rather at the county jail. Once arrested, Mr. Eaton no longer had control over his location or over any of his possessions. That control rested with Officer Starks and the corrections officers at the jail. The State should not be allowed to physically force a subject into an enhancement zone and then be permitted to choose whether he will be penalized for possessing contraband in the enhancement zone or the non-enhancement zone in which his possession could also be established. There was no suggestion by the State in the proceedings below, for example, that Mr. Eaton did not

possess this methamphetamine at the scene of the traffic stop and somehow acquired it after his arrest.

The State, confusing the concepts of actus reus and mens rea, argued that because it was not required to prove the element of knowledge then Mr. Eaton could properly be held criminally liable for an act that was admittedly not voluntary. Mr. Eaton's conviction for an enhancement that was premised upon an involuntary act violated his right to due process under both the Fifth Amendment to the United States Constitution and Article 1, Section 3 of the Washington State Constitution.

II. MR. EATON WAS DENIED HIS DUE PROCESS RIGHT TO BE PRESENT AT SENTENCING AND HIS RIGHT TO COUNSEL WHEN THE COURT SIGNED AN EX-PARTE ORDER AMENDING HIS JUDGMENT AND SENTENCE TO INCLUDE A FINDING THAT HE WAS CONVICTED OF A CRIME AND AN ENHANCEMENT THAT HE WAS NOT ACTUALLY FOUND BY THE JURY TO HAVE COMMITTED.

The Sixth Amendment to the United States Constitution and Article 1, Section 22 of the Washington State Constitution guarantee the right to counsel at each critical stage of the criminal proceeding. *United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740 (3rd Cir. 1979); *State v. Tinkham*, 74 Wn.App. 102, 109, 871 P.2d 1127 (1994). Sentencing is a critical stage of the criminal proceedings. *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

Mr. Eaton's original judgment and sentence, executed on May 2nd, 2006 did not indicate that a special verdict was returned finding a violation of the uniformed controlled substances act in a protected zone. CP 88. On May 19th, 2006, the Department of Corrections sent a letter to the court seeking clarification of the sentence because while paragraph 2.3 indicated that an enhancement had been imposed on Count I, section 2.1, which would confirm that such a finding was made, did not reflect and enhancement. See Appendix C. Subsequently, on June 26th, 2006, Deputy Prosecutor Scott Ikata filed an ex-parte motion and order with the court seeking to correct the judgment and sentence, relying on CrR 7.8 (a). CP 116-117. Specifically, the State asked the court to amend the judgment and sentence as to paragraph 2.1, found on page 2, by checking the third box. CP 117. The court, ex-parte and without a hearing, granted this motion. CP 118. The third box reads as follows:

> A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Count(s) _____, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of, a civic center designated by a local governing authority as a drug-free zone.

CP 87.

Mr. Eaton, however, was not convicted of *delivering* a controlled substance (see RCW 69.50.401 and RCW 69.50.435), or of manufacturing or possessing with the intent to deliver, and was not found to have committed any of the acts outlined in the third box on page 2 under paragraph 2.1 of Clark County's Judgment and Sentence form. Mr. Eaton was found (albeit in violation of his right to due process) to have committed the crime of mere *possession* of a controlled substance in a county jail. This is not listed in the third box on page 2 of the judgment and sentence. CP 87. Perhaps if Clark County used the form provided by the State, rather than its own incorrect and severely outdated judgment and sentence form, this mistake would not have occurred (the current form provided by the State contains this enhancement at box number 7 on page 2).

Because the amendment of the judgment and sentence[1] in this case involved a finding on his judgment and sentence that he committed two acts he was neither alleged by the State to have committed or found by the jury to have committed (delivery, manufacture, or possession with intent, as opposed to mere possession, in a protected zone he was not found to

[1] The amendment to the judgment and sentence in this case, according to Charlene Huffman, appeals clerk of the Clark County Superior Court, involved simply the order by the court correcting judgment and sentence found at CP 118. It did not involve the execution of a new judgment and sentence or the doctoring of the original judgment and sentence by placing an "x" in the third box on page 2.

have been in), this was not a mere correction of a clerical mistake in the judgment and sentence, as contemplated by CrR 7.8 (a). The concern for Mr. Eaton in this erroneous finding is both obvious and compelling: His judgment and sentence now claims that he is a drug dealer or manufacturer who sold or manufactured drugs in a protected zone such as a school or a school bus. This is false and Mr. Eaton is understandably upset.

CrR 7.8 (a) provides: "Clerical mistakes in judgments, orders or other parts of the record and error therein arising from an oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." Clerical errors, however, cannot be assumed. There is a test.

> In *Presidential Estates Apartment Associates v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996), the court set forth the review necessary to determine whether an error is clerical or judicial. The court looks at "whether the judgment, as amended, embodies the trial court's intention, as expressed in the record at trial" to determine if the error is clerical. If it does, then the amended judgment merely corrects the language the court inadvertently omitted. If it does not, then the error is judicial and the court cannot amend the judgment and sentence.

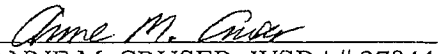
State v. Rooth, 129 Wn.App. 761, 771 (2005). (Internal citations omitted). In Mr. Eaton's case, as already noted, he was not convicted of delivering, manufacturing, or possessing with the intent to deliver, and he was not alleged to have committed his crime in any of the places outlined in box 3 of page 2 of the judgment and sentence. As such, it was error for the trial

court to amend the judgment and sentence without notice to Mr. Eaton and he was denied his right to be present and represented by counsel at the critical stage of sentencing.

E. CONCLUSION

Mr. Eaton's enhancement for committing the crime of possession of methamphetamine in a county jail must be dismissed. Alternatively, if the enhancement is not dismissed, Mr. Eaton is entitled to a new sentencing hearing to amend the judgment and sentence so that it accurately reflects both the crime and the enhancement he was found by the jury to have committed. Mr. Eaton is entitled to be present at this hearing and represented by his trial counsel.

RESPECTFULLY SUBMITTED this 30th day of April, 2007.



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APPENDIX

1. § 9.94A.533. Adjustments to standard sentences

(1) The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.

(2) For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the standard sentence range is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by seventy-five percent.

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Eighteen months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, all firearm enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a

sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(4);

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(4) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the deadly weapon enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a deadly weapon enhancement. If the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any deadly weapon enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Two years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) One year for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Six months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced under (a), (b), and/or (c) of this subsection for any deadly weapon enhancements and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (3)(a), (b), and/or (c) of this section, or both, all deadly weapon enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly

weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(4);

(f) The deadly weapon enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a deadly weapon enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(5) The following additional times shall be added to the standard sentence range if the offender or an accomplice committed the offense while in a county jail or state correctional facility and the offender is being sentenced for one of the crimes listed in this subsection. If the offender or an accomplice committed one of the crimes listed in this subsection while in a county jail or state correctional facility, and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section:

(a) Eighteen months for offenses committed under RCW 69.50.401(2) (a) or (b) or 69.50.410;

(b) Fifteen months for offenses committed under RCW 69.50.401(2) (c), (d), or (e);

(c) Twelve months for offenses committed under RCW 69.50.4013.

For the purposes of this subsection, all of the real property of a state correctional facility or county jail shall be deemed to be part of that facility or county jail.

(6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.605. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

(7) An additional two years shall be added to the standard sentence range for vehicular homicide committed while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502 for each prior offense as defined in RCW 46.61.5055.

(8) (a) The following additional times shall be added to the standard sentence range for felony crimes committed on or after July 1, 2006, if the offense was committed with sexual motivation, as that term is defined in RCW 9.94A.030. If the offender is being sentenced for more than one offense, the sexual motivation enhancement

must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to a sexual motivation enhancement. If the offender committed the offense with sexual motivation and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(i) Two years for any felony defined under the law as a class A felony or with a statutory maximum sentence of at least twenty years, or both;

(ii) Eighteen months for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both;

(iii) One year for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both;

(iv) If the offender is being sentenced for any sexual motivation enhancements under (i), (ii), and/or (iii) of this subsection and the offender has previously been sentenced for any sexual motivation enhancements on or after July 1, 2006, under (i), (ii), and/or (iii) of this subsection, all sexual motivation enhancements under this subsection shall be twice the amount of the enhancement listed;

(b) Notwithstanding any other provision of law, all sexual motivation enhancements under this subsection are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other sexual motivation enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(4);

(c) The sexual motivation enhancements in this subsection apply to all felony crimes;

(d) If the standard sentence range under this subsection exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a sexual motivation enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced;

(e) The portion of the total confinement sentence which the offender must serve under this subsection shall be calculated before any earned early release time is credited to the offender;

(f) Nothing in this subsection prevents a sentencing court from imposing a sentence outside the standard sentence range pursuant to RCW 9.94A.535.

2. ORS § 161.095 (2006)

161.095. Requirements of culpability.

(1) The minimal requirement for criminal liability is the performance by a person of

conduct which includes a voluntary act or the omission to perform an act which the person is capable of performing.

(2) Except as provided in ORS 161.105, a person is not guilty of an offense unless the person acts with a culpable mental state with respect to each material element of the offense that necessarily requires a culpable mental state.

3. ORS § 162.185 (2006)

162.185. Supplying contraband.

(1) A person commits the crime of supplying contraband if:

(a) The person knowingly introduces any contraband into a correctional facility, youth correction facility or state hospital; or

(b) Being confined in a correctional facility, youth correction facility or state hospital, the person knowingly makes, obtains or possesses any contraband.

(2) Supplying contraband is a Class C felony.

4. § 69.50.401. Prohibited acts: A -- Penalties

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

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

(a) A controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam, including its salts, isomers, and salts of isomers, classified in Schedule IV, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) 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 (ii) 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;

(b) Amphetamine, including its salts, isomers, and salts of isomers, or methamphetamine, including its salts, isomers, and salts of isomers, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) 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 (ii) 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, including its salts, isomers, and salts of isomers. The fine moneys deposited with that law enforcement agency must be used

for such clean-up cost;

(c) Any other controlled substance classified in Schedule I, II, or III, is guilty of a class C felony punishable according to chapter 9A.20 RCW;

(d) A substance classified in Schedule IV, except flunitrazepam, including its salts, isomers, and salts of isomers, is guilty of a class C felony punishable according to chapter 9A.20 RCW; or

(e) A substance classified in Schedule V, is guilty of a class C felony punishable according to chapter 9A.20 RCW.

5. § 69.50.435. Violations committed in or on certain public places or facilities -- Additional penalty -- Defenses -- Construction -- Definitions

(1) Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana to a person:

(a) In a school;

(b) On a school bus;

(c) Within one thousand feet of a school bus route stop designated by the school district;

(d) Within one thousand feet of the perimeter of the school grounds;

(e) In a public park;

(f) In a public housing project designated by a local governing authority as a drug-free zone;

(g) On a public transit vehicle;

(h) In a public transit stop shelter;

(i) At a civic center designated as a drug-free zone by the local governing authority; or

(j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand foot perimeter

may be punished by a fine of up to twice the fine otherwise authorized by this chapter, but not including twice the fine authorized by RCW 69.50.406, or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter, but not including twice the imprisonment authorized by RCW 69.50.406, or by both such fine and imprisonment. The provisions of this section shall not operate to more than double the fine or imprisonment otherwise authorized by this chapter for an

offense.

(2) It is not a defense to a prosecution for a violation of this section that the person was unaware that the prohibited conduct took place while in a school or school bus or within one thousand feet of the school or school bus route stop, in a public park, in a public housing project designated by a local governing authority as a drug-free zone, on a public transit vehicle, in a public transit stop shelter, at a civic center designated as a drug-free zone by the local governing authority, or within one thousand feet of the perimeter of a facility designated under subsection (1)(i) of this section, if the local governing authority specifically designates the one thousand foot perimeter.

(3) It is not a defense to a prosecution for a violation of this section or any other prosecution under this chapter that persons under the age of eighteen were not present in the school, the school bus, the public park, the public housing project designated by a local governing authority as a drug-free zone, or the public transit vehicle, or at the school bus route stop, the public transit vehicle stop shelter, at a civic center designated as a drug-free zone by the local governing authority, or within one thousand feet of the perimeter of a facility designated under subsection (1)(i) of this section, if the local governing authority specifically designates the one thousand foot perimeter at the time of the offense or that school was not in session.

(4) It is an affirmative defense to a prosecution for a violation of this section that the prohibited conduct took place entirely within a private residence, that no person under eighteen years of age or younger was present in such private residence at any time during the commission of the offense, and that the prohibited conduct did not involve delivering, manufacturing, selling, or possessing with the intent to manufacture, sell, or deliver any controlled substance in RCW 69.50.401 for profit. The affirmative defense established in this section shall be proved by the defendant by a preponderance of the evidence. This section shall not be construed to establish an affirmative defense with respect to a prosecution for an offense defined in any other section of this chapter.

(5) In a prosecution under this section, a map produced or reproduced by any municipality, school district, county, transit authority engineer, or public housing authority for the purpose of depicting the location and boundaries of the area on or within one thousand feet of any property used for a school, school bus route stop, public park, public housing project designated by a local governing authority as a drug-free zone, public transit vehicle stop shelter, or a civic center designated as a drug-free zone by a local governing authority, or a true copy of such a map, shall under proper authentication, be admissible and shall constitute prima facie evidence of the location and boundaries of those areas if the governing body of the municipality, school district, county, or transit authority has adopted a resolution or ordinance approving the map as the official location and record of the location and boundaries of the area on or within one thousand feet of the school, school bus route stop, public park, public housing project designated by a local governing authority as a drug-free zone, public transit vehicle stop shelter, or civic center designated as a drug-free zone by a local governing authority. Any map approved under this section or a true copy of the map shall be filed with the clerk of the municipality or county, and shall be maintained as an official record of the municipality or county. This section shall not be construed as precluding the prosecution from introducing or relying upon any other evidence or testimony to establish any element of the offense. This section shall not be construed as precluding the use or admissibility of

any map or diagram other than the one which has been approved by the governing body of a municipality, school district, county, transit authority, or public housing authority if the map or diagram is otherwise admissible under court rule.

(6) As used in this section the following terms have the meanings indicated unless the context clearly requires otherwise:

(a) "School" has the meaning under RCW 28A.150.010 or 28A.150.020. The term "school" also includes a private school approved under RCW 28A.195.010;

(b) "School bus" means a school bus as defined by the superintendent of public instruction by rule which is owned and operated by any school district and all school buses which are privately owned and operated under contract or otherwise with any school district in the state for the transportation of students. The term does not include buses operated by common carriers in the urban transportation of students such as transportation of students through a municipal transportation system;

(c) "School bus route stop" means a school bus stop as designated by a school district;

(d) "Public park" means land, including any facilities or improvements on the land, that is operated as a park by the state or a local government;

(e) "Public transit vehicle" means any motor vehicle, street car, train, trolley vehicle, or any other device, vessel, or vehicle which is owned or operated by a transit authority and which is used for the purpose of carrying passengers on a regular schedule;

(f) "Transit authority" means a city, county, or state transportation system, transportation authority, public transportation benefit area, public transit authority, or metropolitan municipal corporation within the state that operates public transit vehicles;

(g) "Stop shelter" means a passenger shelter designated by a transit authority;

(h) "Civic center" means a publicly owned or publicly operated place or facility used for recreational, educational, or cultural activities;

(i) "Public housing project" means the same as "housing project" as defined in RCW 35.82.020.

APPENDIX B

2338-S2
Sponsor(s): House Committee on Appropriations (originally sponsored by Representatives Kagi, Ballasiotes, O'Brien, Lantz, Dickerson, Linville, McIntire, Conway and Wood)

Brief Description: Revising sentences for drug offenses.

HB 2338-S2 - DIGEST

(DIGEST AS ENACTED)

Adopts the recommendations of the sentencing guidelines commission regarding drug offenses.

Declares an intent to increase the use of effective substance abuse treatment for defendants and offenders in Washington in order to make frugal use of state and local resources, thus reducing recidivism and increasing the likelihood that defendants and offenders will become productive and law-abiding persons.

Recognizes that substance abuse treatment can be effective if it is well planned and involves adequate monitoring, and that substance abuse and addiction is a public safety and public health issue that must be more effectively addressed if recidivism is to be reduced.

Intends that sentences for drug offenses accurately reflect the adverse impact of substance abuse and addiction on public safety, that the public must have protection from violent offenders, and further intends that such sentences be based on policies that are supported by research and public policy goals established by the legislature.

Directs the Washington state institute for public policy to evaluate the effectiveness of the drug offense sentencing grid in reducing recidivism and its financial impact. The Washington state institute for public policy shall present a preliminary report to the legislature by December 1, 2007, and shall present a final report regarding long-term recidivism and its financial impacts to the legislature by December 1, 2008.

Directs the Washington state institute for public policy to by March 1, 2003, report on the cost-effectiveness of existing drug courts in Washington and their impacts on reducing recidivism.

Provides that, if specific funding for the purposes of this act, referencing this act by bill or chapter number, is not provided by June 30, 2002, in the omnibus appropriations act, this act is null and void.

HB 2338 - DIGEST

(SUBSTITUTED FOR - SEE 2ND SUB)

Adopts the recommendations of the sentencing guidelines commission regarding drug offenses.

Declares an intent to increase the use of effective substance abuse treatment for defendants and offenders in Washington in order to make frugal use of state and local resources, thus reducing recidivism and increasing the likelihood that defendants and offenders will become productive and law-abiding persons.

Intends that sentences for drug offenses accurately reflect the adverse impact of substance abuse and addiction on public safety, that the public must have protection from violent offenders, and further intends that such sentences be based on policies that are supported by research and public policy goals established by the legislature.

APPENDIX C

STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
WASHINGTON CORRECTIONS CENTER
P.O. Box 900 · Shelton, Washington 98584

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MAY 25 2006
PROSECUTORS OFFICE

May 19, 2006

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Clark County Superior Court
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RE: EATON, Thomas Harry
DOC#894230
CSE#05-1-02126-8

Dear Judge Wulle and Messrs. Ikata and Bruce:

Mr. Eaton was received at the Washington Corrections Center on May 5, 2006. He was convicted of one count of Possession of a Controlled Substance-Methamphetamine with an offense date of September 22, 2005. Upon review of the Judgment and Sentence, it appears we need clarification of the sentencing.

The Sentencing Data in Section 2.3 reflects a 12-month enhancement for VUCSA in a protected zone. Section 2.1 does not reflect a special verdict/finding for Violation of the Uniform Controlled Substances Act in a protected zone.

We respectfully request the Court review the Judgment and Sentence to verify if the enhancement is valid for this sentence. If so, please amend Section 2.1 to provide a special verdict/finding to clarify the enhancement portion of the sentence for this conviction.

Thank you for your assistance in this matter.

Sincerely,

Wendy Stigall
Correctional Records Manager
(360) 427-4628
wsstigall@doc1.wa.gov

cc: Central File

"Working Together for SAFE Communities"

Attachments

07 MAY -3 PM 1:[illegible]
STATE OF WASHINGTON
BY
DEPUTY

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

STATE OF WASHINGTON, Respondent, vs. THOMAS EATON, Appellant.	Court of Appeals No. 34911-6-II Clark County No. 05-1-02126-8 AFFIDAVIT OF MAILING

ANNE M. CRUSER, being sworn on oath, states that on the 30th day of April 2007, affiant deposited in the mails of the United States of America, a properly stamped envelope directed to:

Arthur Curtis
Clark County Prosecuting Attorney
P.O. Box 5000
Vancouver, WA 98666-5000

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

AND

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