

No.

81939-4

IN THE WASHINGTON STATE SUPREME COURT

In re the Personal Restraint of:
JAMES EASTMOND,
Petitioner.

CLERK
RONALD L. SWANWENTER
08 JUL 31 11 8:21
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PERSONAL RESTRAINT PETITION
AND APPENDICES

By:
Suzanne Lee Elliott
Attorney for Petitioner
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-0291

RONALD R. CARPENTER
SUPREME COURT CLERK

THE SUPREME COURT
STATE OF WASHINGTON



TEMPLE OF JUSTICE
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OLYMPIA, WA 98504-0929

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July 31, 2008

Suzanne Lee Elliott
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104

Counsel:

On July 31, 2008, the Petitioner's "PERSONAL RESTRAINT PETITION AND APPENDICES" and "PETITIONER'S MOTION TO CONSOLIDATE HIS PRP WITH *STATE V. MANDANAS*, No. 80441-9" was received.

The petition cannot be processed further until either the required \$250 filing fee is paid or the fee is waived upon appropriate request.

In the event the Petitioner is unable to pay the filing fee, I have enclosed a "Statement of Finances" form with which waiver of the filing fee may be requested (a statement of Mr. Eastmond's total assets and liabilities should support any such request; see RAP 16.7(a)(3)). Please note that the form requires information as to the Petitioner's "spendable balance" in any prison or institutional account.

Accordingly, the pleadings will be held without further action until either the filing fee has been paid or an appropriate request for waiver of the filing fee has been submitted.

Sincerely,

Susan L. Carlson
Supreme Court Deputy Clerk

SLC:bbm



LAW OFFICE OF
Suzanne Lee Elliott
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705 SECOND AVENUE
SEATTLE, WASHINGTON 98104

81939-4

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July 30, 2008

Mr. C.J. Merritt, Clerk
Washington Supreme Court
415 12th Avenue SW
P.O. Box 40929
Olympia, WA 98504-0929

Re: *Personal Restraint of James Eastmond*

CLERK

08 JUN 31 PM 8:21
CLERK CENTER

Dear Mr. Merritt:

Enclosed for filing are the original and one copy of the Personal Restraint Petition and Petitioner's Motion to Consolidate in the above-referenced case. To confirm receipt, please conform the enclosed face pages and return them to me in the postage-paid envelope.

Thank you for your assistance.

Sincerely,



Emily Knudsen
Legal Assistant

Enclosures

No.

IN THE WASHINGTON STATE SUPREME COURT

CLERK

08 JUL 31 AM 8:21
RONALD A. CARPENTER
SUPERIOR COURT
CLERK

In re the Personal Restraint of:

JAMES EASTMON
Petitioner.

*Please conform
& return.
Thank you.*

PERSONAL RESTRAINT PETITION
AND APPENDICES

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Seattle, WA 98104
(206) 623-0291

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) TO CONSOLIDATE HIS)
) PRP WITH STATE V.)
) MANDANAS, No. 80441-9)

CLERK

THOMAS R. HANSEN

08 JUN 21 AM 8:21

I. IDENTITY OF MOVING PARTY

Petitioner James Eastmond requests the relief designated in Part II of this motion.

II. STATEMENT OF RELIEF SOUGHT

Petitioner moves this Court for an order consolidating this PRP with *State v. Mandanas*, No. 80441-9, set for argument on October 14, 2008.

III. GROUND'S FOR RELIEF AND ARGUMENT

Eastmond's timely filed personal restraint petition raises several issues regarding the weapons enhancements imposed in his case. One of his issues is identical to the issue raised in *State v. Mandanas*. Consolidating these two actions would, thus, conserve limited judicial

resources.

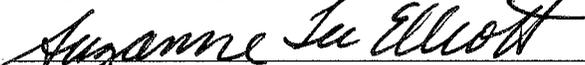
In addition, consolidation with *Mandanas* would accelerate a decision in this case. If Mr. Eastmond prevails on any of his challenges to the weapons enhancements, he will be eligible for immediate release because he has currently served more than 90 months on these charges. If his case is delayed further he will be denied an adequate remedy in this appeal.

IV. CONCLUSION

For the reasons stated above, this court should consolidate this case with *State v. Mandanas*.

DATED this 30th day of July, 2008.

Respectfully submitted,

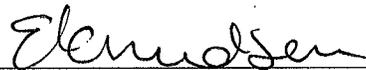

Suzanne Lee Elliott, WSBA 12634
Attorney for James Eastmond

CERTIFICATE OF SERVICE BY MAIL

I declare under penalty of perjury that on July 30, 2008, I placed a copy of this document in the U.S. Mail, postage prepaid, to

Mr. Seth Fine
Snohomish County Prosecutor's Office
3000 Rockefeller Avenue
Everett, WA 98201-4060

Mr. James Eastmond #821591
Monroe Correctional Complex
PO Box 777
Monroe, WA 98272



Emily Knudsen, Legal Assistant

81939-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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| _____) | TO CONSOLIDATE HIS |
| | PRP WITH <i>STATE V.</i> |
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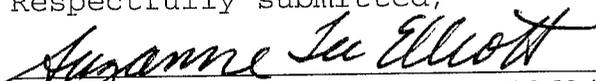
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Emily Knudsen, Legal Assistant

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A. STATUS OF PETITIONER

James Eastmond was convicted in Snohomish County of one count of first-degree burglary and one count of first-degree robbery. He is presently in custody serving a 156 month sentence.

B. STATEMENT OF THE CASE

In 2000 Eastmond was charged with one count of first-degree robbery and one count of first-degree burglary. Appendix 1, Amended Information filed August 14, 2000. As to each count, the Amended Information stated: "in the commission of said crime and in immediate flight therefrom, the defendant or an accomplice was armed with a deadly weapon; and that at the time of the commission of the crime, the defendant or an accomplice was armed with a firearm, as provided and defined in RCW 9.94A.310, RCW 9.94A.41.010, and RCW 9.94A.125." *Id.*

The jury instructions told the jury that:

The term "deadly weapon" includes any firearm, whether loaded or not.

Appendix 3, Instruction 12.

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in Counts I and II.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

Appendix 3, Instruction 15.

The Special Verdict forms asked the jury to determine whether the defendant “was armed with a deadly weapon” at the time he committed the offenses. Appendix 4, Special Verdict Forms. The jury convicted Eastmond as charged and answered “yes” on the special verdict form questions.

At Eastmond’s initial sentencing the Court imposed a sentence of 121 months – concurrent sentences of 61 and 41 months for the two substantive charges and one single weapon enhancement of 60 months. Appendix 5, Transcript of Sentencing, 1/30/01; Appendix 6, Judgment and Sentence, 1/30/01.

Both Eastmond and the State appealed. The Court of Appeals affirmed Eastmond’s conviction but reversed the sentence, finding that Eastmond’s juvenile convictions had been improperly included in his offender score, the court failed to properly consider the issue of “same criminal conduct” and erred in imposing a single weapon enhancement. Appendix 7, *State v. Eastmond*, # 48151-7-I, Unpublished Opinion, filed 2/03/03.

On remand, the sentencing judge corrected Eastmond's offender score, found that the robbery and burglary were the same criminal conduct, but imposed two weapons enhancements of 60 months each. The court, thus, imposed 156 months in prison. Appendix 8, Transcript of Sentencing, 1/16/04. The trial court specifically noted on the Judgment and Sentence that "Court does not apply anti-merger statute." Appendix 9, Judgment and Sentence, filed 1/20/04.

Mr. Eastmond filed this second appeal of that sentencing and argued that the trial court erred in failing to recognize that it could impose an exceptional sentence below the standard range. The Court of Appeals again affirmed. Appendix 10, *State v. Eastmond*, #53836-5-I, filed 1/31/05. Eastmond filed a petition for review in this Court (cause no. #76777-7). In the interim, on April 14, 2005, this Court issued its opinion in *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005) (*Recuenco I*).

In May 2005, Eastmond was given permission to file a supplemental brief raising the *Recuenco* issue as a part of his petition for review. On October 2, 2007, this Court denied Eastmond's petition for review. Appendix 11, Order Denying Petition for Review, filed 10/02/07.

C. GROUNDS FOR RELIEF

1. *The trial court erred in imposing a 60 month firearm enhancement on each count in this case because the jury found only that Eastmond was armed with a deadly weapon.*

Until 2005, sentencing judges determined whether the defendant was armed with a deadly weapon or a firearm. At the time Eastmond was sentenced, trial judges were permitted to impose the lengthier firearm enhancements even when juries found only the presence of deadly weapons. *See e.g., State v. Meggyesy*, 90 Wn. App. 693, 958 P.2d 319, review denied, 136 Wn.2d 1028, 972 P.2d 465 (1998), *State v. Rai*, 97 Wn. App. 307, 983 P.2d 712 (1999); *State v. Olney*, 97 Wn. App. 913, 987 P.2d 662 (1999). Then came the fundamental change in sentencing practice when the United States Supreme Court decided *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Following the *Blakely* decision, the Washington State Supreme Court limited the imposition of any weapons enhancement to the actual type of enhancement charged or defined in the jury instructions. *Recuenco I*. In *Recuenco I*, the Washington State Supreme Court held that where a jury did not explicitly find beyond a reasonable doubt that the defendant was armed with a firearm, the court was limited to the deadly weapon enhancements.

It is true that such an error can be harmless under the federal constitution. *State v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). But our State Supreme Court concluded that under Washington law, harmless error analysis does not apply in these circumstances. Thus, it affirmed *Recuenco I* and remanded to the trial court. *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008)

(*Recuenco II*).

The facts in this case are nearly identical to those in *Recuenco*. Like the information in *Recuenco*, the notice of the charged offense stated that the State was relying on both the deadly weapon enhancement and the firearm enhancement. But the jury was not given a firearm enhancement instruction. The jury was instructed only that “a pistol, revolver, or any other firearm is a deadly weapon whether loaded or not.” And it was not instructed on the definition of a firearm as required by WPIC 2.10.01. And the jury returned only deadly weapon verdicts.

2. *There is no retroactivity issue in this case.*

This Court held that a new rule applies prospectively to all cases pending on direct review or not yet final. *State v. Hanson*, 151 Wn.2d 783, 91 P.3d 888 (2004). Mr. Eastmond’s case was pending on direct appeal when this Court issued its decision in *Recuenco I*. Although

Recuenco II was issued after this Court issued the mandate in Mr. Eastmond's second appeal, #53836-5-I, that decision simply reaffirmed *Recuenco I*.

3. *In the alternative, this Court should recall the mandate in State v. Eastmond, # 53836-5-I.*

RAP 2.5(c)(2) provides that:

The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

The Court of Appeals recently reaffirmed that the appellate courts have authority to recall the mandate in the interests of justice under this rule. *State v. Schwab*, 134 Wn. App. 635, 141 P.3d 658 (2006), *affirmed on related grounds*, -- Wn.2d --, 185 P.3d 1151 (2008).

Here, Mr. Eastmond properly raised the *Recuenco* issue as soon as this Court issued its initial opinion in 2005. Thus, it would be unjust to force him to serve an illegal sentence simply because the mandate in his appeal was issued shortly before this Court reaffirmed the first *Recuenco* decision in 2008. For that reason, if necessary, this Court should recall the mandate issued in October, 2007 so that it can correct the illegal sentence.

4. *Regardless of whether the proper enhancement was for a deadly weapon instead of a firearm, where the State argued throughout that Eastmond was armed only with one weapon, and where the trial court expressly found that the two charged offenses were the "same criminal conduct," it was improper for the trial court to impose two consecutive weapons enhancements.¹*

In this case there was some evidence that more than one weapon was involved in the incident. One of Eastmond's co-defendants had a police baton, another grabbed the victim's samurai sword from inside the victim's apartment. But Eastmond was charged with only *one* weapon enhancement. And, throughout closing the State argued only for a jury finding regarding the semiautomatic rifle. Appendix 2, Transcript of Closing, 11/17/00.²

- a. Statutory Construction

RCW 9.94A.533(3) provides in pertinent part:

[A]dditional 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

¹ These are precisely the same arguments as those made by Mr. Todd Maybrow on behalf of Mr. Bayani Mandanas in *State v. Mandanas*, #80441-9, scheduled for argument in this Court in the fall of 2008.

² In *State v. DeSantiago*, 149 Wn.2d 402, 68 P.3d 1065 (2003), this Court concluded that the previously codified version of this same statute allows the same offense to be enhanced more than once for each weapon used in a sentence offense.

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.

* * * * *

(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.

Id.

“Where statutory language is plain and unambiguous, a statute’s meaning must be derived from the wording of the statute itself.” *In re Swanson*, 115 Wn.2d 21, 27, 804 P.2d 1 (1990) (quoting *Human Rights Comm’n v. Cheney Sch. Dist. No. 30*, 97 Wn.2d 118, 121, 641 P.2d 163 (1982)). A statute must be construed as a whole so as to give effect to all language and to harmonize all provisions. *See City of Seattle v. Fontanilla*, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996). Under rules of statutory construction each provision of a statute should be read together (in para material) with other provisions in order to determine the legislative intent underlying the entire statutory scheme. *See, e.g., In re Estate of Kerr*, 134 Wn.2d 328, 336, 949 P.2d 810 (1998). The purpose of interpreting statutory provisions together with related provisions is to achieve a harmonious and unified statutory scheme that maintains the

integrity of the respective statutes. *See id.* (citing *State v. Williams*, 94 Wn.2d 531, 547, 617 P.2d 1012 (1980); *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974)). Statutes relating to the same subject must be read as complementary, instead of in conflict with each other. *See, e.g., Waste Management of Seattle, Inc. v. Utilities Transp. Comm'n*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994).

As a threshold matter, RCW 9.94A.533(3)(e) provides that a firearm enhancement may apply if the defendant or an accomplice is armed with a firearm and he is “being sentenced” for one or more of the listed offenses. *See id.* (emphasis added). Thus, by its own terms, a firearm enhancement should not apply to any offense upon which the defendant is NOT being sentenced. Where a sentencing court finds that two convictions encompass “same criminal conduct,” however, these offenses must be “counted as one crime” and the defendant is only sentenced for a single offense. *See* RCW 9.94A.589(1)(a).

Similarly, RCW 9.94A.533(3)(e) states that firearm enhancements are mandatory and consecutive in general, but it includes a proviso that such enhancements apply only to “all offenses sentenced under this chapter.” *Id.* (emphasis added). In light of the clear terms of RCW 9.94A.589(1)(a), the legislature did not authorize multiple enhancements were the defendant is being sentenced upon only a single, unified offense.

Division III seemed to conclude that convictions for two related assaults may be subject to consecutive weapon enhancements even if the assaults could be considered “same criminal conduct.” *See State v. Callihan*, 120 Wn.App. 620, 623, 85 P.3d 979 (2004). The *Callihan* Court offered little analysis to support its conclusion. Instead, it simply stated that RCW 9.94A.310 (a previous version of this same statute)

unambiguously requires consecutive sentences for each enhancement.

Callihan did not present the same issues as in this case. The two assaults in *Callihan* were clearly distinct acts. It is hard to understand how any court could have found that they constituted same criminal conduct under RCW 9.94A.589(1)(a). Nevertheless, relying upon this single precedent, the court below in the instant case concluded that the two enhancements must run consecutively to the charged offenses and to each other.

The State is usually permitted to charge a defendant with multiple offenses – and multiple alternative offenses – based upon the same transaction and occurrence. *See State v. Korum*, 157 Wn.2d 614, 141 P.3d 13 (2006) (discussing CrR 4.3). But this does not mean that the Court must impose an increased sentence based upon the multiplicity of charges, particularly where such a scheme would necessarily lead to absurd results. *See e.g., State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66 (2002) (court

must avoid a literal reading of a statute if it would result in unlikely, absurd, or strained consequences).

For example, when faced with a situation where the defendant fires a single gunshot and seriously injures another person during the course of an argument, the State would be free to charge that defendant with numerous offenses: assault in the first degree (assault with intent to kill), assault in the second degree (assault with a firearm), assault in the third degree (reckless assault), felony harassment, and perhaps numerous other offenses. In addition, the State would be free to allege that the defendant was armed with a firearm during the course of each of these offenses. If we assume that neither the State nor the defense requested a lesser-included crime or lesser degree instruction (as in WPIC 4.11), the jury would be free to return verdicts on each of these alternative charges. Clearly, the legislature could not have intended for the court to impose consecutive terms for each firearm enhancement that could conceivably be charged on account of a single incident involving one firearm and one victim.

Another example helps to make this same point. Assume that a defendant strikes an individual with multiple blows while holding a firearm.

Conceivably, the State could charge the defendant with assault for each blow and seek a firearm enhancement on each charge. Although there

would be no question that the Court would impose just one sentence for the multiple blows, the Court would need to impose consecutive multiple enhancements for each of the charged offenses. Such a result defies logic and common sense.

The proposed construction would harmonize these two related provisions – and at the same time it would guard against the absurd results that would necessarily flow from the State’s proffered interpretation.

This Court should conclude that the firearm enhancement provisions are ambiguous in these circumstances. *See e.g., United States v. Santos*, 128 S.Ct. 2020 (2008) (applying rule of lenity to interpret ambiguous terms in federal money laundering statute). The rule of lenity applies to resolve statutory ambiguities in criminal cases in favor of the defendant, absent legislative intent to the contrary. *See State v. Lewis (In re Charles)*, 135 Wn.2d 239, 249-50, 955 P.2d 798 (1998). *Accord State v. Roberts*, 117 Wn.2d 576, 585-86, 817 P.2d 855 (1991). The rule applies in the event of ambiguous provisions of the Sentencing Reform Act as in this case. *See Id.*

b. Double Jeopardy

The United States and Washington Constitutions’ double jeopardy clauses are “identical in thought, substance, and purpose.” *State v. Schoel*,

54 Wn.2d 388, 391, 341 P.2d 481 (1959). U.S. Const. amend. V; Const. art. I, § 9 They both “protect against multiple punishments for the same offense, as well as against a subsequent prosecution for the same offense after acquittal or conviction.” *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005) (citing *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)). Courts may not enter multiple convictions for the same offense without offending double jeopardy. *See State v. Vladovic*, 99 Wn.2d 413, 422, 662 P.2d 853 (1983). *See also State v. Womac*, 160 Wn.2d 643, 657, 160 P.3d 40 (2007) (“double jeopardy may be violated when a defendant receives multiple convictions for a single offense (regardless of whether concurrent sentences are imposed.)”).

The legal foundation for the unit of prosecution analysis rests on double jeopardy protections. While the issue is one of constitutional magnitude on double jeopardy grounds, the analytical framework centers on a question of statutory interpretation and legislative intent. *See State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). When the legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects against multiple convictions for committing just one unit of the crime. *See Adel*, 136 Wn.2d at 634.

If the legislature has failed to denote the unit of prosecution in a criminal statute, the United States Supreme Court has declared that the

ambiguity should be construed in favor of lenity. *See Bell v. United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 99 L.Ed.2d 905 (1955); *State v. Tvedt*, 153 Wn.2d 705, 710-11, 107 P.3d 728 (2005).

In *Adel*, for example, the Court concluded that a defendant could not be punished multiple times for simple possession of marijuana based upon the drug being found in multiple places. In so ruling, the Court rejected the claim that the defendant violated the possession statute multiple times simply because he constructively possessed the drug in two different places and emphasized that the State's argument rested "on a slippery slope of prosecutorial discretion to multiply charges." *Id.* at 636.

Similarly, in *State v. Varnell*, 162 Wn.2d 165, 170 P.3d 24 (2007), the Court analyzed the appropriate prosecution unit for Washington's solicitation statute and concluded that the statute criminalizes the singular act of engaging another to commit a crime. Thus, the court found one singular unit, even though the defendant had been convicted for soliciting the murder of four individuals. As the Court explained:

Varnell's solicitation to the undercover detective to commit the four murders was made only to the detective, at the same time, in the same place, and for the same motive. This scenario constitutes a single unit of prosecution.

Id. at 171.

In *DeSantiago*, this Court concluded that, under the enhancement statute, use of the term “a firearm” means that a defendant may be punished for each firearm involved. *See* 149 Wn.2d at 419. Here, there is no dispute that the defendant possessed only a single firearm.

As this Court has explained, the unit of prosecution need not be determined by any single characteristic or factor. *See e.g., Tvedt*, 153 Wn.2d at 711. In a case of this sort, in light of the terms of the statute, the prosecution unit is each “sentenced offense.” Thus, where the defendant is sentenced for a single offense, only one prosecution unit – or enhancement – can apply.

5. *There is no retroactivity issue regarding the double jeopardy issue.*

Any ruling by this Court on the double jeopardy issue will necessarily involve an issue of statutory construction. Thus, any decision by this Court will apply to all cases raising the same issue, no matter when they were final. That is because it is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it. “In other words, there is no ‘retroactive’ effect of the court’s construction of a statute; rather, once the court has determined the meaning, that is

what the statute has meant since its enactment.” *Johnson v. Morris*, 87 Wn.2d 922, 927-28, 557 P.2d 1299 (1976) (citations omitted).

6. *Eastmond may raise these issues regarding the weapons enhancements even though he raised these issues in his appeals.*

A petitioner in a personal restraint petition is not prohibited from renewing an issue that was raised and rejected on direct appeal when the interests of justice require relitigation of that issue. An issue is considered raised and rejected on direct appeal if the same ground presented in the petition was determined adversely to the petitioner on appeal and the prior determination was on the merits. *In re Pers. Restraint of Taylor*, 105 Wn.2d 683, 687, 717 P.2d 755 (1986). The interests of justice are served by reexamining an issue if there has been an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 720, 16 P.3d 1 (2001).

As to the *Recuenco* issue, Eastmond raised the issue in a supplemental brief in support of his petition for review to this Court. But it is impossible to tell if the order denying review included consideration of the issue “on the merits.” And, *Recuenco* was an intervening decision in the sense that it was published very late in Eastmond’s appellate

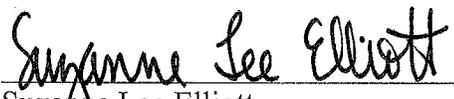
process. Moreover, even if this Court did decide Eastmond's *Recuenco* issue on the merits, it did so incorrectly. An incorrect appellate decision can be corrected in a PRP proceeding when the interests of justice so require. *In re Personal Restraint of Percer*, 150 Wn.2d 41, 48, 75 P.3d 488 (2003).

As to the double jeopardy issue, *State v. Callihan*, 120 Wn.App. 620, 623, 85 P.3d 979 (2004), has been the controlling precedent on this issue when dismissing Sutton's personal restraint petition. But if this Court grants Mr. Mandanas relief, it will need to overrule *Callihan*, and there will be a substantial change in the law.

D. CONCLUSION

This Court should grant the petition on all of the grounds stated above.

Respectfully submitted this 30th day of July 2008.


Suzanne Lee Elliott
WSBA 12634

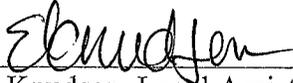
CERTIFICATE OF SERVICE

I declare under penalty of perjury that on July 30, 2008, I served one copy of the foregoing document by United States Mail, postage prepaid,

to:

Mr. Seth Fine
Snohomish County Prosecutor's Office
3000 Rockefeller Avenue
Everett, WA 98201-4060

Mr. James Eastmond #821591
Monroe Correctional Complex
PO Box 777
Monroe, WA 98272



Emily Knudsen, Legal Assistant

Appendix 1

Amended Information

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 v.)
)
 EASTMOND, JAMES TAYLOR,)
)
 Defendant.)

No. 00-1-00227-5
AMENDED INFORMATION

Aliases:

Other co-defendants in this case: BUNDY, JOSHUA DUSTIN, BUSH, TODD RAYMOND, COTE, JACOB, VARGAS III, GUADALUPE

Comes now James H. Krider, Prosecuting Attorney for Snohomish County, State of Washington, and by this, his Information, charges and accuses the above-named defendant(s) with the following crime(s) committed in the State of Washington:

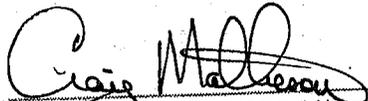
COUNT I: FIRST DEGREE ROBBERY, committed as follows: That the defendant, on or about the 30th day of December, 1999, with intent to commit theft, did unlawfully take personal property of another, to-wit: marijuana, from the person or in the presence of Thomas Gibbler, against such person's will, by use or threatened use of immediate force, violence, and fear of injury to Thomas Gibbler, and in the commission of said crime and in immediate flight therefrom, the defendant or an accomplice was armed with a deadly weapon; and that at the time of the commission of the crime, the defendant or an accomplice was armed with a firearm, as provided and defined in RCW 9.94A.310, RCW 9.41.010, and RCW 9.94A.125; proscribed by RCW 9A.56.200, a felony.

COUNT II: FIRST DEGREE BURGLARY, committed as follows: That the defendant, on or about the 30th day of December, 1999, with intent to commit a crime against a person or property therein, did enter and remain unlawfully in the building of Thomas Gibbler, located at 1033 136th Street SW, Everett, Washington, and in entering and while in such building and in immediate flight therefrom, the defendant or another participant in the crime was armed with a firearm, a deadly weapon; proscribed by RCW 9A.52.020, a felony; and that at the time of the commission of the crime, the defendant or an accomplice was armed with a firearm, as provided and defined in RCW 9.94A.310, RCW 9.41.010, and RCW 9.94A.125.

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COUNTY CLERK
SNOHOMISH CO. WASH.

JB
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JAMES H. KRIDER
PROSECUTING ATTORNEY


CRAIG S. MATHESON, #18556
Deputy Prosecuting Attorney

Appendix 2

Verbatim Report of Proceedings
Closing Argument
(11/17/2000)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

FILED
COURT REPORTER
SNOHOMISH
2001 JUN 29 AM 11:29

THE STATE OF WASHINGTON,
Plaintiff,

NO. 00-1-00227-5

vs.

JAMES EASTMOND,
Defendant.

COA NO. 48151-7-1

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2001 JUN 29 AM 9:01

VERBATIM REPORT OF PROCEEDINGS

THE HONORABLE GERALD L. KNIGHT, JUDGE
Snohomish County Courthouse
Everett, Washington
November 17, 2000
Volume V, Pages 667 - 752

APPEARANCES:

FOR THE STATE:

CRAIG MATHESON
Deputy Prosecuting Attorney

FOR THE DEFENDANT:

DAVID SHAYNE
Attorney at Law

SHARON L. WESTLING, RMR
OFFICIAL COURT REPORTER
CSR No. WE-ST-LS-L452Q5
425 388 3571

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| JOHN LIND | 42 | 51 | | |
| KARL GILJE | 53 | 58 | | |
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1

MORNING SESSION

2

November 17, 2000

3

(The following occurred out of the
presence of the jury:)

4

5

6

THE COURT: Mr. Shane, I've received your
supplemental reasonable doubt instruction. It reads

7

differently than the WPIC. Did you intentionally
submit it that way?

8

9

MR. SHANE: I copied it out of the WPIC, it was
like the old 401 (a), I believe that's the --

10

11

THE COURT: No. I was just looking at the 401.

12

MR. SHANE: It's not the abiding belief one.

13

14

THE COURT: I know which one it is. But the
instruction in WPIC reads -- how it reads differently
than yours, your instruction reads as follows. A
reasonable doubt is one for which a reason exists and
may arise from the evidence or lack of evidence. A
reasonable doubt is one that would exist in the mind
of a reasonable person after fully, fairly, and
carefully considering all the evidence. That's where
your instruction stops. The WPIC instruction goes on
and includes these four words: or lack of evidence.

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MR. SHANE: That's probably my own typo. I would
not object if the Court wanted to --

24

25

THE COURT: Do you want the instruction that you

1 submitted to the Court?

2 MR. SHANE: No. I thank you, Your Honor, for
3 correcting it. I don't have a copy. I would ask the
4 Court just to interlineate those four words.

5 THE COURT: Mr. Matheson?

6 MR. MATHESON: Again, I prefer the one I
7 proposed, but it's -- I don't think it's that big of a
8 deal one way or the other.

9 THE COURT: All right. Well, I'm not going to
10 interlineate it. It highlights it. I'll have my law
11 clerk type it over. I'm just going to read it to
12 them.

13 MR. SHANE: Thank you, Your Honor.

14 THE COURT: Mr. Matheson, did you get one of the
15 new reasonable doubt instructions I've been talking
16 about from the defense?

17 MR. MATHESON: Yes. Apparently the defense
18 doesn't have one.

19 MR. SHANE: Just, and this is the first I heard
20 of this, and I'm calling this to the Court's
21 attention, I haven't informed this, but my client
22 informed me or asked me whether he would be entitled
23 to say anything to the jury.

24 THE COURT: Absolutely not.

25 MR. SHANE: Okay.

1 THE COURT: He was making a request?

2 MR. SHANE: Yes, he was.

3 THE COURT: No. He's represented by counsel, we
4 don't have co-counsel here. So you will make the
5 closing argument in his behalf, and I'm sure you'll do
6 a good job.

7 The State want to say anything in regards to the
8 request?

9 MR. MATHESON: Not if the Court's ruling no.

10 THE COURT: You just don't. You don't have
11 co-counsel when you have a nonattorney and an
12 attorney. So you'll be making the argument,
13 Mr. Shane, not your client.

14 MR. SHANE: Thank you.

15 THE COURT: Bring the jurors in.

16 MR. SHANE: I presume there is nothing wrong
17 with me saying: I want to say on my client's behalf --

18 THE COURT: No.

19 MR. SHANE: -- whatever it is.

20 (The following occurred in the
21 presence of the jury:)

22 THE COURT: Good morning. Please be seated.

23 You've heard the testimony. What remains to be
24 done is for me to instruct you as to the law and for
25 you to hear closing argument. And that's what we're

1 going to do right now. I will read the instructions
2 to you. As I told you earlier, you will have the
3 typewritten instructions with you in the jury room.

4 (The reading of the Court's
5 instructions to the jury was not
6 reported.)

6 MR. MATHESON: I told you the evidence in this
7 particular case was going to show beyond any shadow of
8 a doubt that a vicious crime occurred at the home of
9 Thomas Gibler on December 30th of 1999, and that the
10 defendant, James Eastmond, was one of the participants
11 in that crime. I would suggest that every bit of
12 credible evidence that you've heard throughout the
13 last four days of trial have borne that out.

14 Before I get started talking about some of the
15 specific pieces of evidence that I think as a jury you
16 should consider, I want to remind you of one thing.
17 The evidence that you heard was from the witnesses
18 that were sworn in on the stand and the evidence items
19 that were marked and admitted by the judge. What I'm
20 going to say, what defense attorney is going to say is
21 not evidence. That's an important thing to keep in
22 mind. So if you disagree with what one of the
23 attorneys has to say, think collectively as to what
24 the actual witness on the stand said, or what evidence
25 was admitted in the trial.

1 Now, initially, I suggest, and I don't anticipate
2 that there is going to be any serious argument, if
3 any, that the crime of robbery in the first degree and
4 the crime of burglary in the first degree didn't occur
5 on December 30th. I would suggest that when the
6 argument is all done, the only issue before you is was
7 the defendant there.

8 The evidence you heard from Tom Gibler, the
9 evidence you heard from Todd Bush, from Jake Cote,
10 from JJ Vargas, all spell out in graphic detail a dope
11 rip. A dope rip that almost turned lethal for Josh
12 Bundy, and quite frankly could have turned lethal for
13 Tom Gibler if he hadn't got out the front door when
14 Todd Bush was trying to lead him downstairs.

15 You saw the samurai sword, the SKS rifle, you
16 heard the testimony from the various officers about
17 the dope that was found in the house and the blood and
18 marijuana trail leading out to Ash Way where the
19 get-away vehicle was parked. You saw the photos of
20 the zip ties, you saw the bloody handcuffs, you saw
21 the mask, you saw the gloves. Folks, this was a rip.
22 And again, there is really no issue about that. So
23 I'm not going to talk about the elements of the
24 various crimes anymore, because, again, I don't expect
25 any argument that these things didn't happen.

1 What I am going to talk about is, as I see it,
2 really the only issue in the trial, and that's whether
3 this guy was there or not.

4 The evidence in this trial as to whether the
5 defendant is guilty as he's charged can be summed up
6 real easily. If there were five guys there, he was
7 one of them and he's guilty. There has been zero
8 suggestion that anybody else other than the defendant
9 was the fifth person with those four guys, other guys
10 that went in and committed the robbery and the
11 burglary. There's been no suggestion by the defense
12 there is anybody else named James or any other
13 accomplice that was present that would be that fifth
14 person. So if you find there was a fifth person, I
15 would suggest that all of the evidence viewed
16 logically indicate that the fifth person is him.

17 And I would suggest that in that vein, you can
18 begin and end your inquiry with the testimony of
19 Kathleen King. I would suggest very strongly that you
20 don't have to have a whole lot more other than what
21 she had to say to convince you there were five people
22 at the robbery.

23 Kathleen King was in the perfect spot to see
24 everything after the robbery occurred. She was in the
25 perfect spot to see these guys run out, and she was in

1 the perfect spot to see them run to their get-away
2 vehicle. The robbery occurred down here at the end of
3 the cul-de-sac on 136th Street. Kathleen King lives
4 almost straight north of Tom Gibler's house.

5 She testified that she heard the gunshots, she
6 went out here to the shoulder of Ash Way and watched
7 as not one, not two, not three, not four, but five
8 young men. And the only thing she had a question mark
9 about is age and gender. But she was assuming they
10 were five young men. She was never at all in doubt as
11 to the number. Came running down 136th, cut across
12 her neighbor's yard and ran down Ash Way, crossed the
13 road, got into a white Blazer and left.

14 She testifies very clearly that she saw a
15 neighbor she didn't know by the name of Tom Gibler who
16 went up to the Yost residence here. She testified
17 about seeing Jake Leno and Russ Leno, his father, when
18 they came out later here, picked up Gibler and
19 commenced the chase.

20 Again, she was in the perfect spot to see
21 everything that she said she saw, and she was very
22 clear, she was very definite as to what she saw and
23 where it was when she saw it. She, quite frankly, is
24 the most important witness in this trial. You don't
25 have to go any further than her.

1 But also consider the testimony of Tom Gibler.
2 Tom Gibler is a criminal. He is a dope dealer. He
3 lives on the other side of the line between law
4 abiding citizens and criminals. I'm not trying to
5 portray him as anything other than a drug user and a
6 drug grower and, in all probability, a drug dealer.

7 But we talked about this in voir dire, whether he was
8 committing a criminal act or engaged in criminal
9 activity when he was robbed is really of no moment.
10 Just because he is committing a crime does not make
11 him fair game for every armed robber who might want to
12 rip him off. We talked about that.

13 Nowhere in the instructions that Judge Knight
14 just gave you is it said that if the victim happens to
15 be engaged in a crime, you all can do whatever you
16 want to him. That's not what the law is. And I think
17 if you think about this logically, and you sit back
18 and you wonder why that might be, it's quite clear
19 very easily this could have resulted in the death of
20 at least two people. Josh Bundy could have been dead
21 if Tom Gibler had swung that sword a little higher and
22 cut him in the throat, could have cut his head right
23 off.

24 Tom Gibler could be dead real easily if he had
25 been led down the downstairs by Todd Bush. And I

1 would suggest that the Todd Bush that we saw on the
2 stand was kind of a scary guy. But imagine that kid
3 on ten hits of acid, drinking beers, jacked up with
4 adrenaline, with a fully loaded SKS rifle and his good
5 buddy just got slashed. That's why it's not fair
6 game, you're not fair game if you're engaged in a
7 crime because you cannot say, killing a dope dealer is
8 okay. Again, that makes sense when you think about it
9 logically.

10 But Tom Gibler tells you some things that I
11 would suggest again are completely corroborated by all
12 the physical evidence and are completely corroborated
13 by what Kathleen King saw.

14 Gibler is the victim, he lives here. He tells
15 you about getting a phone call -- I'm sorry, not a
16 phone call but a knock at the door, approximately
17 1:30, goes to the door, and here's this big,
18 heavy-set, clean shaven white kid saying, have you
19 seen my dog?

20 And Gibler says, I was about ready to open that
21 door up and chew his ass for waking me up at 1:30
22 about a dog when I see the gun and try to slam the
23 door. Eventually this big guy kicks the door open and
24 Gibler starts going up the stairs. And he says as he
25 is running up the stairs he could see through the

1 banister, and he sees the guy with the gun, who he
2 eventually cuts the guy with the gun, coming in, and
3 three guys going downstairs. That's five people.

4 Later he says once he escaped and once he made
5 his way down 136th and ran to the Yost residence and
6 started kicking on the door screaming for help,
7 screaming for someone to call the police, he saw five
8 guys coming down 136th, run down Ash Way and get into
9 the white Blazer.

10 Now, again, we know he was exactly where he says
11 he was because Kathleen King sees him there. Again,
12 he describes pretty much the exact same thing that
13 Kathleen King described. And Kathleen King
14 corroborates his story by describing essentially the
15 same thing. Again, if you find there were five people
16 that committed this thing, that there were five people
17 that went in, five people that came out, five people
18 got in that Blazer and ran or drove away, this guy is
19 guilty.

20 One other bit of evidence that I would suggest
21 speaks very clearly as to there being five people
22 involved in this thing is the cut phone lines at
23 Gibler's house. When you think back to the testimony
24 of Jake Cote, and to a lesser extent JJ Vargas, they
25 both talk about there at least being some discussion

1 prior to the robbery about phone lines being cut. And
2 again, if you're going to be ripping somebody off and
3 you don't want the police to be coming down on your
4 head, that makes a lot of sense. You cut the phone
5 lines, you can't call 911. That's what any good
6 robber is going to do before he goes into somebody's
7 house.

8 But if you remember about Jake's testimony, door
9 gets kicked open, Bush and Bundy immediately go in,
10 Cote and Vargas immediately go downstairs, and there's
11 about that minute lapse between the time that the two
12 of them get downstairs and start yanking plants out
13 before Eastmond comes down, what was he doing at that
14 time frame? I would suggest he was cutting the phone
15 lines. JJ Vargas also testified that when he went
16 downstairs, he doesn't remember seeing James. Why is
17 that? Probably because he's around the side of the
18 house cutting the wires. Both of them are very clear
19 that once they're making their escape and getting the
20 heck out of Dodge, James is beating feet with the rest
21 of them down 136th. But although neither of these
22 codefendants actually see him cut it, they both tell
23 you there was some talk about it. And given the
24 description of what occurred at that house, there's
25 only one person who was in a position to have cut

1 those phone lines once it happened, unless it happened
2 quite sometime before.

3 Now, let's talk about what we know did happen,
4 and what we know about what items were used in that
5 robbery and how they were used.

6 Well, we know that the defendant's 1992 white
7 Blazer was both the vehicle these robbers arrived in
8 and got away in. We know that for a certainty. Josh
9 Bundy's blood is all over it. And given the amount of
10 blood that is pictured in the photographs, given the
11 injury that Josh Bundy had, given the DNA testing,
12 there is no issue about that. That was the car.

13 And we also know that the rifle, the SKS rifle
14 that Todd Bush used when he went into the house,
15 pumped two rounds into the ceiling and then put to the
16 head of Tom Gibler when he finally got him on his
17 knees, was the defendant's gun. And we know this
18 because the police were able to find it later, they
19 were able to track it down, and they found the two
20 shell casings that Bush shot off when he initially
21 came in the front door.

22 And you heard Mr. Wyant from the crime lab
23 testify very specifically that that shell casing,
24 unique to any other gun in the world, was fired from
25 that SKS rifle. We know that gun was used.

1 Well, when the defendant testified yesterday,
2 essentially, as I understand what he was telling us,
3 that was a coincidence. It just happened to be that
4 JJ borrowed my car on the day of the robbery. It just
5 happened to be that I happened to have my SKS in the
6 back of the car at that time. It was just one big
7 really unlucky coincidence that my stuff was
8 involved.

9 Well, let's spin this story out a little bit and
10 think about it. What the defendant is telling you is
11 that someone else committed this robbery, somebody
12 else took his car, essentially stole it, took his gun,
13 essentially stole it, and then several days later
14 called him on his voice mail, it's obviously somebody
15 that knows him, and leaves a message that, if you talk
16 to anyone or tell anyone, probably the police, about
17 who's got your car, we're going to kill you. And then
18 there is the sound of the action of a gun being driven
19 back and forth.

20 And I guess the logical assumption behind that is
21 whoever made that phone call is probably Todd Bush.
22 Todd Bush, I think everyone who testified can agree
23 to, is the main guy here. Jake Cote may have come up
24 with the idea, but Todd Bush, he's the bad guy here.
25 He's the guy that actually gets these guys moving.

1 He's the guy that pumps the rounds into the ceiling.
2 He's the guy with the gun. He's the big major
3 desperado in this thing.

4 Well, think about what the defendant wants you to
5 believe. That this vicious criminal, Todd Bush, a guy
6 who told you when he was on the stand the other day

7 that the reason you take a gun to a rip like this is
8 in case the guy you're trying to rob fights back, you
9 can shoot him. He told you that. After he uses this
10 weapon in this crime, although he's a vicious
11 criminal, apparently he is a polite vicious criminal,
12 he is going to have the gun returned to the owner. He
13 is going to have the vehicle that was used that got --
14 that has his buddy's blood all over it returned to the
15 owner. The keys to that vehicle are going to be
16 politely returned. Does that make any sense? Does
17 Todd Bush sound like the kind of guy that is polite,
18 is going to use a weapon in this fashion, and then
19 politely return it to the owner if he wasn't
20 involved? Is he going to politely return the key to
21 Mr. Eastmond? Are they going to politely tell him
22 where his car is? Does any of this make sense, folks?

23 If the defendant is not involved, and in reality,
24 is Bush, Cote, Vargas, and Bundy who committed this
25 robbery, and the gun's not their's, and they don't

1 have anything vested in that weapon, don't they really
2 just toss it in the river? Don't they just go to the
3 Sound somewhere and toss the gun in the water?

4 What you do, folks, is you don't allow the police
5 to find the gun, because then they can trace it back
6 to you, exactly like what happened here. But if the

7 gun's yours, or it's your buddy's, you want to hang on
8 to that. It's exactly what the defendant did. They
9 used it, he got it back, he snuck it back into
10 Chimenti's closet, and a few weeks later Chimenti
11 sells the gun.

12 Now why, if you are this vicious criminal gang,
13 do you give a weapon back to the one person who's not
14 involved but can dime you out? Even from the
15 defendant's own lips, he knows that JJ has got to be
16 involved in this somehow. Are these guys going to
17 return the weapon and the get-away car to the one guy
18 who can actually say, if he was ever going to tell the
19 truth to the cops, Well, JJ took my car, and should
20 probably start with him. Are they going to do that?
21 Are they going to give him the physical evidence
22 that's going to allow the police again to round them
23 up and connect them to this crime? It's ludicrous
24 when you think about it. That's what the defendant is
25 trying to sell you.

1 And also remember this. When the defendant is
2 telling you that his keys are returned to him, his gun
3 is returned to him, and he's told where the car is,
4 the robbers know the police have already identified
5 Josh Bundy. He was identified an hour after this
6 robbery. They know that the heat on. They know the
7 police are going to be sweating Josh Bundy. So
8 they're going to be giving some more ammunition to
9 this guy so he can dime them out, too? I mean, think
10 about that.

11 The physical evidence in the truck and the
12 physical evidence that was found at the house, I would
13 suggest, also is corroborative of what Jake Cote and
14 JJ Vargas told you.

15 Now, again, granted, he didn't find any
16 fingerprints from the defendant there, and he didn't
17 find his blood there, and he didn't find any clothing
18 from the defendant in that truck or anything that
19 could be tied directly to him, other than that
20 speaker. We'll talk about that later. But what you
21 do know is this. In the rear passenger seat right
22 here directly behind the front passenger is Josh
23 Bundy's blood all over the place. You see it on the
24 back of the front seat, you see it here. You know
25 that's where Josh was sitting on the way out of

1 there. Remember where Todd Bush's fingerprint was
2 found? It was found on the outside of the front
3 passenger window. Where's Todd Bush tell you he was
4 seated? He tells you he was either seated in the back
5 seat going there or driving away from there. I mean,
6 is it just coincidence that his fingerprint is found

7 in the one seat that both Cote and Vargas tell you
8 that Bush was seated? I would suggest there are only
9 so many coincidences that are going to add up before
10 you got to say, that's probably how it was.

11 And, again, that is not to say that Bush couldn't
12 have been in other places in the car, and that's not
13 to say that Bundy could have been seated elsewhere
14 going there. But, again, it is all consistent. The
15 evidence that you've heard is all consistent with only
16 one logical story.

17 Let's think about the defendant and let's think
18 about his story to the police. Let's think about the
19 story he gave on the phone on the 4th, the interview
20 that he gave on the 5th, and the taped interview he
21 gave on the 7th.

22 And I want to really highlight the taped
23 interview, because that I think tells you as much
24 about the defendant as you really need to know in this
25 case. When you go back into the jury room, request to

1 hear that tape. Play it, listen to it. Doesn't
2 really matter what he says. What I want you to listen
3 to is the manner in which he says it, how he lied to
4 the police, how comfortable he is lying. That is a
5 45, approximately, minute long tape, and this guy is
6 smooth. He's cool.

7 And he is telling the same story that he told two
8 days to the police officers, and these are two guys
9 who have been cops for a long, long time. And they're
10 working him over. You hear Ward towards the end of
11 the tape kind of losing it with him a little bit and
12 crawling into his face telling him to cut the crap,
13 and I think that's a quote. This guy is smooth. He
14 is comfortable telling a lie. And I think you should
15 remember that very clearly when you're trying to gauge
16 just how credible this guy is when he is testifying
17 and giving you yet another version after he's yet
18 again sworn to tell the truth.

19 Again, swearing to tell the truth and telling
20 the truth don't have any real connection with this
21 fellow. He's going to lie to you when it's to his
22 advantage. He thought it was to his advantage when
23 he talked to the cops. And I suggest he thought it
24 was to his advantage to lie to you folks when he
25 testified the other day. Again, manner in which he

1 talked to the police officers I think is just --
2 tells you all you really need to know.

3 In referencing the story that the defendant gives
4 to the police on the 4th, the 5th, and the 7th, if he
5 tried to tell you yesterday that this story just kind
6 of popped up and he was just kind of playing with it,
7 well, again, I've got to say, au contraire. Think
8 about the details he gave the police on both the 4th,
9 5th, and 7th. This is a story he thought about. This
10 was a story he attempted to keep straight on three
11 different occasions. Every time the police tried to
12 catch him up in something, he had more excuses than
13 Carter had pills. This guy again tells a good story
14 even when he comes back before you months later and
15 admits, yeah, just about everything I told those guys
16 was a lie.

17 But assume, for the sake of argument, that that
18 tape doesn't exist and you can't go back there and
19 you can't listen to the manner in which he lies.
20 Let's just listen to the story, or think about the
21 story that he gave you yesterday.

22 Let's first start with the voice mail where he
23 got threatened. The defendant's story is this. He
24 gets a voice mail, there is a deep voice that tells
25 him if he tells the police who has his car, that he's

1 going to get killed. And then there is the sound of
2 the action of a gun being taken back.

3 Well, one thing that I find curious, and I would
4 suggest you all ought to find curious also, is why
5 doesn't Matt Chimenti hear the voice? All Chimenti
6 hears is the gun action. Well, I would suggest there
7 is a very reasonable and logical explanation for
8 that: There was no voice message. What Chimenti
9 heard and what was the only portion of that message
10 that actually existed was the gun action.

11 And that gun action was Todd Bush. And Todd Bush
12 was telling him in so many words, Bundy was a stand-up
13 guy, told the cops to pound sand, the cops have your
14 car, it's your turn to be a stand-up guy. And since
15 the defendant knew what the robbery was about and knew
16 what he needed to keep his mouth shut about, there is
17 no reason to tell him, Oh, and by the way, you're
18 supposed to keep your mouth shut about the robbery,
19 because he knew what it was about. He was there.

20 Don't you think that if your good buddy from
21 seventh grade is with you and you get this very
22 unusual message where someone is threatening to kill
23 you, and then there is the sound of action of a weapon
24 being drawn back, don't you have your friend hear
25 that? Don't you say, hey, Matt, come here, come here,

1 and have him listen to that? That's not what
2 happened. Remember Chimenti's testimony. He heard a
3 gun action. Heard no voice, no deep voice making any
4 kind of threat. Heard a gun action.

5 And the defendant doesn't say anything about a
6 voice to him, just the gun action. Now, again, think
7 about that. If you have just had your life
8 threatened, don't you tell your best friend, who's
9 right there, assuming that this story about his voice
10 mail just eating up a portion of the message and not
11 the whole thing, don't you say, Oh God, I wish you
12 would have heard the whole thing, they threatened to
13 kill me. Don't you tell your best friend that? I
14 think you probably would. Okay. That's just a
15 little thing that struck my mind.

16 Another thing, although these vicious criminals,
17 whoever threatened to kill him, have threatened his
18 life, tell him that, If you go to the cops, we will
19 kill you, and then there is the sound of the action
20 of a gun being drawn back, after they threatened this
21 guy, again, because they are potential -- or
22 essentially they must be very polite and very stupid
23 criminals, they return to this guy a semiautomatic
24 SKS rifle with a clip so he can defend himself. They
25 give him a gun, essentially arms him to the teeth.

1 Now, what kind of sense does that make? If you want
2 to threaten somebody and if you want to be able to
3 take somebody out that might be able to send you to
4 prison for a very, very, very long time, do you give
5 him a semiautomatic rifle politely? Do you give him
6 ~~the means both, one, to track you down, perhaps end a~~
7 threat to himself, or to defend himself, or perhaps
8 to go to the police? Do you do that? Todd Bush may
9 be a lot of things, I would suggest that stupid and
10 polite are not two adjectives that are often going to
11 be used in the same sentence when talking about him.

12 Here's some more about Mr. Eastmond's version of
13 what happened and why you know he was selling you a
14 bill of goods yesterday. I never been at Todd
15 Bush's house. Ha? How does Traci Bruggman recognize
16 James, this James that she points out in court, and
17 that he owns a white Yukon and that he drives this
18 vehicle? I was never at Todd's. So either Traci is
19 lying, or Traci saw me, or Traci is psychic in some
20 fashion to know that I own a white Yukon such as is
21 pictured in any number of pictures that we've got
22 here. Why is it so important for him to deny ever
23 having been at Todd Bush's house?

24 Similarly, hand in hand with that goes, I've
25 never met Traci Bruggman. Well, again, if he's never

1 met her, how does she know him? How does she know,
2 well, he's white, he's young, about 20, he's clean
3 cut. Oh, there he is. That he drives a white
4 Yukon. What is so important about denying ever
5 having been at Bush's, ever having seen his house,
6 been there, or ever having met Todd's roommate? Why
7 do you have to deny that so badly? Well, again, that
8 connects you up to the crime, so you lie about it.

9 Never met Jake Cote. Don't know what he looks
10 like until he testified here in court. Had no idea
11 who that guy was. That's funny, Jake Cote knew who
12 he was. Remember Detective Scharf when he testified,
13 and do you remember when Jake Cote testified when
14 Jake Cote went to the sheriff's department on January
15 7th, parenthetically, the same day this guy was
16 giving his taped statement, as the defendant's
17 leaving, Jake's coming in, Jake sees him. We know
18 this happened because Jake told you that. But he
19 also told Detective Scharf immediately upon getting
20 up to the fourth floor. He was excited. Hey, I just
21 saw James.

22 Well, something's not right here, folks. If he
23 doesn't know Jake Cote and has never met him, how
24 come Jake Cote knows and recognizes him? And, again,
25 why is so important to lie about that: I've never

1 seen that guy before. Well, again, that's just one
2 more thing that links you up to this crime.

3 Another thing that the defendant talked about
4 yesterday is that he told you this Andy Gallagher is
5 actually a real person, and he actually had really
6 planned on going down to California with Andy and
7 spending New Year's, but after his car got taken and,
8 according to him, on the 29th, he went ahead and
9 called Andy off. Said, Never mind, can't do it now.
10 How did he get the phone number? Don't you remember
11 his testimony, don't you remember his taped statement
12 to the police that I'm not good with numbers, I'm not
13 good with addresses, all that stuff is either in my
14 phone book, my address book, or my brief case.
15 That's where you can find the information regarding
16 Andy Gallagher. Well, if that stuff is gone and the
17 defendant's not part of the crew that cleared out the
18 interior of that truck, how does he get the phone
19 number to call Andy and say Oh, by the way, can't
20 make it this year? It doesn't work. Either he had
21 that phone book and was able to call Andy, or again
22 Andy is a figment of his imagination and he is still
23 lying about it. I don't know. But they both can't
24 be true.

25 What about his reaction to the police when

1 Scharf told him, You know, James, one of the guys
2 that is involved is coming up here. When you listen
3 to that tape, play that particular portion over a
4 couple of times. What was his reaction? It wasn't,
5 Good, hey, and by the way, these guys are threatening
6 to kill me. Listen to the tone of his voice.

7 Someone that's involved is coming in? That's a
8 worried tone of voice. Someone who may come in and
9 dime him off and dime his buddies off.

10 And remember, it was shortly thereafter that, as
11 the defendant's going downstairs and leaving the
12 courthouse, Jake Cote is coming in.

13 And, just for the sake of argument, assume that
14 you still think the defendant is telling the truth
15 for some reason about this story. Well, he knows
16 that his good friend JJ Vargas is involved in this
17 thing, because JJ's the one that borrowed his
18 truck. Once JJ gets arrested on January 19th, at
19 that point once you know the jig is up, once you know
20 your good buddy has been arrested by the cops, at
21 that point aren't you forced to go -- forced at that
22 point to go to the police and say, Hey, this guy did
23 this, I don't want them thinking I dimed them off,
24 but I've got to get in front of this thing at this
25 point. There is nothing like that.

1 James Eastmond, when he testified yesterday,
2 attempted to sell you folks exactly the same way he
3 attempted to sell the police when he talked to them on
4 three separate occasions. He tells a pretty good
5 story, and he's comfortable telling the story. But
6 when you think about the story, when you actually
7 start putting under a microscope and actually start
8 kind of ferreting out things, it doesn't hold up.

9 And, lastly, this bit about, I didn't want to
10 tell the police about where I had been at or what I
11 had been doing or who I'd been doing it with because
12 I wanted to keep them out of harm's way, again,
13 that's, you know, that's not true, either. Because
14 he did tell the police three out of the four people
15 that he had been with, at least according to his
16 version of events, Matt Chimenti, Mike Mock, and
17 Ashley Peterson. It's all in the tape, folks. You
18 don't have to take my word for it. The only person
19 who he doesn't mention to the police that he says now
20 that he was with was Jake Dick. And we'll talk about
21 Jake a little bit later. But, again, if he is
22 attempting to keep his friends out of harm's way and
23 that's why he's going through this elaborate charade,
24 he's not doing a very good job of it.

25 Todd Bush. I've already talked about Mr. Bush to

1 a degree. Again, kind of a scary guy. He's the guy
2 with the gun. He's the big kid at the door. He's the
3 guy that's all jacked up on acid and beer. He is also
4 someone who has demonstrated over and over and over
5 again that when it is to his perceived advantage, or
6 he may get something out of it, he's going to lie.

7 He'll lie to police, he'll lie to judges, he'll lie to
8 his own attorney, at least according to his
9 testimony. And he came in here and told you that
10 there were four people involved. It was him, Jake,
11 JJ, and Josh. Well, let's think about some other
12 things that he's told some other people about who did
13 this thing.

14 Initially his roommate, Traci Bruggman. She
15 testified yesterday, and she testified that she heard
16 some statements from Mr. Bush regarding James, and
17 she doesn't know James' last name, but she has met
18 him, he is a friend of Todd's. And prior to the
19 robbery, Todd says, This guy can be my backup any
20 time.

21 After the robbery, after Traci's daughter comes
22 to her and says, Mom, Todd, JJ, James, Josh, and Jake
23 just ripped Tom Gibler off at gunpoint. And then
24 Traci goes and confronts Todd about that. Does Todd
25 deny that? Does Todd say, No, no, we didn't do that?

1 What he does is he admits it. Yeah, that's what
2 happened.

3 And then Traci angrily says, Where is the gun?
4 Where is that gun, and whose is it? I want it out of
5 my house.

6 Well, that's James' gun.

7 Again this is a woman who, unless she is psychic
8 or lying, has no reason to know that that SKS is in
9 fact this guy's weapon.

10 Todd has no reason to know that. At least from
11 his testimony he thought it was JJ's. It was JJ that
12 he'd asked to get him a gun. Well, if he doesn't know
13 the defendant, if he doesn't know that he has this
14 SKS, how does he know it's James' gun?

15 There is also the testimony from Traci that Todd
16 told her that both Jake and James had cased the
17 Gibler residence prior to the robbery occurring.
18 Now, again, all of these statements are in direct
19 contradiction to what this guy told you. His
20 essential purpose, I would suggest, in coming here
21 was to testify and tell you that his buddy is not
22 there.

23 He and I went back and forth some about whether
24 a snitch is a good thing or a bad thing to be in
25 prison, and whether a stand-up guy, someone who's

1 going to not talk to the police or the courts, is a
2 good or a bad thing to be in prison.

3 I would suggest that Todd Bush was back here
4 repaying a debt. His buddy, James, didn't give him
5 up. His buddy, James, was a stand-up guy. Unlike JJ
6 and Jake, James kept the party line. He denied, he

7 denied, he denied. He didn't give up his friend Todd,
8 he didn't give up any of his friends. And Todd's back
9 here paying him back.

10 Okay. Well, assume for the sake of argument that
11 Traci is either lying or psychic. Todd Bush is
12 arrested on January 13 by Detective Scharf. He is
13 told what he is under arrest for, and he makes a very
14 curious statement. What about the other four or five
15 guys? Well, if one is to do the math, if you are to
16 believe Todd Bush, there is Todd, Jake, JJ, and
17 Josh. So unless there are in fact five robbers, which
18 means this guy is involved, shouldn't Todd actually be
19 saying what about the other three guys?

20 That's on January 13, again, before people are
21 charged. Before everyone is arrested. Before anyone
22 has access to the police reports and has time to look
23 at them and to craft a very careful story.

24 And then there is Judith Bronson, the CCO who
25 writes the PSI, the presentence investigation for

1 Todd Bush prior to him getting sentenced. And again,
2 part of her job is to get the defendant's version of
3 events, the offender's version is how it's captioned
4 in the report. What does Todd tell her? I wasn't
5 involved in the crime. Jake Cote carried the gun,
6 and the gun belonged to James Eastmond.

7 Well, again, think about what Todd Bush told
8 you. I had no idea that the gun belonged to James. I
9 thought it was JJ's. That's who I asked to get the
10 gun from. Where does he come up with this
11 information? Again, I would suggest that Bush, before
12 he has a motive and before he kind of realizes the lay
13 of the land, is giving far more accurate information
14 accidentally than he gave you purposely on the stand.

15 His statements to Traci, his statements to the
16 police, and his statements to Judith Bronson I would
17 suggest are all far more accurate representations of
18 what actually occurred than what he testified to. And
19 that's why those witnesses were called. Todd Bush
20 / \ lied to you about any number of things.

21 Last thing I want to talk about is Jake Cote and
22 JJ Vargas, and then I'm going to sit down and shut up
23 for awhile.

24 And what is the possible motive to implicate
25 James Eastmond if he's not involved? Well, if you're

1 JJ, this guy is a buddy of yours. This is a friend
2 of yours for years. In fact you are friends with his
3 family. You're friends with both his mom and his two
4 little brothers. You're not in a beef with this
5 guy. There is no ongoing fight, you have no reason
6 to falsely accuse him of anything, because that's

7 what we've heard from the defendant yesterday. So
8 what's the motive for JJ?

9 And Jake Cote, Jake doesn't know this guy. He's
10 got nothing against him. What motive does he have to
11 give up or to implicate somebody that he has nothing
12 against?

13 Well, I would suggest, you know, the suggestion
14 might be made that, well, these people are trying to
15 make sure that they cut their sentence however
16 possible. That's a legitimate question to ask
17 yourself when you listen to these guys testify. Are
18 they telling me the truth, and how can I discern
19 that? Well, if there are only four guys involved in
20 this robbery, what possible motivation do you have
21 for risking five years? And that's what both these
22 guys think they're risking by testifying. What
23 possible motivation do you have to come in here and
24 implicate either your friend or someone you don't
25 even know and put yourself at risk for five more

1 years? Does that make any sense?

2 Both those guys were asked, you know, what
3 happens, Mr. Cote, what happens, Mr. Vargas, if you
4 get caught in a big old lie while you're testifying
5 here? What am I, the prosecutor, going to do to
6 you? ~~And both of them told you, I get five years.~~
7 What possible motivation do you have for diming
8 somebody off that you either like and is a friend for
9 a long, long time, or somebody you don't know, and
10 then risk that penalty? Doesn't make any sense.

11 And remember both of these guys gave up James
12 when they talked to the police independently of one
13 another. When Cote came in on the 7th and then
14 called Scharf back and had him go out to his dad's
15 house, gave up James on the 7th. Vargas gets
16 arrested on the 19th and gives up James. This is not
17 something that occurred after they were charged.
18 This is not something that occurred, or this is not
19 information they gave after they were charged or
20 after they knew they might be able to curry favor
21 with the police or the prosecutor's office by giving
22 up the one guy who hasn't pled guilty. This all
23 occurred early in the investigation. And, again,
24 what's the motivation? Why are you going to risk
25 five years? I don't know.

1 And, again, if you're going to lie, if you're
2 going to come into court and you're going to lie and
3 implicate somebody that wasn't there because, for
4 whatever reason, you think that's going to make you
5 look better to the police or the prosecutor or the
6 judge, don't you tell a better lie? If you're going
7 to implicate someone that wasn't there and you are
8 not a savory criminal and you're not all that sure
9 about accomplice liability, don't you make sure that
10 when you talk about James and you talk about his
11 involvement, that you make him a bigger player in the
12 whole picture? Isn't he perhaps one of the guys with
13 the guns? Isn't he perhaps one of the guys with the
14 weapon? Isn't he in there from the get-go? Isn't he
15 the first one down the stairs getting the dope?
16 Isn't he far more involved in this thing than either
17 JJ or Jake told you? If you're going to make up a
18 lie, don't you make it a good one?

19 What is the information that Jake gives you?
20 Door gets kicked, Bush and Bundy go upstairs, JJ and
21 I run downstairs, and I don't see James for about a
22 minute, minute-and-a-half. He comes down, grabs a
23 few plants, and then we all bail out. From that
24 version of events, James is the least involved of
25 these five guys. If you're lying, if you're risking

1 time in the joint, five years, don't you make a lot
2 better lie?

3 And, JJ, this is his buddy. This apparently is
4 the guy who is going to dime off his friend of many
5 years. And what was JJ's testimony? We got to the
6 house, boom goes the door, Bundy and Bush go in, Jake
7 and I go in, I don't remember seeing James inside the
8 house. I remember seeing him once we got, you know,
9 back out here and were running to the car, but I
10 don't remember him in the house. Could have been
11 there, I don't know. I was paying attention to the
12 dope.

13 Well, if you are concerned that you're lying and
14 you are concerned that if you get caught in this lie
15 you're going to go to prison for a whole lot longer,
16 don't you make sure you get all your ducks lined up?
17 Don't you make sure you tell a story that you know
18 the cops and the prosecutor are going to want to
19 hear? Don't you want to give them James on a silver
20 plate? Do you actually say, You know, in all honesty
21 I can't remember seeing him inside the house? Do you
22 put yourself at risk like that?

23 And, again, what's the motivation? Why are
24 these guys coming in and giving up somebody that
25 wasn't there if it's going to put them at risk for

1 going to prison for a far longer time?

2 Again, I think when you look at the evidence,
3 and if you conclude that there were five robbers, and
4 every bit of credible evidence suggests that, this
5 guy is guilty of exactly what he's charged with. He
6 drove them there, he drove them away. He let them

7 use his van -- I'm sorry, his Blazer. He brought his
8 gun. He was there, and he's guilty as he's charged.

9 Listen very carefully to what the defense
10 attorney has to say. Remember what he's saying and
11 what I said is not evidence. Remember what the
12 witnesses said on the stand, and convict this guy of
13 exactly what he did.

14 THE COURT: Okay. Thank you, counsel.

15 We're going to take a ten-minute recess. Be on
16 a ten-minute recess.

17 (A recess was taken.)

18 (The following occurred in the
19 presence of the jury:)

20 THE COURT: Mr. Shane, whenever you're
21 ready.

22 MR. SHANE: Please the Court, counsel, members
23 of the jury. This case, this trial, I should say, is
24 the battle of the liars. And of course I include my
25 own client. I include James Eastmond in that

1 grouping. The problem with this trial is that he
2 ain't the only one. Far from it. All the
3 participants in this sick, sordid event all lied at
4 some point. Even the so-called victim, the
5 samuari-wielding dope dealer.

6 Preliminarily I always like to start my closing
7 arguments by discussing the jury instructions and
8 particularly the to-convict instructions. Jury
9 instructions are like a road map, and heaven knows I
10 believe a jury will benefit from a good road map in
11 this case.

12 And at the heart of the road map, the heart of
13 the maze and the twisting turns that you have to go
14 through as you sort through all this evidence is the
15 to-convict instruction. When you get to that
16 to-convict instruction, it's time to go left or to go
17 right. Thumbs up or thumbs down.

18 In this case, however, I don't know what to say
19 about the to-convict instruction, because really the
20 State definitely put on evidence that the crimes for
21 which James had been charged with did in fact occur.
22 There can be very little doubt that somebody
23 committed all of the actions that constitute all the
24 elements that you will see in the to-convict
25 instructions, except for one, which isn't really a

1 separate element, but as part of each element, the
2 part that says the defendant did it. That's the only
3 issue in this case, what the defendant did.

4 This is the version you've heard, the State's
5 version of events. State has a theory, or as
6 Mr. Matheson used the term, a spin, says the defense

7 has a spin. Sure the defense has a spin, so does the
8 State. That's because neither Mr. Matheson nor I
9 were there. And only the people who were there know
10 absolutely what happened.

11 I called this case earlier the battle of the
12 liars. I could also call it the case of the not very
13 polite but very stupid. Mr. Matheson asked you to
14 reject the defense theory before it's been presented
15 on the basis of what? Are you suggesting, defense,
16 that these people were very polite? No. I wasn't. I
17 wouldn't suggest anything like that.

18 Are you suggesting, defense, that these people
19 are very stupid? Yeah. How smart are these people?
20 How smart is it to do what these guys did? Is it
21 really a stretch to think that Todd Bush, Jake Cote,
22 JJ Vargas and Josh Bundy are among the dumbest people
23 on earth? I submit to you that's not a big stretch.
24 And I'm not saying my client's any rocket scientist,
25 either. But that doesn't make him guilty.

1 Jake Cote was the mastermind of this case. And
2 I actually at this particular instance I think I
3 would agree with Mr. Matheson up to a point, he was
4 the mastermind only in the sense that he -- his
5 little brain conceived of this brilliant idea.

6 And it is quite possible, as Mr. Matheson
7 suggests, that once Todd Bush got involved, and he
8 may have taken over the criminal genius side of it,
9 he didn't do this as a favor to Cindy Rhodes. Come
10 on. He said -- it's hard to sort out all of
11 Mr. Cote's lies.

12 First he said Chris Young put him up to it.
13 That actually makes more sense, I submit, than saying
14 Cindy Rhodes put him up to it. Don't forget the
15 first time he talked to the police he said Chris
16 Young put him up to it. And then he goes and talks
17 and says, No, no, no, Cindy Rhodes put me up to it.
18 That's all a pack of lies.

19 He told us when he interviewed with us, and
20 again this is after he's no longer trying to save his
21 hide, he's no longer trying to make a deal, he's just
22 fulfilling the end of his deal because he knows of
23 the huge hammer that's hanging over his head. And
24 what does he tell the defense when he interviews
25 him? Money. It was all money. Of course most of

1 these crimes if not all these crimes are committed
2 for one simple reason: Greed. That's why it was
3 done.

4 So, anyway, he gets Todd Bush involved, and now
5 Todd Bush jumps in with both feet. It's Todd Bush who
6 recruits Joshua Bundy, and it's Todd Bush who recruits

7 JJ Vargas. He tells JJ Vargas he needs a gun.

8 Now when he testified here he said he wasn't
9 thinking about this particular crime. Maybe he was,
10 maybe he wasn't. But what does make perfect sense is
11 that he goes to his buddy, JJ Vargas, and he tells
12 him he needs a gun.

13 Now JJ, who wants to do this also because of
14 greed, he has a very gullible, unsuspecting, friend,
15 James Eastmond. And he knows James has a Blazer and
16 James has a gun, an SKS black rifle. Why does he
17 know this? Because he's his friend. James actually
18 lets him borrow his Blazer. And James is too
19 careless to be sure that the SKS is carefully put
20 away at Chimenti's house like it should be.

21 Mr. Matheson said that we're asking you to
22 believe that this is just a wonderful coincidence that
23 Vargas happens to show up at Ashley Peterson's house.
24 No. No. I'm not asking you to find a coincidence.
25 It wasn't a coincidence at all. It might have been a

1 lucky shot in terms of JJ happening to find James at
2 home at that particular point on the 29th when he
3 showed up, but it was no coincidence. Oh, no. JJ
4 Vargas wanted that gun. JJ Vargas wanted that
5 Blazer. JJ Vargas knew where James hung out. Wasn't
6 a hundred percent sure of his work schedule, but he
7 knew it was not a steady nine-to-five work schedule.
8 So he shows up that day.

9 What if James hasn't been there? No problem. He
10 would have shown up three hours later. James wasn't
11 there, he would have shown up again. This is his
12 friend. He comes in and out all the time. He doesn't
13 bother to call the guy, just flits around and goes
14 over and looks for him.

15 So he showed up. For all we know maybe he was
16 there the day before looking for James and James
17 wasn't there. My point is, this was not a
18 coincidence. This was JJ's intention.

19 And so he shows up, he sees the Blazer, he
20 doesn't know if the SKS is there or not, looks in the
21 Blazer, ha, I'm in luck. My idiot buddy left his SKS
22 in the car. Knocks on the door, gives him this cock
23 and bull story about going to see his girlfriend, he
24 did go to see his girlfriend, but he doesn't bring
25 the truck buck.

1 Vargas, Bush and Bundy go off on the 29th to
2 commit the crime. I'm not going to rehash all the
3 events. The basic outline is, as you've already
4 heard several times, Bush and Bundy go in first, Cote
5 and Vargas come behind him. Bundy chases Gibler,
6 Bush -- Bundy chases Gibler upstairs, and Vargas and
7 Cote come in at some point while Bundy is struggling
8 with Gibler and Bush is coming up after them with the
9 gun.

10 This is a little out of order, but maybe this is
11 a good time to point out exactly why you cannot
12 believe Thomas Gibler, who perhaps as graphically as
13 no other witness in this case has proven to be an
14 unabashed and unashamed liar. I will just remind
15 you, in all this mountain of evidence, there's only
16 one piece of evidence introduced by the defense in
17 this case, and that's document or defense evidence
18 Number 33, and is introduced only for one reason, to
19 point out to you how easily and unembarrassingly
20 Thomas Gibler can sit here and lie through his
21 teeth.

22 What does he lie about? Does anybody remember?
23 I asked him, Well you're charged with the crime out
24 of this also, you're going to be convicted, or you
25 might be convicted, and you're facing criminal

1 jeopardy because of what these yo-yo's did. What did
2 he tell you? Oh, no, that's not true. My case was
3 dismissed. I was just growing for medical purposes.

4 Take a look at defense Exhibit No. 33. Maybe he
5 was generally confused. I have to acknowledge there
6 is a slight possibility, but I would just ask you,

7 how does a person, especially a person who appears to
8 be as smart and sophisticated as Tom Gibler is, not
9 know that today while I'm standing here talking to
10 you, Thomas Gibler's lawyer is in another courtroom
11 arguing what's called a 3.5 motion, basically a motion
12 to suppress evidence on the case that arose out of
13 this incident? Is he that dumb? You have to decide
14 that. At any rate, here's what Thomas Gibler expects
15 you to buy.

16 I'm not going to sit and parse the testimony of
17 each one of the participants, but the basic outline is
18 true. Calling your attention to picture B. Can
19 everybody see it? Does anybody want to move it
20 closer? Good enough?

21 Bush and Bundy are going up the steps. If you
22 take a look back over picture A, although Cote's and
23 Vargas' testimony are different as they are in a lot
24 of issues, they're somewhere in the yard. My
25 recollection is -- and again I will just support

1 what Mr. Matheson said, my recollection is just a
2 recollection, I couldn't take notes to everything,
3 and if I make a mistake in stating the evidence, I
4 will apologize in advance. You're not to pay any
5 attention to my opinion of the evidence but to trust
6 your own collective memories.

7 But my recollection is that Vargas had everybody
8 hiding behind a tree where Cote, I think he said was
9 behind a bush. But they're in the yard. They're not
10 standing at the doorstep. They're in the yard.
11 They're at least -- remember this whole driveway
12 area I believe was 15 yards, about 15 yards long,
13 they're at least ten to 15 feet away at the point of
14 entry.

15 You got to remember and you got to keep this in
16 mind, this is one thing that I haven't heard
17 emphasized in this trial, although it was testified
18 to, these events that we have spent four whole days
19 talking about took place in the space of three to
20 five minutes. From the moment Bush knocks on the
21 door to the moment they're all piling into the van
22 here, three to five minutes. This whole thing went
23 down, boom, boom, boom, boom. And everybody who
24 testifies and says, I remember this, I saw this, this
25 is happening, boom, boom, boom, boom. We're going

1 fast here. Bush goes in, Bundy goes in. Gibler
2 scoots up the stairs. Bundy is hot on his heels.
3 Bush it right behind them. My belief, and again if
4 I'm incorrect about this, that's fine, you use your
5 own memories, I believe Gibler said he went into the
6 kitchen or into the living room to get the samuari
7 sword.

8 Now, both Cote and Vargas agreed on one thing,
9 they did not go in until they heard the shot. It was
10 the sound of Todd Bush's firing the gun that got them
11 to go into the house. It took them at least 10, 15
12 seconds to run across that lawn and hop up the
13 stairs. At the point of time they're going in the
14 house is about the point of time our samurai-wielding
15 dope dealer is taking his swing at Josh Bundy's arm.
16 There is no way he saw anybody go into his basement.
17 That is a flat-out lie.

18 What's more interesting, why. Why does Thomas
19 Gibler want to stand here and lie about that? If you
20 know what the answer is, good, because I don't. I
21 don't know. That's what's one of the hard things
22 about this case. There is a lot of stuff about this
23 case that really just doesn't make sense, and that's
24 a big one. But Tom Gibler, when he told you three
25 people, what he saw with his own eyes, three people

1 go down in that basement, he is lying.

2 Phone line, same thing. How many police
3 officers participated in the investigation of this
4 crime? Detective Scharf, who was a very capable,
5 well-trained, responsible veteran of the Snohomish
6 County Sheriff's Department, testified when he
7 arrived on the scene place was swarming with police
8 officers. Not one wrote a single report mentioning
9 these alleged cut phone lines. Mind you that's not a
10 big issue in terms of proving James did anything,
11 because even if you had 20 officers saying, We found
12 the phone lines cut, that doesn't prove anything.

13 Mr. Matheson said only James Eastmond could have
14 cut the phone lines. Why? Cote and Vargas are out
15 there. Any reason they couldn't have cut the lines?
16 But what's interesting is, the reason why I'm
17 emphasizing this point, is the fact that Gibler made
18 a big deal about the phone lines being cut. Cote
19 made a big deal about the phone lines being cut.
20 Vargas made a big deal about the phone lines being
21 cut. The State's making a big deal about the phone
22 lines being cut, and not a single police officer who
23 testified to you or saw or viewed the scene of this
24 crime noticed the phone lines cut. Wouldn't that be
25 kind of basic police investigation? Another issue we

1 have in this case.

2 Back to what I hope will be my brief recitation
3 of the facts of the crime. As I said, we've got --
4 taking you to the point after Mr. Bundy has had his
5 arm unsurgically opened up, Todd Bush has taken the
6 gun, pointed it to Gibler's head, and bound him up.
7 He tells Cote, and Mr. Bush tells Gibler to move
8 downstairs.

9 Now Mr. Gibler is wondering why he's being told
10 to move downstairs. A fairly logical and reasonable
11 response. He sees the door is open and he breaks for
12 it. Never mind that would have been a perfect time
13 to shoot him in the back. What I suggest to you is,
14 what is Mr. Gibler feeling right now? Is he cool?
15 Is he calm? Is he collected? No. He's terrified.
16 He's scared. It's not that uncommon for people to be
17 killed over their dope. For him to think that Todd
18 Bush was capable of pulling that trigger is not a
19 stretch. He is scared for his life. He thinks he's
20 about to die, and he is out of there. And that's the
21 only thing he cares about at that point in time.
22 He's not stopping, looking around, he ain't counting
23 noses, he is running for his life.

24 What does he do? He goes over, as he
25 testified - just hold this up here - and he goes

1 over to Mr. Yost and he starts pounding on the Yost
2 door.

3 Now, how long did Bush and Bundy wait before
4 they -- actually put this back up. How long did Bush
5 and Bundy wait before they left the scene? Well,

6 Bush tells you, and I suggest to you logic tells you
7 the minute Gibler's out the door, he's out after
8 him. Right away. He's not sitting around going,
9 Gee, what should I do now? Our victim has escaped.
10 He's running down the street. Bush's first thought
11 is, go stop him. I think Bush thinks he was actually
12 going to catch up with him. You know, Gibler's got
13 his hands behind -- I believe Gibler's hands are
14 tied behind his back, so that's possible he's going
15 to catch up with him, drag him back into the house.
16 I don't think Bush had any -- let me strike that.

17 I suggest it is -- it does not appear that Bush
18 had any real intention to kill him, because that again
19 would have been the time to do it. Bush wants to get
20 him back to continue to commit the crime. Once he
21 sees how far ahead of him Gibler is, and I suggest
22 it's probably maybe half a block up here, then he
23 says, Okay, it's time to get out of here. The jig is
24 up. He runs out, Bundy runs out, Cote and Vargas are
25 downstairs ripping off the plants, they hear the

1 commotion, they figure, okay, let's get the hell out
2 of here. And they all go out.

3 And they're running past, they're running past
4 Mr. Gibler at the time he's still knocking on the
5 door. There is no way that Mr. Gibler calmly,
6 collectively turned around and said, Let me see, one,
7 two, three, four, five. Not credible. Not credible
8 at all.

9 At this point in time, by now the Lenos are out
10 on the street. Remember Ms. Burns, Ms. Leno,
11 testified, I thought it was very poetic, she heard
12 the shots, she shot out of bed. She's up, she's
13 out. Her husband Russ is out in front of her,
14 they're out on the street. Where is their vantage
15 point? Right there. They got a ring side seated.
16 They can see clearly down the end of the block, and
17 they can see everything. They can see the Gibler
18 household.

19 Just keep in mind about Ms. King, and I will get
20 to Ms. King for a moment. Ms. King, who was a very
21 honest, credible sounding witness, absolutely, but she
22 also honestly and credibly agreed she can't see all
23 the way down the street. Her vision's blocked. So
24 she only has a partial view of 136 Street.

25 But not the Lenos. They see, they have a much

1 better view of the whole scene, and they're out there
2 already. And of course they say there were four
3 people running down the street, three and then one
4 behind carrying a bat.

5 And then here comes Jake Leno, the kid with a
6 baseball bat. And he comes charging after everybody.
7 Keep the baseball bat in mind. I'm going to get back
8 to that, because that is an important fact here.

9 At any rate, they all pile into the van, the van
10 hangs a U-ie, off it goes. The Lenos show up and
11 take after him. And that's pretty much it for this
12 point.

13 Now at some point in time, and it's certainly
14 not clear, I suggest not really clear exactly when,
15 and I'll knowledge it's never completely clear why,
16 another -- some point in time JJ Vargas and Jake Cote
17 decide to implicate James. I suggest what's very
18 logical is that Vargas had already had it in mind to
19 do so to begin with. Or it maybe that he decided to
20 do this after the fact because James wouldn't cover
21 for him.

22 We also don't really know exactly what kind of
23 pressure was brought by the police officers who
24 investigated this case. One thing you do know is
25 that both Vargas and Cote got a better deal than Bush

1 got. Now, there may be reasons for that that have
2 nothing to do with this trial, but they did get a
3 better deal.

4 You heard testimony that Todd Bush got a weapons
5 enhancement, which means he is going to have to serve
6 ~~five years on top of whatever his sentence was based~~
7 on stuff that did not come into the trial, so I
8 couldn't get into it in front of you now, but
9 whatever it is, he's doing five years on top of
10 that. My recollection is he testified he was doing
11 eight years. Again, if I'm wrong, your recollection
12 is what counts, not mine. So you can do the math.
13 And that five years, if you recall, has no, what's
14 called good time. If you remember good time, it's a
15 general policy in the prison system that, barring
16 some aggravating circumstances, prisoners generally
17 serve about two-thirds of their sentences. Not on a
18 weapons enhancement, you get zero off.

19 How do they get this deal? What do they have to
20 agree to do to get this deal? Very simple. They
21 agreed to come to this trial and testify against
22 James Eastmond.

23 In all due respect, I mean, let's not kid
24 ourselves, it's not logical to think that if they
25 have testified falsely against James, that somebody

1 would turn around and charge them with a new crime.
2 That threat of the State to add stuff to them meant
3 if you come here and you sit here and say, Hey I made
4 it up, James is really innocent, boom, that's when
5 they get whacked with new charges. That's what plea
6 bargaining usually involves. So they decide to
7 implicate him.

8 Now Detective Scharf and Ward are absolutely
9 convinced from the moment James comes up with his
10 story about going to California, in fact they already
11 know that the car is his and the gun is his, it's not
12 a stretch to jump to a conclusion. We got one of
13 them, here's one of them, here's one of the guys that
14 did this.

15 Was that conveyed to them, that giving up James
16 was a quid pro quo for getting their deals? I have
17 no evidence of that. However, it certainly appears
18 that they either both believed that or they were
19 certainly very happy to comply.

20 It may be in his own twisted little mind JJ
21 Vargas was justifying his betrayal to himself by
22 blaming James for eventually picking up the phone and
23 calling the police.

24 Let's talk a moment about Cote seeing James. I
25 believe that the State's putting a lot of emphasis on

1 this fact that Cote sees James coming out of the
2 courthouse, therefore James' statement that he
3 doesn't know Cote must be a lie, therefore he must be
4 guilty. That's the logic to that one.

5 But stop and analyze the situation. If Cote and
6 Vargas have already cooked up this story together,
7 Vargas knows James very well, plus, however stupid
8 they are, they can't be so stupid as to not know the
9 police have James' name. They got his car; right?
10 It's not a stretch at all for Vargas to point out to
11 Cote, this is what James Eastmond looks like. Keep
12 your eye open for him. Cote sees James coming out of
13 the courthouse, so Cote recognizes him. But James,
14 who's still in his own little world on this thing, he
15 doesn't know what Cote looks like, so he doesn't
16 react. Cote reacts because Cote recognizes him.

17 So where is James while this stuff is going
18 down? Well, first of all, he's hanging around his
19 girlfriend's house. He's out of a job, he's
20 gullible, he's confused, he's waiting for his good,
21 trusty friend JJ to bring his truck back to him.
22 Only it doesn't come back.

23 So, being board and lonely, decides to stop in at
24 his friend's. He goes to Jake Dick's house. Jake's
25 mom was not happy because she runs a tight ship, or at

1 least she thinks she runs a tight ship. Frankly I
2 suggest her ship isn't as tight as she thinks it is.
3 And she has all these rules, even though her son's
4 nineteen years old and not in school anymore, and the
5 testimony that I -- the testimony seems to suggest he
6 pretty much does as he pleases anyway.

7 He discusses with her James staying over, she
8 reluctantly agrees, he stays over, and then he gets
9 sick. And during the following day, which is the day
10 after the crime has been committed, he does little or
11 nothing to get his truck back. The day after that is
12 New Year's, and he gets better, and he goes over to
13 Matt Chimenti's, and he gets the threatening voice
14 mail. Chimenti hears the gun racking back.

15 Now, a lot of emphasis has been put on this
16 voice mail suggesting this is something that James
17 made up. But nobody has suggested that Matthew
18 Chimenti is anything other than a credible witness.
19 Indeed his testimony is as important to the State as
20 it is to the defense. He was subpoenaed by both
21 sides to be here.

22 Now, do I have any evidence that, other than
23 James' own clearly self-serving statement that the
24 voice part of that was on there? No. But is there
25 any doubt, based on Matthew Chimenti's testimony that

1 that pager occurred? It occurred because Matthew
2 Chimenti tells you so. And you can take Matthew
3 Chimenti's word at face value. One of the few people
4 who testified in this case whose word you can take at
5 face value.

6 ~~The State admits it. It probably happened. The~~
7 State's theory is that Todd Bush did it. Maybe. I
8 suggest to you it's more likely JJ Vargas did it, or
9 that he engineered it. Why? Because JJ Vargas still
10 had the gun. And JJ Vargas wanted to try to deter
11 James from doing anything to sick the police on him.
12 Now he could have disguised his voice, he could have
13 gotten somebody else's voice, but that's what would
14 make most sense.

15 Two days later JJ shows up, dumps the key, drops
16 off the gun, speeds off. Doesn't bother to close the
17 trunk. Then he tells James where to go look for the
18 truck. James goes, there is no truck.

19 Let me stop here, because this is a good point to
20 comment on one of the arguments of the State. State
21 says the whole -- that's stupid. Why should you
22 believe that these robbers would be so dumb or so
23 polite as to take this guy's truck, unwittingly use
24 his gun, and then politely return it to him? That's
25 crazy. Yeah, yeah, crazy like a fox. Because what

1 Vargas, either on his own or in the conspiracy,
2 intended to happen is exactly what happened. They
3 have got a hot car, they have got a hot gun. If they
4 just leave it and dump it -- well, they eventually did
5 leave the car. If they leave the gun with it, that's
6 going to be found sooner, they're going to be caught
7 sooner.

8 But if part of Vargas' plan is to use James as a
9 patsy and to set him up to be a fall guy, never mind
10 that they went about it stupidly, what better thing to
11 do than to take the gun that was used in the crime and
12 give it back. Here's your gun back. And I submit
13 that's what happened. It was not politeness. It was
14 not even all that stupid, really. It was an
15 intentional frame up.

16 Now, the fact that framing James in the end
17 didn't help them, I suggest to you that was the stupid
18 part of it. But it was an intentional, malicious act
19 on JJ Vargas' part.

20 So now when James finally decides that's it, I'm
21 going to call the police, James doesn't have much
22 faith in the police, he's scared, he's heard this gun
23 racking back and he's been afraid to call the police.
24 Actually there is nothing inconsistent between James
25 being afraid and the testimony that you heard, not

1 just from him, but again from Matthew Chimenti.

2 Matthew Chimenti says James looked afraid. James
3 didn't want to go to this party. James didn't want to
4 smoke dope. He was mopey. Matthew Chimenti was the
5 one saying, Come on, forget about it. Nothing's going
6 to happen to you. You're making too big of a deal of
7 it. Matthew Chimenti probably doesn't understand
8 really the gravity of what's happened. Come to the
9 party, let's smoke dope together. And he gets James
10 to go along and do it.

11 So finally he calls the police, and he's scared,
12 so he does something really stupid. He panics under
13 the pressure, tells a whopper of a lie, giving the
14 police plenty of rope to hang him on. And that's, of
15 course, what the police are trying to do at this
16 trial. They're trying to hang James with his own rope
17 using JJ Vargas and Jake Cote as the hanger.

18 Now, let's talk about the various liars who
19 testified to you at this trial. James -- and let's
20 talk about their motives. James, sure, of course he's
21 got a motive. Every person facing lengthy prison
22 sentences certainly has a motive to be a self-serving
23 liar. And it's well understood that the credibility
24 of any criminal defendant is going to be probably low
25 end of the totem pole.

1 Jake Cote. Now, the State points out, the State
2 points out that he's got no animosity towards James.
3 I doesn't know the guy from Adam. Fine. I
4 acknowledge that Jake Cote probably has no animosity,
5 nothing against James personally. That doesn't mean
6 he doesn't have a motive to lie. He's got plenty of
7 motive to lie. I've already touched on that once,
8 like ten motives to lie. Like ten years worth, at
9 least, of motive to lie. Maybe he has no personal
10 animosity towards James. Maybe this is kind of like
11 the motive, a movie where they're dumping the victim
12 in the river and says, Sorry, it's just business.
13 That's what it is for him. It's just business. He's
14 doing 21 months instead of ten years and 21 months.
15 It's a very small price to pay to sit here and point a
16 finger at him and say, Yeah, he was here, he did it,
17 to save yourself ten years plus in prison. Lots of
18 motive there.

19 Vargas, ditto. And he very well may harbor
20 personal animosity towards James, as I've already
21 suggested. Is it logical? Well, you may be sitting
22 there thinking, why should he be mad at James? He
23 went, ripped James truck off, he did this stuff, and
24 then for him to blame James, that's pretty twisted.
25 Yeah, it is, and I suggest to you that JJ Vargas is a

1 very twisted guy.

2 I suggest that he took James for a patsy and
3 expected his friend to lay low and be passive and do
4 nothing. And he was surprised and angry when James
5 finally took one little initiative, picked up the
6 phone and called the police.

7 And I suggest that the most likely scenario --
8 and again, I acknowledge that this is speculation or
9 deduction based on the facts that we do know -- that
10 he told Cote to go to the police and tell of his
11 involvement.

12 Gibler, his motive is less clear. We've already
13 talked about that. But you got to take a look at this
14 from Gibler's point of view. What a double whammy.
15 What a double whammy to have these drug-using creeps
16 invade his home, nearly blow his brains out, bleed all
17 over his carpet, rip off all his pot, and then to add
18 insult to injury, instead of being treated like an
19 innocent victim, the police turn around and file a
20 police report against him and now he's being
21 prosecuted. He's got to be livid. He's got to hate
22 everybody who was involved in this. And if he has it
23 in his mind, and clearly the name James Eastmond was
24 given to him, clearly he formed the opinion that James
25 must be guilty, even though he couldn't identify James

1 as being one of the people there, then of course he's
2 got a lot of motive to come in here and help hang
3 James. But does that mean that he's credible? No, it
4 doesn't.

5 In addition to the fact, as I've already pointed
6 out, he couldn't have possibly seen three people go
7 down the stairs. In addition to the fact that it's
8 not likely that he was calm enough and collected
9 enough to sit and count the number of people running
10 into that Blazer, he told Detective Gilje that there
11 were four people. Either he told detective Gilje that
12 or Detective Gilje told him that. What did he say?
13 He sat here and he said, I read the report, I checked
14 it, I double checked it, and that report said there
15 were four people. Now, if Tom Gibler was so sure
16 there were five, why didn't he say, Wait a minute,
17 Officer Gilje, that is wrong. There were five. You
18 got to fix that. He didn't do it.

19 Now we get to Todd Bush finally. Is Todd Bush a
20 liar? Oh, yeah. No question of it. Is Todd Bush a
21 bad man? Yeah. Is he maybe the scariest guy who was
22 in the courtroom last week? No doubt. But ask
23 yourselves something, What's his motive? Why would he
24 go through all the trouble that he went through to
25 come and testify here and go -- to be adamant and go

1 through such great lengths to say James wasn't there?
2 Is it loyalty? Does Todd Bush strike you as the kind
3 of guy who's that loyal, has that much sense of
4 honor? Somebody pay him off? No evidence of that.

5 Why? Is it possible that just maybe, after having
6 ~~been convicted and having been sentenced and having~~
7 nothing to lose or gain, he just wanted to tell the
8 truth finally? Did he participate in the original
9 lie? Was he, first of all, willing to turn James in
10 if he thought it was to his benefit? Possibly.

11 That's where Mrs. Bronson's testimony came in.
12 I suggest there is two possible explanations for Mrs.
13 Bronson's testimony. One is that she acknowledges she
14 wrote this report, that was like 15 or 16 reports ago,
15 and she had read the certification of probable cause.
16 So before she interviewed, before she interviewed Todd
17 Bush, she knew that the gun had been associated with
18 James Eastmond. So it's possible that she put that
19 fact in there and attributed it to him.

20 It's also possible that he said so, for the same
21 reason. Just because he may have told her that the
22 gun belonged to James Eastmond then doesn't
23 necessarily mean he's lying now. Because you still
24 have to ask yourselves, if that's true, why?

25 And he gave up, he testified, he didn't want to

1 come here. And he did not want to come here. He's
2 not happy to be dragged out of his cell where he got
3 situated and he got comfortable, and he said he lost
4 his cell, he had a job inside that Airway Heights
5 facility he liked, he lost that job to come here and
6 testify. It's a mystery.

7 I'm not going to sit here and tell you that he
8 did it because all of a sudden he's a fine, upstanding
9 honorable guy. I don't know why. But neither does
10 the State. The State doesn't know why he would come
11 in here and lie, either. And I'm sorry, I submit to
12 you the idea that somehow he's going to improve his
13 status in prison, or that he is so loyal to his good
14 buddy James that that would be a reason for him to go
15 through all this, I submit to you that doesn't make
16 sense.

17 While we're on the subject of good buddy James,
18 let's talk about good buddy James. Where did we hear
19 that testimony from? From Traci Bruggman. Right. A
20 credible witness? I suggest to you otherwise. Again,
21 the question is reversed. Why is Traci Bruggman so
22 anxious to come into court and help convict James
23 Eastmond? I don't have an answer for that one either,
24 but I have some ideas.

25 Let's talk about the friendship. Traci Bruggman

1 is not a very good liar. And she told you a piece of
2 evidence that the State wants you to think that really
3 what's going on is that Todd Bush and James are like
4 this, they're really goods friends, and they're both
5 lying to you by telling you they're not. That's the
6 theory. That's the State's theory here.

7 But what did she tell you? I asked her, I said,
8 Miss Bruggman, after Todd's best friend Shane died,
9 who were the people he associated with the most? And
10 she sat on the stand and I asked her, Did you not tell
11 me the following names? Josh? Yes.

12 Jake? Yes.

13 Andy? Yes.

14 BJ? Yes.

15 Seth? Yes.

16 JJ? Yes.

17 Was James Eastmond on this list? No. So if
18 they're so tight, if this is Todd Bush's main man, how
19 come of the six people she said that he saw him hang
20 around with on a regular basis for the two months
21 between the time Shane died and the time he got
22 arrested for this, how come is James not on that
23 list? Because she's a lousy liar, that's why.

24 Let's go on a little bit more about Ms.
25 Bruggman. Let's talk about her in-court

1 identification. She testifies that she saw James once
2 for an hour in her house. They came over with a
3 truck or something. And that was almost a year ago.
4 And she also testified in another instance that people
5 were coming in and out of her house, and she didn't
6 pay attention to the kind of people that hung out with
7 Todd. So there is a little inconsistency right
8 there. One hour, and not even in the context where
9 she would have had that much contact.

10 She walks into this courtroom and says, That's
11 him. That's James Eastmond. Well, da. This is the
12 trial of State versus James Eastmond. Hello. He's
13 sitting right there. That is not reliable
14 identification. Something else that is unreliable.

15 Now, she goes and she talks to Detective Scharf.
16 She tells Detective Scharf, as I believe she
17 acknowledged on the stand, that Jake Cote and Todd
18 Bush were the only two people she saw in or around her
19 home on the night of December 30th right after the
20 crime was committed, and that Jake was soaked in blood
21 and shaking. Where is James Eastmond? She didn't see
22 him.

23 What did Jake Cote and JJ Vargas tell you? Who
24 was in Traci Bruggman's house? James Eastmond. Do
25 you remember Jake Cote saying James was shocked -- I'm

1 sorry, JJ Vargas said that. James was in shock. He
2 was -- I believe I asked him, was it a catatonic
3 state? And I had to explain that.

4 What did Jake say? No, James was shaken, he was
5 just trying to figure out how to get away. But what
6 do they agree on? James was in Traci Bruggman's
7 house. So I asked Ms. Bruggman, James wasn't there,
8 was he?

9 Well, I don't know.

10 Did you see him?

11 No, no.

12 You don't know?

13 No.

14 She lives in a 900 square foot house. That's
15 small. One floor. Got three bedrooms. She's got a
16 teenage daughter, and she doesn't know that a guy who
17 looks like that is hanging around her house for almost
18 a day? Don't forget, JJ said he left early in the
19 morning and came back 3:00 in the afternoon, and James
20 is still there. Come on.

21 Bottom line with Ms. Bruggman -- one more thing
22 about her. She also has Todd Bush saying that he and
23 James went and cased the house. Now that's the most
24 amazing one of all. Didn't you hear JJ Vargas, didn't
25 you hear Jake Cote and Todd Bush all say, this was

1 almost a spur of the minute thing? Cote knew where
2 Gibler lived. They all got together that afternoon on
3 the 29th, high as kites. And I forgot -- keep that in
4 mind.

5 We're talking about three people who candidly
6 acknowledged to you they were higher than kites.

7 Okay. Do they go case the joint? No. Nobody went
8 and cased the joint. They don't need to.

9 So that's nonsense, too. Again, why is Traci
10 Bruggman coming here and spilling nonsense? I don't
11 know. Is it the fact that Detective Scharf offered to
12 help her with a warrant in a misdemeanor case in
13 Marysville? Maybe. I don't know.

14 We do know that, at least that much, that
15 Detective Scharf and her had a conversation about his
16 helping her out with a warrant, and he drove her back
17 here.

18 Let's get back to James. Mr. Matheson in the
19 middle of the trial asked James what's really a very
20 fair question: You sat there and lied to the police
21 for three days. Why the heck should anybody believe
22 you?

23 And James, in great candor, looked at you and
24 said, I have no reason for you to believe me. He
25 knows. He knows what he did to himself with that

1 stupid, stupid lie.

2 There's a reason to believe James, actually,
3 and it's this one. He lied, he got caught in it. He
4 knows he got caught. He had a golden opportunity.
5 And when you go back to the -- when you go back to the
6 jury room and you take this exhibit with you, you will
7 be able to read to yourself the kind of third degree
8 he was being pressured. I mean, you heard Detective
9 Ward practically screaming at him over the tape. You
10 heard the sarcasm dripping from Detective Scharf's
11 voice. You can almost imagine Detective Ward shining
12 their light in his eyes like the old detective
13 movies. This was his golden opportunity. This is
14 okay, caught, you caught me. What do I get for
15 turning over everybody else?

16 Why didn't he do that? He knew he couldn't lie
17 his way out of two police officers. Does he really
18 think that he can sit there and lie to the 12 of you?
19 Is he that dumb? Maybe. Or maybe he's just that
20 innocent. And that's a very tough decision that
21 you're going to have to make.

22 And what about the police? Are they neutral?
23 Hardly. From the get-go they are -- I'm certainly not
24 suggesting that anybody in the Snohomish County
25 Sheriff's Office had a vendetta against James

1 Eastmond. Not at all. And no doubt all the police
2 officers who participated in this investigation,
3 particularly and especially Detective Scharf came in
4 with an open mind and simply want to solve a nasty
5 crime that deserves solving and the perpetrators of
6 which deserve punishment.

7 But they do conclude quickly that James must have
8 done it. It's not that illogical a conclusion. After
9 all, it's the same conclusion they want you to draw,
10 right? It's his car, it's his gun, he lied to them,
11 he's guilty. We don't need to think about this
12 anymore. And that's what happened. Once the
13 investigating officers make up their mind, neutrality
14 is out the window. Now it's adversarial.

15 And, again, don't take my word for it, any
16 question about what I'm saying, just read this, listen
17 to the tape again. They have decided he's guilty.
18 Now they're going after him hammer and tongue. And
19 it's important. And I appreciate the feeling. You
20 have in your hands, if you're an investigating
21 officer, you have in your hands a man who participated
22 in a horrible crime, in which Mr. Matheson pointed out
23 could have resulted in the death of one or two
24 people. Of course you want to go after him.

25 And, after all, it's not the officer's job to

1 ultimately decide guilt, that's your job. But that
2 means neutrality goes out the window. Means now they
3 made up their minds, James is guilty, and the whole
4 investigation is conducted from that point of view.
5 And they make sure, and there is evidence of that,
6 ~~that the people they come into contact with about~~
7 their case know what he supposedly did and what's
8 involved.

9 Detective Wilkins, for example, and Jake Dick
10 testified, he talked about how Wilkins came out and
11 pumped him full of, quote unquote, weird questions.
12 Of course Detective Wilkins was trying to get Jake to
13 admit, you don't really know if it was the 29th.
14 Maybe it was the 28th. Maybe it was the 30th. You're
15 not sure. Fine. But Detective Wilkins also told him
16 the details of the crime. Was that necessary? Was it
17 legitimate? Maybe. But the point is, Detective
18 Wilkins wanted to be sure that Jake was apprised of
19 all the facts before he came to court and testified.

20 And I suggest to you that one of the factors in
21 this case that produces the confusing mess we find
22 ourselves in just very well may be that good faith and
23 inadvertent pressure that police officers can bring to
24 bare on witnesses when they talk to them.

25 There are a lot of discrepancies, and I had meant

1 to go through a lot of the discrepancies, but it's
2 getting late and I'm going to try to cut more to the
3 chase here.

4 I leave it up to you just to remember, in
5 reviewing the testimony of Jake Cote and JJ Vargas,
6 ~~you have two very drunk, very high dope robbers with a~~
7 lot of motive to lie. Compare their stories. Look at
8 all the differences. Look at all the discrepancies
9 and stuff. It just doesn't make sense.

10 Let's go on now to the nonliars. We have some
11 witnesses here who are perfectly credible people who
12 are not liars. Let's talk about Kathleen King first
13 of all. And obviously the State's putting a lot of
14 faith in Kathleen King. State practically asked you
15 to convict James based on Kathleen King's testimony.
16 But what's the problem with Kathleen King's
17 testimony? We talked about some of it.

18 First of all, yes, it's true she's standing
19 there, and she has a view of something, but she
20 doesn't have a clear view. She says she sees five
21 people, and she's positive she sees five people. But
22 she also said, and she acknowledged, although she
23 changed her testimony a little bit in court, but she
24 acknowledged on cross-examination that she had made a
25 statement before trial that all five were wearing

1 similar clothing, baggie jogging suit type clothing.
2 In fact the evidence shows only Josh Bundy was dressed
3 that way. The rest of the participants were wearing
4 more normal, street-type clothing.

5 She also said they had baseball bats. But the
6 ~~only person who had a baseball bat that the evidence~~
7 shows was actually Jake Leno, you know, the kid who
8 came out from the Leno residence.

9 I expect that Mr. Matheson's going to get up and
10 point out, wait a minute, Jake Leno wasn't running
11 with him, he was way behind them. Sure. I agree.
12 But is it possible, remember what I said at the
13 beginning of my argument, this whole thing went down,
14 boom, boom, boom, boom. We're not talking about ten
15 minutes, 15 minutes. Three to five at most. Kathleen
16 King only has a couple of minutes to form impressions
17 in her mind of what she thinks she saw. Could she be
18 mistaken that there were five robbers? I submit to
19 you, yes she could, and that mistake is compounded by
20 the fact that Pamela Burns Leno, whose testimony
21 wasn't even mentioned by the State, she said, I saw
22 four.

23 And then there is Tom Gibler again, in his
24 original statement to Officer Gilje confirmed there
25 were four.

1 I'm sorry, there is not evidence beyond a
2 reasonable doubt that there were five robbers. It
3 just ain't so.

4 That's all I'm going to say at this point about
5 the evidence. Again, there is a lot more I could
6 say, but I'm just going to trust you to go back
7 there. I saw you were all busy taking notes during
8 the trial, which is good, and to use your collective
9 memories, to use your notes and see what you remember
10 about this trial.

11 So I'm going to finish up here in a couple
12 minutes. I want to talk about legal standard. Let me
13 just state, as an aside here, can you all see this?
14 Please don't snicker; that's why I practice law and
15 not art.

16 Everything we've been talking about up until now
17 is the facts. Right. Okay. And your jobs are fact
18 finders. The whole part of the American trial is we
19 take the two major functions of the trial, deciding
20 the law, deciding facts, we bifurcate them. We split
21 them up. The judge, the person wearing the black
22 robe, he or she is the person who decides the law.
23 The jurors, they're the ones that figure out the
24 facts. In figuring out the facts, however, as I said
25 earlier, you have to be guided by a road map. Your

1 road map are the jury instructions.

2 And here is what is perhaps the most important
3 instruction of all. A defendant is presumed innocent.
4 This presumption continues throughout the entire
5 trial, unless you find during your deliberations that
6 has been overcome by the evidence beyond a reasonable
7 doubt.

8 Well, what's a reasonable doubt? I assure you,
9 forests and gallons of ink have been destroyed over
10 the noodling of what's a reasonable doubt. A
11 reasonable doubt is one for which a reason exists and
12 may arise from evidence or lack of evidence. A
13 reasonable doubt is one that would exist in the mind
14 of a reasonable person after fully, fairly, and
15 carefully considering all the evidence.

16 I appreciate the fact that that often says
17 basically nothing to people. Let me try to give you
18 sort of my take on it.

19 In the legal system there are different, what's
20 called standards, or burdens of proof; the amount of
21 evidence which a fact finder must have before he or
22 she can find a certain fact. And I've created a chart
23 here. Everybody can see this? PC, that stands for
24 probable cause. Fifty-one percent, same thing as by
25 the preponderance. If you've ever heard that term,

1 more likely than not, same thing. 51 percent of the
2 evidence.

3 Up here is C and C, stands for clear and
4 convincing.

5 Then finally at the top of the chart you have
6 beyond a reasonable doubt, BRD.

7 What's probable cause? Probable cause is the
8 level of proof that a police officer must have before
9 he or she can arrest a person for committing a crime,
10 the level of proof a judge or magistrate must have
11 before he or she can issue a warrant. At this point
12 in time they don't have to know how guilty, or if the
13 person is really guilty, just that there is enough
14 information for a person to be charged with a crime.

15 That's the lowest legal standard, at least for
16 purposes of this discussion, that has significance in
17 a courtroom, at any rate, in this context. Charge
18 anyone with a crime, there must be at least probable
19 cause. I admit I freely acknowledge there is
20 probable cause in this case to have arrested and
21 charge James Eastmond for this crime.

22 Next we get to the fifty-one, what I have down
23 here as fifty-one percent, which is right in the
24 middle of my bar. That's the civil standard. If A
25 hits B with a car and they have a lawsuit over whether

1 A owes B damages, that's what the jury has to find,
2 more likely than not he was liable. More likely than
3 not A owes B X number of dollars. That's because
4 civil cases are almost always about dollars. The
5 worst that can happen to somebody in a civil case is
6 they lose money. That's the worst you can do to
7 somebody in a civil case. And it can be pretty bad.
8 I don't want to make light of it, but that's why it's
9 a lower standard of proof.

10 Clear and convincing. That's kind of unique. I
11 only know of it being used in parenting, termination
12 of parental rights cases, an area that I have some
13 personal experience with. If the State wants to tell
14 a parent, you are so unfit that you cannot have your
15 child anymore, the State, or whoever the party is,
16 usually the State must prove by clear and convincing
17 evidence, higher than by the preponderance but lower
18 than beyond a reasonable doubt, that that particular
19 parent is not fit to parent their children. That's
20 clear and convincing.

21 Then we get to the top of the bar, beyond a
22 reasonable doubt. That's in a criminal case. That's
23 where we are here today. We're at the top of the
24 bar. You can only convict James if you find him
25 guilty beyond a reasonable doubt, that all of the

1 elements that are charged in the to-convict have been
2 proven.

3 Then the bar goes up a little bit to acknowledge
4 beyond a reasonable doubt is not absolute doubt.
5 Clearly you can always have a little bit of doubt, but
6 ~~if it's a reasonable doubt, if it's something with~~
7 substance, if you believe Jake Dick, you've got
8 reasonable doubt. If you believe Matt Chimenti,
9 you've got reasonable doubt. If you believe Pamela
10 Burns' version is more accurate over Kathleen King's,
11 or that maybe it's more accurate over Kathleen King,
12 you've got reasonable doubt.

13 Which is giving you some examples of the many,
14 many, many ways to have reasonable doubt in this
15 case.

16 This chart over here is just another way to
17 attempt to demonstrate the same thing. The higher,
18 if you're the proponent, the plaintiff, the higher
19 you go up the chain, the stronger your evidence has
20 to be. If you're defending, the less it has to be.
21 The State has to prove all of these elements. That's
22 why the State had to put on evidence. You remember
23 at the beginning of the trial we were doing jury
24 selection I said we could sit here, put on no
25 evidence. We didn't have to put on Jake Dick. We

1 didn't have to put on Matt Chimenti. I didn't have
2 to cross-examine Cote and Vargas. I could have sat
3 there and done nothing. You still have to examine
4 the evidence carefully and be sure that it proves
5 guilt beyond a reasonable doubt. If either by the
6 lack of the evidence the State has over here, or by
7 one reason, one witness, one piece of evidence, if it
8 goes on this scale over here, you vote to acquit.
9 Only if this scale is empty, you have no reasonable
10 doubts, can you vote to convict.

11 I have one more chart here. I would put it
12 another way. I'd say there is three basic possible
13 scenarios here, how you look at this confusing mess,
14 stuff we have here. One is to look at the defense
15 witnesses and say, the defense witnesses are
16 credible. Then you've got to have a reasonable doubt.
17 Period. If Todd Bush is at all reasonable, you've got
18 reasonable doubt. Again, if Jake Cote is reasonable,
19 you've got reasonable doubt. That doesn't matter if
20 the State's witnesses are also reasonable. You can
21 say, Hey they're all reasonable, I believe them all.
22 I think they all told the truth. Well, that can't be,
23 right? But if you find the defense witnesses at all
24 credible, or other evidence or other challenges to the
25 State's evidence, then you vote to acquit, not

1 guilty.

2 If, on the other hand, you find JJ Vargas
3 credible, you find Jake Cote credible, but you find
4 Todd Bush is a liar, you find Jake Dick is confused,
5 you reject all of the defense evidence and you accept
6 all the State's evidence, then you have a situation
7 where you can vote to convict, guilty. Both of these
8 scenarios one and three make you have to do something
9 very difficult. Makes you have to go back there and
10 do what's called a credibility resolution. Decide
11 who's telling the truth.

12 But I submit there is a third possibility.
13 Maybe nobody's credible. Maybe they're all a bunch of
14 liars, except for the people who aren't but don't
15 really have enough information to tell you one way or
16 the other. You don't have to go back there and guess
17 as to who's telling the truth. In fact I suggest to
18 you the last thing you should do is guess. Don't play
19 darts with this case. Don't say, I can't tell if JJ
20 Vargas is telling me the truth or not, I'll say he is,
21 because I have to resolve it one way or the other.
22 You don't. You don't ever have to decide if he's
23 telling the truth. You only have to decide whether
24 you have enough evidence, enough reason to decide
25 who's telling the truth.

1 This case is a confusing mess. There is a lot of
2 incomplete evidence. We had one day of all the
3 physical evidence being introduced in this crime. You
4 had the guy with the clothing and the blood. You had
5 all that stuff. Very impressive stuff. But what did
6 it prove about James Eastmond's guilt? Nada. Not one
7 thing.

8 And that is why I'm confident when you look at
9 all this evidence and you try to sort this out, you
10 will have lots and lots of reasonable doubt, and you
11 will do your duty under the law and vote to acquit
12 James Eastmond. Thank you.

13 THE COURT: Thank you, counsel.

14 Rebuttal, Mr. Matheson?

15 MR. MATHESON: Pity poor James Eastmond. He is
16 either the victim of a vast conspiracy entered into by
17 criminals, police officers, and citizens; or he is the
18 unluckiest man in the world because the moon and the
19 stars and everything were aligned just so that so many
20 people made so many mistakes, it just all happened to
21 point towards his guilt. Or he's guilty of exactly
22 what he's charged with. And I would suggest that's
23 one of those three things.

24 Conspiracy, huge mistake of cosmic proportion,
25 or guilty.

1 Now, you also just saw a good example of why
2 Judge Knight told you that the evidence that you are
3 to consider is what the witnesses testified to not
4 what some of the various lawyers might argue.

5 And I wanted to talk specifically about the
6 testimony of Pamela Burns Leno and her vantage point
7 and how much she actually saw. Remember what Pamela
8 told you? She was inside her house, she was in the
9 window when she saw the four people run by. She was
10 not out in the street looking down at seeing these
11 people. Okay. That was my memory of the testimony.
12 You go back there and think about it. I'm assuming
13 that was an innocent mistake.

14 Also, Tom Gibler and his statement to Deputy
15 Gilje. And again there was some back and forth on
16 this because it's a somewhat important point. What
17 Gibler said in his statement was, I heard the neighbor
18 across the street yell at his wife, Call the police
19 because four guys ran by south on Ash Way. Gibler is
20 reporting what he heard somebody say. He is not
21 telling the police at that time that he saw four
22 people. He was very clear with you, he saw five.

23 And the idea, quite frankly, that Kathleen King
24 somehow has mistaken Jake Leno for one of the robbers
25 is ludicrous. She knows Jake Leno. She saw him

1 later. She recognizes this guy. And not only does
2 she see five guys running down 136th crossing the
3 corner of her neighbor's yard, she sees five guys
4 getting into the Blazer. Now, I didn't hear any
5 testimony that Jake Leno got in that Blazer with these
6 guys. I would suggest because that didn't happen.

7 Kathleen King is absolutely clear she saw five
8 guys, then she saw Gibler, then she saw Jake Leno, and
9 then she saw Russ Leno in the van. You go back, you
10 look at your notes, but that, I would suggest, is what
11 the testimony actually was in this particular case.

12 Now, a lot of weight is being put, obviously, on
13 Jake Dick being able to provide an alibi for the
14 defendant. And I would suggest that Jake Dick is
15 probably a fairly normal nineteen-year-old where one
16 day he just kind -- one day kind of melts into the
17 next except when there is a party going on. And the
18 idea of this guy ten months after the fact being able
19 to come in here and tell you with particularity, I'm
20 sure it was the 28th and not the 29th, or the 28th and
21 the 30th is ridiculous.

22 Think about your own lives. If someone asked you
23 to tell them what you were doing ten months ago to the
24 date and you had not written it down, you had not made
25 notes, there was nothing that was very unusual about

1 it, just some friend dropping by, could you do it? I
2 would suggest that particularly some kid like Jake,
3 that that's ridiculous.

4 And I'm not telling you he's up here lying, he's
5 trying to help his friend. And, again, there is
6 something to be said for that. He's up here, he's
7 willing to come in and have somebody in a suit go
8 after him a little bit. But, folks, he doesn't know.
9 It was sometime after Christmas, period. And any
10 suggestion that that guy can tell you that it was on
11 this date at these hours is ludicrous.

12 Jake Cote and JJ Vargas got the deal they got
13 instead of Todd Bush for one reason and one reason
14 only: Todd Bush had the gun. He was the one that
15 fired it, and he's the one that pointed it at the
16 head of Tom Gibler. This guy didn't get that deal
17 because he supplied the gun. It's that simple.
18 That's why the deal was offered to those two to
19 testify, and that's how the decision was made.

20 Now, the suggestion was made that apparently
21 between the police and the prosecutor's office Jake
22 Cote and JJ Vargas were bludgeoned by threat of prison
23 to come in here and testify against an innocent
24 person. If you believe that that's what occurred, and
25 if you believe that the police and the prosecutor's

1 office does not have enough real criminals to go after
2 and we've got to go out there and convict innocent
3 people knowing that, you should walk this guy.

4 But if you go back and believe that after hearing
5 all the evidence in this trial over the past week I've
6 done my job, go back into the jury room, review the
7 evidence, not what the lawyers said, what the evidence
8 was, and convict this guy of what he did.

9 THE COURT: Thank you, counsel. Thank you
10 both.

11 When we started, I told you if I still had 13, we
12 would have the clerk draw a number and that person
13 then would be determined to be the alternate. And
14 we're going to do that by the number that corresponds
15 to their seat. So you're one, two, three, four, five,
16 six, seven, eight, nine, ten, eleven, twelve,
17 thirteen. If you turn out to be the alternate, just
18 stay where you are, have the jury go back and leave
19 the courtroom. The alternate will get his or her
20 belongings in the jury room, I believe there's a lunch
21 there for you, too, you can take that with you. And
22 when we have the remaining 12, you can start
23 deliberations.

24 I also told you at the outset there is still a
25 possibility we would need the alternate if a

1 deliberating juror became ill or was unable to
2 continue. So if you are the alternate, please do not
3 discuss the case with anybody, because we still may
4 need your services. If it turns out that we never use
5 the services of the alternate, I thank you in advance
6 for serving as a juror.

7 And, two, if you would like to know what the
8 verdict is, let my law clerk know and she will give
9 you a call.

10 So if you will just now let us know who the
11 alternate is, and just stay where you're seated.

12 THE COURT CLERK: Number four.

13 THE COURT: Juror number four is the alternate.

14 The jury has heard the testimony, been
15 instructed as to the law, heard closing argument.
16 What remains to be done now is for you to commence
17 your deliberations with a view of reaching a verdict
18 if that can be accomplished. Please start your
19 deliberations. Take the jury out.

20 THE COURT: Please be seated.

21 (The following occurred out of
22 the presence of the jury:)

23 THE COURT: Mr. Shane, should we receive
24 either a verdict or a question from a deliberating
25 juror after 2:30, do you have somebody else to take

1 that over?

2 MR. SHANE: Yes, Your Honor. I did anticipate
3 that situation, and I spoke with Peter Mazzone of my
4 office. Peter Mazzone has graciously agreed to stand
5 in for me.

6 THE COURT: Okay.

7 MR. SHANE: Also in the event that for some
8 reason he couldn't be found, I've also alerted Brian
9 Phillips. He is aware of the situation, and
10 generally around, so I suspect there should be no
11 difficulty getting either of those gentlemen. But
12 Pete Mazzone is the number one guy.

13 THE COURT: Thank you.

14 If you two are going to be out of your office
15 for any period of time, whether it's now for lunch of
16 what have you, please leave a phone number with my
17 law clerk that you can be reached at that place
18 should we need you for a verdict or a question from
19 the deliberating jury.

20 Anything the State needs to put on the record at
21 this time?

22 MR. MATHESON: No.

23 THE COURT: Anything the defense needs to put on
24 the record?

25 MR. SHANE: No, Your Honor.

1 THE COURT: I compliment both counsel on
2 excellent closing arguments. We're in recess.

3 (Court recessed.)
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Appendix 3

Court's Instructions to the Jury

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON

Plaintiff,

v.

JAMES TAYLOR EASTMOND

Defendant.

CASE NO. 00-1-00227-5

Filed in Open Court

11-17 2000

PAM L. DANIELS
COUNTY CLERK

By [Signature]
Deputy Clerk

COURT'S INSTRUCTIONS
TO THE JURY

[Signature]
JUDGE

November 17th, 2000
Date given to Jury

TB
60

INSTRUCTION NO. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It is also your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

~~The attorney's remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.~~

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely. You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

INSTRUCTION NO. 2

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 3

The defendant has entered a plea of not guilty, which puts in issue every element of the crime charged. The State, as plaintiff, has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless you find during your deliberations that it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. A reasonable doubt is one that would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence.

INSTRUCTION NO. 4

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts which he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 5

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

INSTRUCTION NO. 6

The testimony of an accomplice, given on behalf of the plaintiff, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

INSTRUCTION NO. 7

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 8

A person commits the crime of robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he or an accomplice is armed with a deadly weapon.

INSTRUCTION NO. 9

To convict the defendant of the crime of robbery in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 30th day of December, 1999, the defendant or an accomplice unlawfully took personal property from the person or in the presence of another;

(2) That the defendant or an accomplice intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's or accomplice's use or threatened use of immediate force, violence or fear of injury to that person or to that person's property;

(4) That the force or fear was used by the defendant or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) That in the commission of these acts or in immediate flight therefrom the defendant or an accomplice was armed with a deadly weapon; and

(6) That the acts occurred in the State of Washington.

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

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

INSTRUCTION NO. 10

A person who is an accomplice in the commission of the crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

INSTRUCTION NO. 11

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 12

The term "deadly weapon" includes any firearm, whether loaded or not.

INSTRUCTION NO. 13

A person commits the crime of burglary in the first degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person or an accomplice in the crime is armed with a deadly weapon.

INSTRUCTION NO. 14

To convict the defendant of the crime of burglary in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 30th day of December, 1999, the defendant or an accomplice entered or remained unlawfully in a building;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein;

(3) That in so entering or while in the building or in immediate flight from the building the defendant or an accomplice in the crime charged was armed with a deadly weapon; 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 a reasonable doubt, then it will be your duty to return a verdict of guilty.

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

INSTRUCTION NO. 15

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in Counts I and II.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

If one participant in a crime is armed with a deadly weapon, all accomplices to that participant are deemed to be so armed, even if only one deadly weapon is involved.

INSTRUCTION NO. 16

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 17

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted into evidence, these instructions, and a verdict form for each count.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror will sign it and notify the bailiff, who will conduct you into court to declare your verdict.

Appendix 4

Special Verdict Forms

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 JAMES TAYLOR EASTMOND,)
)
 Defendant.)

No. 00-1-00227-5

VERDICT FORM A

Filed in Open Court

11-17 2000 9:00

PAM L. DANIELS
COUNTY CLERK

By W. Gale
Deputy Clerk

We, the jury, find the defendant, James Taylor Eastmond,

GUILTY of the crime of First Degree Robbery,
(write in not guilty or guilty)

as charged in Count I.

Michael R. Swale
Presiding Juror

IB
601

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SNOHOMISH COUNTY

Filed in Open Court

11-17 2000

PAM L. DANIELS
COUNTY CLERK

filed

By *M. Pale*
Deputy Clerk

THE STATE OF WASHINGTON,)

Plaintiff,)

vs.)

JAMES TAYLOR EASTMOND,)

Defendant.)

No. 00-1-00227-5

SPECIAL VERDICT FORM A

We, the jury, return a special verdict by answering as follows:

Was the defendant, James Taylor Eastmond, armed with a deadly weapon at the time of the commission of the crime in Count 1?

ANSWER:

Yes

(Yes or No)

Michael R. Swale
Presiding Juror

11/17/00

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 JAMES TAYLOR EASTMOND,)
)
 Defendant.)

No. 00-1-00227-5

VERDICT FORM B

Filed in Open Court

11-17 2000

PAM L. DANIELS
COUNTY CLERK

By Wale
Deputy Clerk

We, the jury, find the defendant, James Taylor Eastmond,

GUILTY of the crime of First Degree Burglary,
(write in not guilty or guilty)

as charged in Count II.

Michael R Swale
Presiding Juror

TB
602

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SNOHOMISH COUNTY

Filed in Open Court

11-17 20 00

PAM L. DANIELS 4.00
COUNTY CLERK

By Alpole
Deputy Clerk

THE STATE OF WASHINGTON,)

Plaintiff,)

vs.)

JAMES TAYLOR EASTMOND,)

Defendant.)

No. 00-1-00227-5

SPECIAL VERDICT FORM B

We, the jury, return a special verdict by answering as follows:

Was the defendant, James Taylor Eastmond, armed with a deadly weapon at the
time of the commission of the crime in Count II?

ANSWER:

Yes

(Yes or No)

Michael R. Swank
Presiding Juror

11/17/00

Appendix 5

Transcript of Sentencing
(1/30/01)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON,
Plaintiff,

NO. 00-1-00227-5

vs.

COA NO. 48151-7-

Sentencing

JAMES TAYLOR EASTMOND,
Defendant.

PAHLL DANIELS
COUNTY CLERK
SNOHOMISH CO. WASH.
01 JUN 14 PM 2:35

FILED

VERBATIM REPORT OF PROCEEDINGS

THE HONORABLE GERALD L. KNIGHT, JUDGE
Snohomish County Courthouse
Everett, Washington
January 30, 2001

Pages 761 - 797

APPEARANCES:

FOR THE STATE:

CRAIG MATHESON
Deputy Prosecuting Attorney

FOR THE DEFENDANT:

DAVID SHAYNE
BRIAN PHILLIPS
Attorneys at Law

SHARON L. WESTLING, RMR
OFFICIAL COURT REPORTER
CSR No. WE-ST-LS-L452Q5
425 388 3571

FILED
COURT OF APPEALS
2011 JUN 14 AM 11:14

dn

1 MR. MATHESON: State v. James Taylor Eastmond,
2 cause No. 00-1-00227-5. Comes on for sentencing this
3 morning on one count of robbery in the first degree
4 and one count of burglary in the first degree.

5 Present in the courtroom currently is Craig Matheson
6 representing the State; David Shayne, who was the

7 trial counsel for Mr. Eastmond; and Mr. Eastmond is
8 present, he is in custody; and Brian Phillips of the
9 law firm of Spaulding and Phillips, who apparently
10 will be taking over any post sentencing issues for
11 Mr. Eastmond.

12 Does the Court wish to put on the record what
13 we've discussed in chambers?

14 THE COURT: Sure.

15 MR. SHAYNE: Okay. I don't have the exact date,
16 but sometime, I would say maybe five days or so after
17 the trial, I got a phone call from my client, from
18 Mr. Eastmond, stating that he now had information in
19 his possession that he believes one of the jurors was
20 the mother of a friend of his.

21 When I asked him, why didn't you say something
22 to me during the trial, he didn't -- he acknowledges
23 that he didn't recognize her, and that's why he
24 didn't say anything to me, that he gathered this
25 information from his friend. And I said to him,

1 Well, I need more information before I take any
2 action on this. I need the name of your friend, I
3 need the name of the juror.

4 Based on our discussions, I had preliminarily
5 formed the opinion he was referring to Sharon Mauch,
6 M A U C H. And then last week he called and he spoke
7 again with Mr. Phillips. And Mr. Phillips -- I
8 believe the conversation he had with Mr. Phillips --
9 in fact I have a notation from a conversation, I
10 believe he said that it was -- the friend in
11 question's name was Joe Dagenstein (phonetic
12 spelling), but that Joe Dagenstein told him that his
13 mother was on the jury panel, but refused to tell
14 James what the name of his mother was.

15 THE COURT: Jury panel or on the jury?

16 MR. SHAYNE: Well, I don't know.

17 THE COURT: I mean, that's the word, jury
18 panel.

19 MR. SHAYNE: I don't know, Your Honor.

20 THE COURT: Is that the word that was used?

21 MR. SHAYNE: My client's here, I have no problem
22 if Your Honor wants to interview my client.

23 THE COURT: Well, why don't you just ask him.
24 That's all I'm asking you, to tell me what he
25 related.

1 MR. SHAYNE: You spoke with Mr. Dagenstein?

2 MR. EASTMOND: Yes.

3 MR. SHAYNE: What did he tell you, exactly?

4 MR. EASTMOND: He told me his mother was on my
5 jury, the jury box.

6 MR. SHAYNE: ~~In the box. So on the actual~~
7 jury. So did he tell you that he spoke to her about
8 the case?

9 MR. EASTMOND: Yes. And he said he wouldn't
10 give me her name for -- because he was, I guess he
11 was protecting her or something. I don't know. I
12 can't say.

13 THE COURT: Okay. Keep going.

14 MR. SHAYNE: So, for that reason, first of all,
15 I do want to put on the record, although I'm still
16 counsel of record at this time and I'm appearing for
17 sentencing, my personal involvement with the case is
18 going to end after today. I have -- my employment
19 has ended with Spaulding and Phillips, so at this
20 point in time I believe Brian Phillips will be
21 stepping in as attorney of record. And what was
22 Mr. Phillips' intention is, first of all, we would
23 ask the Court to hold Mr. Eastmond in custody for two
24 weeks, and we would like the Court to extend the time
25 frame permitted for bringing a motion for a new trial

1 under the rules for that same period of time, and to
2 allow us to have contact with the juror, with the
3 juror in question.

4 THE COURT: State's position?

5 MR. MATHESON: As we discussed in chambers, I
6 don't believe there's been any showing at this point
7 that that juror's potential knowledge of Mr. Eastmond
8 affected the jury verdict in any fashion. I have no
9 objection to the Court holding Mr. Eastmond here for
10 two weeks, but ask the Court to proceed to sentencing
11 this morning.

12 MR. SHAYNE: We're prepared to proceed to
13 sentencing also.

14 THE COURT: Okay. Well, number one, we are
15 going to proceed to sentencing.

16 Number two, whether or not there is anything to
17 this, I don't know. But I will enter an order
18 holding him here for two weeks so that you can pursue
19 it. I am not extending the time to bring a motion.
20 That, you know, that is running. I'm not extending
21 it based upon what I heard.

22 The juror will be contacted today if at all
23 possible. It does complicate it by the fact that the
24 juror will be notified, there is an attorney who
25 wishes to contact her in regards to the case of State

1 versus Eastmond, and that he's taking over for you.
2 Makes it a little cumbersome, because there may be
3 some built-in concern on her part that one -- well,
4 why is he talking to me rather than the attorney who
5 represented Mr. Eastmond.

6 MR. SHAYNE: If Your Honor would specifically
7 prefer that I attempt to contact her, I'm more than
8 happy to do so if the Court feels that would be a
9 better procedure.

10 THE COURT: I'll just leave it that if one or
11 both of you wish to speak with her, and if she has a
12 preference. Okay. Let's proceed to sentencing.

13 MR. MATHESON: Mr. Eastmond was convicted by
14 jury verdict on both counts on November 17th last
15 year, both robbery one and burglary one. There was a
16 finding of Mr. Eastmond or an -- Mr. Eastmond or an
17 accomplice be armed with a firearm.

18 Mr. Eastmond's criminal history consists of a
19 TMV from juvenile court from August of 1995; a second
20 degree possession of -- unlawful possession of a
21 firearm from March of 1998, that's also a juvenile
22 conviction; and a second degree possession of stolen
23 property from March of 1998, that is also a juvenile
24 conviction.

25 Your Honor, the State is going to ask the Court

1 to use the burglary anti-merger statute and score the
2 burglary one and the robbery one against one
3 another. If the Court does that, we calculate
4 Mr. Eastmond's offender score is a three on both the
5 robbery and the burglary. On the robbery it is a
6 level nine offense, standard range 46 to 61 months,
7 enhancement of 60 months, potential maximum term of
8 life.

9 On Count II his offender score again would be a
10 three, seriousness level would be a seven, standard
11 range 31 to 41 months, enhancement of 60 months,
12 potential maximum term of life.

13 I'm asking the Court to set the restitution
14 hearing for Mr. Eastmond and to make any restitution
15 order joint and several with the four co-defendants,
16 Mr. Eastmond, Mr. Bush, Mr. Cote, Mr. Vargas, and
17 Mr. Bundy. To date we have received no information
18 from Mr. Gibler, who is doing his own prison sentence
19 at this point, and I do not expect to get anything
20 from him. But again I would ask the Court to set a
21 date that we can at least attempt to make another
22 shot at getting something from Mr. Gibler.

23 I'd ask the Court to impose recoupment of court
24 costs, recoupment of attorney fees, and to give
25 Mr. Eastmond credit for time served since he was

1 brought back from Utah.

2 Due to the nature of this offense I'm going to
3 ask the Court to order DNA testing over at the jail,
4 and to impose a lifetime no contact order between
5 Mr. Eastmond and the victim of this matter, Thomas
6 Gibler. Due to the date that these offenses

7 occurred, back on December of 1999, I'm going to ask
8 the Court to impose one year of community placement
9 upon Mr. Eastmond's release from prison.

10 THE COURT: Is it community placement or
11 community custody?

12 MR. MATHESON: Community placement. July 1 of
13 2000 is the effective date of the community custody.
14 This occurred, I believe it was December 29 of 99.

15 THE COURT: Okay. And what conditions are you
16 asking?

17 MR. MATHESON: I would ask the Court to order
18 the standard conditions, and again to have no contact
19 with Mr. Gibler during the time frame of his
20 community placement. I would also ask the Court to
21 advise Mr. Eastmond that with this conviction, like
22 his three previous juvenile convictions, that he has
23 forfeited any right he has had to either own or
24 possess a firearm.

25 If the Court has any questions regarding the

1 briefing on the same criminal conduct matter that was
2 briefed for the Court, I'm more than willing to
3 answer the Court's questions.

4 THE COURT: Did you give your recommendation as
5 to what you were recommending for the total
6 sentence?

7 MR. MATHESON: I'm sorry, I'm asking the Court
8 to impose on Count I a low end of 46 months plus the
9 60 month enhancement. On Count II, a high end of 41
10 months concurrent with the 46 months on Count I, to
11 also add the 60 month enhancement on that. By
12 statute the enhancement needs to run consecutively to
13 one another. And I'm asking the Court to actually
14 sentence Mr. Eastmond to an actual sentence of 166
15 months.

16 THE COURT: All right. The questions I have in
17 regards to the question of law is, what is the
18 State's position that the application of the
19 anti-merger statute is discretionary?

20 MR. MATHESON: Yes.

21 THE COURT: Okay. And what is the State's
22 position in regards to whether or not this is the
23 same criminal conduct in regards to the two acts?

24 MR. MATHESON: I believe it is not. The
25 burglary --

1 THE COURT: Why is that?

2 MR. MATHESON: The burglary in the first degree,
3 notwithstanding the anti-merger statute, the burglary
4 in the first degree was committed as soon as that
5 front door was kicked in. Once the entry into the
6 house was effectuated, the robbery, with the subduing
7 of Mr. Gibler upstairs, the firing of the gunshots,
8 all that occurred after the burglary legally already
9 occurred. And I'm going to ask the Court to exercise
10 your discretion and not find the same criminal
11 conduct for a number of reasons.

12 Essentially -- again, we argued this in front
13 of the jury -- is that this very easily could have
14 been a homicide or a fatality, either of one of the
15 co-defendants or of Mr. Gibler. It was just through
16 the grace of God that no one got hurt any worse than
17 Mr. Bundy did.

18 Secondly, any time a person is robbed in their
19 house, I think that when you invade someone's zone of
20 privacy in that fashion, it is worse than if you rob
21 someone out on the street. Mr. Gibler may have been
22 involved in an illegal activity, he may have been a
23 criminal, he's doing his time for that now. But
24 kicking someone's door in in a residential
25 neighborhood, such as the one that Mr. Gibler lived

1 in, with the real citizens, I guess, for want of a
2 better term, who lived in that area, the potential
3 injury or damage that could have occurred based on
4 the actions of Mr. Eastmond and his codefendants
5 argues for the Court's exercising your discretion not
6 to find same criminal conduct.

7 The shots from the assault rifle went into the
8 ceiling. In a neighborhood of this type, it's
9 frightening. As spelled out in my sentencing
10 memorandum, Mr. Eastmond was offered initially the
11 exact same thing as Mr. Bundy and Mr. Bush. I'm
12 sorry, Mr. Bush were rob one with a firearm
13 enhancement, low end. Mr. Eastmond decided to roll
14 the dice, dice came up snake eyes for him. He should
15 not at this point come up before the Court and
16 complain that that -- his gamble didn't pay off.

17 THE COURT: And you don't think that almost six
18 years higher than anybody else's sentence in this
19 cases is grossly disproportionate?

20 MR. MATHESON: I do not. Again, Mr. Eastmond
21 made that decision on his own. He was told early on
22 the risk of going to trial, he decided to take that
23 risk, and here he is.

24 THE COURT: Do you believe the anti-merger
25 statute if applied prohibits a finding of same

1 criminal conduct?

2 MR. MATHESON: I'm sorry?

3 THE COURT: Do you believe if the anti-merger
4 statute is applied, then that prohibits the Court
5 ruling that it's the same criminal conduct? What's
6 the interplay, I guess? I know the difference in
7 regards to scoring, and if it's the same criminal
8 conduct, you score it as one. But you sentence two
9 offenses, if it's merged, you sentence one offense,
10 but does the application of the anti-merger statute
11 prohibit a finding that it's the same criminal
12 conduct? I mean, if you can't merge the two saying
13 these two offenses are really the same, it seems that
14 then, therefore, you can't say it's the same criminal
15 conduct. Seems like the statute prevents that as
16 well.

17 MR. MATHESON: Well, again, I think we need to
18 keep in mind what the difference between merger and
19 same criminal conduct is. I think there is an
20 argument that, absent anti-merger statute, these
21 crimes are same criminal conduct. I would ask the
22 Court not to find that, but I think there is a
23 legitimate argument that they are same criminal
24 conduct.

25 THE COURT: That's what I'm asking. You say

1 absent. So that question I'm asking you is if I
2 declare and apply the anti-merger statute, therefore
3 that prohibits a finding that it's the same criminal
4 conduct?

5 MR. MATHESON: I don't think that would prohibit
6 you. Again, I think this is a discretionary call for
7 the Court.

8 THE COURT: Well, that's where I'm lost, because
9 you put in your brief, absent the anti-merger
10 statute, the Court could find same criminal conduct.
11 So to me, obviously opposite of that, with the
12 application of the anti-merger statute, you cannot
13 find the same criminal conduct. Why would you say,
14 absent one you could do the other, unless the one
15 prohibits you doing the other? Do you understand
16 what I'm asking?

17 MR. MATHESON: Well, yeah. Maybe I'm not
18 tracking real well. I guess if the Court was going
19 to -- if the Court found them -- if the Court is not
20 going to use the same -- or is not going to engage
21 the same criminal or the anti-merger statute and call
22 them same criminal conduct, I guess the way I look at
23 it, if the Court finds them -- if you're going to use
24 the anti-merger statute and score them separately,
25 there is no need to go to that second level where

1 we're going to find the same criminal conduct.

2 THE COURT: Well, that's okay, because you
3 sound like most of the judges who don't quite
4 understand the full interplay between the two.

5 Mr. Shayne, what's your presentation?

6 MR. SHAYNE: Okay. I think I would like to
7 stand on my brief and address some of the issues that
8 Your Honor just had in your colloquy.

9 THE COURT: Go ahead.

10 MR. SHAYNE: And invite Your Honor to ask me any
11 puzzlements you have regarding my position. And I
12 want to start off, because I think Your Honor went
13 right to the heart of the matter, and frankly it
14 drove me nuts, too, trying to find a case that
15 discusses exactly the interplay between RCW 9.94.400,
16 I guess the same criminal conduct statute, and the
17 anti-merger statute. And other than finding a case
18 which simply stated, noting that the anti-merger
19 statute was older than the same criminal conduct
20 statute and saying well, it wasn't overruled, I
21 couldn't find any other clear discussion.

22 I will say this, however, and I'm relying on
23 particularly in the case of State v. Rienks, which I
24 quoted and discussed in my brief, and which is
25 interesting because it's a factually similar case,

1 although with a very big difference is that in that
2 case there were multiple victims, but it also
3 involved a burglary and a robbery. And in that case,
4 and this is what I am relying on, the trial court had
5 found that they were different cases, that they were
6 not same criminal conduct. The Court of Appeals
7 reversed. Court of Appeals at no time said the trial
8 court abused its discretion. It simply said the
9 trial court was wrong as a matter of law.

10 And what I conclude from the Rienks case and
11 from the wording of the statute itself is that, while
12 finding whether or not there is anti-merger for a
13 burglary is discretionary with the Court, on the
14 other hand, determining whether or not you have same
15 criminal conduct, as that is defined in RCW
16 9.94A.400, and by the case law State v. Dunaway and
17 its progeny, the Court does not have a choice, it's
18 not a discretionary ruling. It is a mixed question
19 of law and fact.

20 So as far as saying, well, the jury found he was
21 guilty, that's irrelevant what the jury found as far
22 as this issue is concerned. This is for the Court to
23 decide, but as a factual determination.

24 And what the cases and the statute say is that
25 there are four elements. The Court has to look at

1 the offenses as they occurred at the time and place,
2 how many victims were involved, what was the overall
3 intent of the criminal actor, and what was the time
4 frame that all of these events occurred in.

5 And if you take and apply all four factors to
6 this case, you get zero ambiguity. Actually one and
7 four are similar. The crimes were all committed in
8 the exact same place, in the residence of Thomas
9 Gibler, and they were committed in a very short
10 period of time.

11 Now there was a certain amount of witness --
12 you know, conflict in testimony as to whether the
13 entire incident took three minutes, took five, or
14 took seven minutes. But I submit to the Court no way
15 this incident, the entire incident from the moment
16 Bush and Bundy broke the door down to the moment that
17 they were, you know, climbed into the van and were
18 hauling off, no more than seven minutes passed. So,
19 first of all, we're talking about all of these crimes
20 that are at issue here being committed in very short
21 space of time.

22 Victims. We have one victim, that's all. State
23 v. Dunaway, State v. Rienks, the other case cited in
24 my brief all discuss multiple victims versus single
25 victim being a very important factor.

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THE COURT: Well, the law is quite clear, you cannot have the same criminal conduct if you have multiple victims.

MR. SHAYNE: Well, I cited a case for a different proposition, but also goes to this proposition, State v. Tili, which was a case involving multiple acts of rape. And the Court -- the State in that case argued for defendant to be convicted of three separate acts of rape based on, I don't know the details, but three particular acts. And the Court looked at the fact that the criminal had basically one intent at the time that he committed the criminal acts. Even if you could theoretically break it down into three different acts, it was, from a very realistic point of view, all one single act, all one single intent. And the Court pretty much relied on time as being a determinative factor here in distinguishing between Tili and those other cases where a perpetrator committed several acts of rape against the same victim and was convicted of each separate one, Your Honor.

So when you take all of these factors and you look at this, I respectfully submit to this Court, I don't see how this -- a court can conclude that it

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was anything but the same criminal conduct.

Now from there I do want to add and just give a brief discussion of what I feel is the over-arching issue here is whether or not this Court can impose ten years of two weapons enhancements. And that's really what we're boiling down to.

And my basic argument is if the Court agrees with the defense position and finds that this was the same criminal conduct despite -- and I know that, you know, the legislature rewrote RCW 9.94A.310 to overrule the holding of In Re Charles -- despite that fact, if you have same criminal conduct here, you still -- the Court still is left with one weapon enhancement to impose.

And my reasoning is what In Re Charles said is that even if you have multiple underlying convictions in a case, the weapons enhancements run consecutive to the underlyings, but they run concurrent to each other. So if you have a defendant convicted of three separate criminal charges, each one carries a weapons enhancement, there is no merger of same criminal conduct. Then that person gets three weapons enhancements instead of one. They don't run concurrent to each other. Excuse me, I'm sorry, they do -- I'm confusing myself. In Re Charles said you

1 only get one weapons enhancement because they all run
2 concurrent to each other. The legislature said no,
3 we're going to reverse that legislatively, reverse
4 that holding, and we're going to make it in that
5 scenario that he or she gets three.

6 But the problem is neither In Re Charles nor the
7 new statute addresses the situation we have here. I
8 submit to the Court that it is a matter of first
9 impression. And this is also a statute that has not
10 yet been judicially interpreted. We don't know if --
11 what eventually the Supreme Court is going to do with
12 the new version of 9.94A.310. I am of the personal
13 opinion that it is unconstitutional, that it doesn't
14 invite a double jeopardy violation.

15 But as I thought about it, and I've argued
16 double jeopardy, and I think double jeopardy does
17 apply if this Court does not find same criminal
18 conduct. If this Court finds same criminal conduct,
19 I don't even think we get to the double jeopardy
20 really because then, based on my analysis, we're left
21 with one weapons enhancement.

22 So the bottom line is my client gets sentenced
23 for the standard range of one underlying criminal
24 act, which I assume would be the robbery because
25 that's the greater of the higher sentence of the two,

1 one criminal act and one weapons enhancement. And I
2 don't remember what the exact -- I don't know what
3 the exact calculation is. I would, of course, I
4 would ask the Court to impose the low end of the
5 standard range, but that is discretionary. But
6 that's basically my analysis in this.

7 THE COURT: Okay. The question I have is your
8 scoring. I don't understand how you, under your
9 analysis, how do you reach your scoring? Which I
10 believe you reach a range of 96 to 108. Because if
11 it's the same criminal conduct, you don't score each
12 offense into each other, you score it as a one.

13 MR. SHAYNE: That's correct.

14 THE COURT: So it would be less than what you
15 have here, I believe.

16 MR. SHAYNE: Well, I agree with the State.

17 THE COURT: What is it you're saying that the
18 range is?

19 MR. SHAYNE: I may have miscalculated the range,
20 but I agree with the State. Starting as an initial
21 premise, I agree with the State regarding its
22 calculation of the prior offense that my client comes
23 to this with, I think was one.

24 THE COURT: I understand that. But what I'm
25 asking you is, under your analysis, are you, under

1 the same criminal conduct, are you scoring burglary
2 as a conviction that goes into the scoring of robbery
3 and vice-versa, or do you score it as a one? Because
4 Mr. Matheson scores it as a three. If you score it
5 as a one, the scoring really would be at the two
6 range.

7 MR. SHAYNE: I did address that in my response
8 brief, and I relied on the case of State v. Collicott
9 at 112 Wn.2d 399. And that says it's scored as a
10 one.

11 THE COURT: And so then what is your range?

12 MR. SHAYNE: That would give my client a total
13 of two.

14 THE COURT: We're going to go back to
15 Mr. Matheson on rebuttal argument on legal issue, and
16 then I'll come to your client.

17 MR. MATHESON: The only thing I would like to
18 add is that referencing 310, the amendment that was
19 made to the firearm enhancement provision of the SRA
20 after In Re Charles is a plain reading of that
21 statute. I just don't -- I mean when -- under
22 normal circumstances if there are two acts are going
23 to be same criminal conduct, they're going to merge
24 or they're going to be sentenced as one under more
25 normal circumstances, that's correct. But a plain

1 reading of how the legislature amended 310 I just
2 don't believe leaves any ambiguity about what they
3 meant. The finding In Re Charles by the Court was
4 that it was ambiguous what the legislature intended.
5 Quite frankly I've read the original 310, I didn't
6 see the ambiguity. They were looking for it, they

7 found it. The legislature went back and said, no, we
8 really meant it. Firearm enhancements are
9 consecutive to everything including each other. And
10 I don't believe they can be anymore specific or clear
11 than how that particular portion of the statute was
12 amended. It just under this section --

13 THE COURT: You think that's clear if you have
14 the same criminal conduct and you don't apply the
15 anti-merger statute that you would have two weapons
16 enhancements under that scenario as well?

17 MR. MATHESON: I think that is how the statute
18 is read.

19 THE COURT: Because if you're making that
20 argument, why do you make the argument about applying
21 the anti-merger statute? Because under your
22 interpretation of the statute, it doesn't make a
23 tigger's difference what you declare it if the jury
24 has convicted the person of two offenses; right?

25 MR. MATHESON: As the statute is read, I believe

1 that's how -- I believe that's how it is. I don't --
2 that doesn't seem fair to me, quite frankly.

3 THE COURT: Are you arguing that the anti-merger
4 statute -- that I should apply it because -- as a
5 fall-back position, or are you arguing it because the
6 statute's ambiguous to you?

7 MR. MATHESON: The statute, as far as the
8 firearms portion, I do not find that ambiguous. I'm
9 troubled by that by how I read this and how our
10 appellate unit reads it. I don't think we need to go
11 that far, though. What I'm asking the Court is just
12 to apply the anti-merger statute based upon just the
13 facts of this particular case and --

14 THE COURT: But leads you to the same
15 conclusion, then?

16 MR. MATHESON: Leads me to the same conclusion,
17 yeah. But I'm troubled by that conclusion.

18 THE COURT: But you're less troubled with that
19 analysis --

20 MR. MATHESON: I don't have any issue asking
21 this Court to apply the anti-merger statute based on
22 the facts of this case.

23 THE COURT: I understand that. But you're less
24 troubled reaching the result, the same result through
25 one analysis than you are through another?

1 MR. MATHESON: Yes.

2 THE COURT: Anything you wish to say, sir? We
3 don't want to keep you up. Before I sentence you.
4 I'm saying that because you were yawning.

5 MR. EASTMOND: I'd just like to say that I've
6 been in here, I've been in jail for a year because of
7 this and pretty much lost everything I own, and I
8 have no one to blame but myself, because if I
9 wouldn't have loaned the vehicle and been an
10 irresponsible gun owner, this never would have
11 happened. And I just --

12 MR. SHAYNE: I don't think my client has
13 anything further to add, Your Honor.

14 THE COURT: I'm just making sure. I've got the
15 time if he wants to wait. I'll be glad to wait and
16 let him compose himself.

17 So, sir, do you wish to say anything further?

18 MR. EASTMOND: I just --

19 THE COURT: Okay. I'll wait for you.

20 While we're doing that, we have nobody to speak
21 on behalf of the victim?

22 MR. MATHESON: No. Mr. Gibler is in prison.

23 THE COURT: I know he's in prison, but I didn't
24 know if he had a relative here.

25 MR. EASTMOND: Okay. I guess all else I have

1 to say is I have a three month old daughter, and I
2 don't want to see her at age 15.

3 THE COURT: Okay, sir.

4 MR. EASTMOND: That's all.

5 THE COURT: Well, the jury found you guilty, I
6 have no reason to doubt that finding. Plus judges
7 aren't supposed to go behind the verdict anyway. But
8 I have no quarrel with the jury. They found you
9 guilty, and therefore you're culpable, and now it's
10 time to suffer the consequences. And if you're not
11 going to be able to see your three-year-old daughter,
12 that is a shame, but you have nobody to blame other
13 than yourself.

14 What we have here, for the record, we have five
15 irresponsible young adults who decided to steal from
16 a marijuana grow operation, and they did that while
17 armed with a weapon. The jury, I think,
18 Mr. Eastmond, has found you, by the testimony anyway,
19 can find that you're guilty as at least as an
20 accomplice by supplying the car and as well as
21 supplying the firearm.

22 Two of the codefendants who pled, Mr. Cote got
23 31 months, Mr. Vargas got 36 months. Mr. Bundy, who
24 almost lost an arm that was almost severed by the
25 victim got 101 months, I believe -- or 91 months,

1 excuse me. And Mr. Bush, who was the shooter, who
2 shot into the ceiling and had the weapon himself, got
3 96 months. Those two, Bundy and Bush, pled guilty to
4 first degree robbery with a weapon enhancement.

5 You decided to go to trial on first degree
6 ~~robbery with weapon enhancement and first degree~~
7 burglary with weapon enhancement. The scoring as
8 done by the State indicates that your range is 166
9 months to 181 months. Which if applied, the minimum
10 part of that range means that your sentence would be
11 just under six years higher than Mr. Bush, the
12 shooter. It comes to actually five years and eight
13 months. This is how I see it from the legal
14 analysis, and it is muddled to me. The law is not
15 clear.

16 But as clear as I can make it and make sense and
17 harmonize everything, we start first with the same
18 criminal conduct statute, which is RCW 9.94A.040.
19 Where I disagree with the State, I believe that but
20 for the anti-merger statute, this is the same
21 criminal conduct. You apply the factors under the
22 same criminal conduct statute: There was one intent
23 to take marijuana from Mr. Gibler's residence one
24 time on the day that was done, it was December 30th;
25 one place, Mr. Gibler's home; and one victim,

1 Mr. Gibler. So I have no difficulty in finding that
2 this is the same criminal conduct, whether you call
3 it first degree assault while armed, or if you call
4 it first degree burglary while armed, because I
5 believe both enhancements is the firearm. And so I
6 ~~make that legal conclusion, that it is the same~~
7 criminal conduct.

8 Where does that lead me? It leads me to the
9 burglary anti-merger statute, which is clear to me
10 that the only way that the burglary anti-merger
11 statute is saved from not being repealed by
12 implication by the same criminal conduct statute,
13 which I've just mentioned, and the burglary
14 anti-merger statute is 9A.52.050, as one court
15 concluded, and that was the Court of Appeals in State
16 v. Lessley, 59 Wn.App., 461, by concluding that the
17 burglary anti-merger statute is discretionary with
18 the court. Since the same criminal conduct statute
19 was enacted after the burglary anti-merger statute,
20 and they being on their face inconsistent, State v.
21 Lessley has concluded that the reason why the
22 burglary anti-merger statute hasn't been repealed is
23 that they harmonize it by discretion.

24 And then the courts have gone on to not look so
25 much at harmonizing the statutes, but as to talking

1 about somewhat interplay of the burglary anti-merger
2 statute and the same criminal conduct, even though
3 they don't quite use that language at the time is by
4 saying discretion. And that's noted by the Court in
5 State v. Davis, 90 Wn.App. 776, Division I, same as
6 State v. Lessley, Division I Court of Appeals, and
7 State v. Sweet. As a concluding paragraph in State
8 v. Sweet says, "Based upon our decisions in Bonds and
9 Collicott, we conclude in this case that under the
10 burglary anti-merger statute, the offenses of first
11 degree assault and first degree burglary may be
12 separately charged and separately punished upon
13 conviction for both."

14 So Sweet in upholding two offenses that were
15 not merged by the trial court, and in upholding the
16 trial court and relying upon their case decision in
17 Bonds and Collicott, is reaffirming that the
18 application of the burglary anti-merger statute is
19 discretionary.

20 The Court in State v. Lessley made the following
21 comment from page 467. "The Washington Supreme Court
22 has never directly addressed the interaction between
23 same criminal conduct and the burglary anti-merger
24 statute. Hence, RCW 9A.52.050 was not repealed by
25 implication with enactment of RCW 9.94A.400(1)(a).

1 The two statutes can be harmonized by recognizing
2 burglaries as exempt under RCW 9A.52.050, at the
3 discretion of the sentencing judge, from
4 consideration as same criminal conduct when
5 additional crimes committed during or in connection
6 with the burglary are charged."

7 There was a concurring opinion in that decision
8 by Judge Baker, who I respect a lot, and he didn't
9 need to reach what the majority reached because he
10 didn't think it was the same criminal conduct in that
11 case.

12 Coming to the case of State v. Bonds, which is
13 what our State Supreme Court in State v. Sweet said
14 that they were relying upon, Bonds was a case where
15 the anti-merger statute was applied, court recognized
16 that it was precursor of being discretionary, and
17 then with an argument that the defense made in State
18 v. Bonds of double jeopardy, which is made here in
19 this case, our State Supreme Court in Bonds, 98 Wn.2d
20 1, said, "We have recently held that there is no
21 constitutional double jeopardy nor multiple
22 punishment policy issue where the sentences on crimes
23 charged for the same act are made to run
24 concurrently."

25 So where does that take you? It takes me

1 saying, if you exercise your discretion, meaning me
2 as a judge, under the anti-merger statute and decide
3 not to merge the offenses, the offenses must run
4 concurrently to pass constitutional muster.

5 The State is asking in this case that the
6 offenses run concurrently, but is asking that the
7 weapons enhancement statute be applied twice and run
8 that consecutively.

9 The weapons enhancement statute as modified in
10 its most recent modification by the legislature, I
11 believe to reverse State Supreme Court case that said
12 they run concurrently, enacted 9.94A.310 (3)(e). I
13 believe that the legislature knows what it's doing
14 and intends -- they say what they mean. And they
15 also take into account constitutional concerns.

16 I do not believe that the weapons enhancement
17 statute as enacted now has dealt or does deal with
18 the issue that is confronted by the Court in this
19 case. I do not believe that it was the intent of the
20 legislature to run the risk of having the statute
21 declared unconstitutional because it violates double
22 jeopardy. Was the intent of legislature to just
23 thumb their noses at the Constitution and say, let
24 double jeopardy be damned? I believe that the
25 legislature in their enlightened view are saying,

1 these are to run consecutively. Whenever you have
2 offenses where weapons are involved and you don't
3 have the same criminal conduct, that then if you come
4 to that conclusion, everything is harmonized. The
5 statute is not unconstitutional, or comes under
6 constitutional attack. I do not believe that the
7 legislature intended the result that is argued by the
8 State. I could be wrong, but I don't think so.

9 I believe that the defense argument is that this
10 is a case of first impression, and that the
11 legislature did not intend to say that acts of the
12 same criminal misconduct are going to be punished
13 twice. So that's my conclusion.

14 And coming to that conclusion, and harmonizing
15 that way, I apply the anti-merger statute, and I
16 believe the anti-merger statute prohibits me from
17 saying it's the same criminal conduct for scoring
18 purposes. I score it the same as the State scores,
19 robbery with a range of 46 to 61, burglary with a
20 range of 31 to 41.

21 I impose a sentence for the first degree robbery
22 of 61 months. I impose a sentence for the burglary
23 of 41 months. Those two sentences to run
24 concurrently with one weapons enhancement, because it
25 is all the same criminal conduct.

1 But I decide to, in my discretion, to apply the
2 anti-merger statute. And therefore the sentence,
3 sir, that you have is 121 months.

4 If I'm wrong in my legal analysis and that the
5 legislature has said -- is saying something different
6 than what I interpret it to be, then I just want to
7 save everybody some time, so that this matter is
8 probably going up on appeal, so that if it goes up on
9 appeal and if I'm reversed, then everybody will know
10 what my sentence will be under that situation. And
11 if I'm wrong in my first analysis, then I decline to
12 apply the anti-merger statute, I stand by my total
13 feeling that it's the same criminal conduct.
14 Therefore, the scoring becomes different. The
15 robbery range becomes then 41 to 54, the burglary
16 becomes 26 to 34. And I then impose a sentence of 54
17 months on the robbery to run concurrent with the
18 sentence of 34 months on the burglary and impose one
19 weapons enhancement, because I've merged the two
20 offenses. And then that would be a sentence of 114
21 months. So, under my first analysis, which I believe
22 to be correct, I impose a sentence of 121 months. If
23 my analysis is incorrect, then I exercise my
24 discretion by not applying the anti-merger statute.
25 I do merge, it is the same criminal conduct, you

1 score it as a two on the burglary and robbery and you
2 come with the second range that I just indicated.

3 The defendant will be on community placement for
4 one year, will become employed, in contact with his
5 community placement officer, have no offenses, and
6 engage in any lawful orders that the correction
7 placement officer imposes. You will have no contact
8 with the victim, sir, for the rest of your life. You
9 will be required to pay restitution in an amount to
10 be determined later if I order some. You will be
11 required to pay \$500 for the general victims' fund.
12 I'm going to waive -- let me ask you this,
13 Mr. Shayne. Do you know, will you or Mr. Phillips be
14 paid for doing post verdict relief, such as
15 contacting this juror and what have you for your
16 efforts to see if there is any merit to what your
17 client says?

18 MR. SHAYNE: I'd like to defer that question to
19 Mr. Phillips.

20 MR. PHILLIPS: I'm not aware of any provision
21 for that in the court's reimbursement.

22 THE COURT: It is the intention of the Court to
23 waive attorney fees because of the significant time
24 that this gentleman is going to be behind bars. But
25 if there are additional attorneys fees that the

1 county becomes obligated to pay for this to track
2 down this issue that the defendant has now raised,
3 and if there is no merit to the issue, it's the
4 Court's intent, if possible, to impose attorney fees
5 against the defendant. So attorneys fees to this
6 date are waived. As to any future attorneys fees,
7 imposing that against the defendant, I guess the
8 future tell on that. There will be DNA testing. You
9 are to pay the financial obligations within two years
10 of being released. No later than that time. If you
11 have any monthly income while in prison, your
12 community correction officer can impose a monthly
13 plan for you to reimburse the victim and the victims'
14 fund. You will receive credit for any time that you
15 have served on this matter. You've said you've been
16 in jail for a year. Whatever the period of time
17 you've been in jail in this county jail for this
18 offense, he will receive credit for that on this
19 sentence.

20 Any right you had to possess firearms, if not
21 previously lost, is clearly lost by this offense, and
22 it should be. So you will, for the rest of your
23 life, not have any right to bear arms.

24 That's the sentence of the Court. Does the
25 State have any questions from my long decision?

1 MR. MATHESON: The Court waived court costs?

2 THE COURT: I did. If I didn't say that, it's
3 my oversight.

4 THE COURT: Any other questions from the
5 State?

6 MR. MATHESON: ~~I want to make sure I get, as to~~
7 the weapon enhancement, the Court is finding both and
8 imposing but one; would that be a correct way --

9 THE COURT: I'm planning there is only one to be
10 imposed. The legislature for the same criminal
11 conduct never intended to have multiple weapon
12 enhancements.

13 MR. MATHESON: And we'll get a date from your
14 law clerk.

15 THE COURT: Yes.

16 Mr. Shayne, do you have any questions?

17 MR. SHAYNE: No. Thank you, Your Honor.
18 However at this time I would like to hand up a -- I'd
19 like to file a notice -- well, I'll do that in the
20 clerk's office, but I would like to -- I've just
21 been told by Mr. Phillips to tell the Court never
22 mind.

23 MR. PHILLIPS: Okay.

24 THE COURT: Just a second.

25 Any other questions, Mr. Shayne?

1 MR. SHAYNE: No. Thank you, Your Honor.

2 THE COURT: Mr. Eastmond, any questions?

3 MR. EASTMOND: No.

4 THE COURT: Mr. Phillips?

5 MR. PHILLIPS: Just with respect to -- I have on
6 ~~appointed case in the past asked for supplemental~~

7 funds and received them where the work involved in a
8 particular case was well beyond the norm, whatever
9 that is for a particular case. So there is potential
10 that that could happen, depending on how much work
11 would need to be done if this motion with respect to
12 the juror is pursued. There is a potential for
13 additional attorney fees. I just wanted to make that
14 clear.

15 THE COURT: If there is a potential, then I'm
16 making it clear that your client's going to be
17 responsible for those.

18 MR. PHILLIPS: Understood. And I'll discuss
19 that with him.

20 THE COURT: Any other questions?

21 MR. SHAYNE: No, Your Honor.

22 THE COURT: Okay. Does your client wish to be
23 present when I sign the Judgment and Sentence?

24 MR. PHILLIPS: I do have one other question. I
25 don't know that this needs to be on the record.

1 THE COURT: We'll put it on.

2 MR. PHILLIPS: The Court gave a rather lengthy
3 and comprehensive overview of the anti-merger
4 statutes and the conduct and those two statutes.
5 Whether or not there is an appeal in this case, would
6 be wise to review the Court's comments about the

7 interplay of those two statutes, and I'm wondering if
8 we could get a transcript of the Court's -- that
9 portion of the Court's comments.

10 THE COURT: Well, obviously you'll get a
11 transcript if the matter goes up on appeal. That is
12 part of the sentencing, if you request that. And I'm
13 sure if it goes on appeal, it will be requested and
14 you will get a transcript.

15 MR. PHILLIPS: I'm not sure it will go up on
16 appeal. But the reason I'm asking because I think I
17 can inform not only the counsel in the courtroom but
18 other counsel in other cases the Court's comments in
19 this case.

20 THE COURT: I don't know if I was that
21 profound.

22 Sharon, I'm going to order that.

23 Anything else?

24 MR. MATHESON: I don't have anything.

25 THE COURT: I'll be waiting for you in chambers

1 whenever you have the Judgment and Sentence.

2 Mr Eastmond, I forgot to tell you, you now
3 stand convicted and sentenced for the offense or
4 offenses committed. You have the right to appeal.
5 If you cannot afford an appeal and if you qualify,
6 you can appeal at public expense. In any event, the
7 most important thing I'm telling you is that you have
8 your right to appeal, and if you wish to appeal, it
9 must be perfected within 30 days from today.

10 Any questions?

11 MR. EASTMOND: No.

12 THE COURT: Thank you. Court in recess.

13 (Court recessed.)

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Appendix 6

Judgment and Sentence
(1/30/01)

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

EASTMOND, JAMES TAYLOR

Defendant.

SID: WA19545109

If no SID, use DOB: 10/17/1980

No. 00-1-00227-5

JUDGMENT AND SENTENCE

- Prison
- Jail One Year or Less
- First Time Offender
- Special Sexual Offender Sentencing Alternative
- Special Drug Offender Sentencing Alternative
- Clerk's Action Required, restraining order entered para. 4.4
- Clerk's action required firearms rights revoked, para. 4.3 and 5.6
- Clerk's action required, para 5.4 Restitution Hearing set.

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 11/17/00 by plea of Jury verdict

| COUNT | CRIME | RCW | INCIDENT # | DATE OF CRIME |
|-------|-------------|-----------|--------------|---------------|
| I | 1° Robbery | 9A.56.200 | SSO, 0000509 | 12/30/99 |
| II | 1° Burglary | 9A.52.020 | SSO, 0000509 | 12/30/99 |

as charged in the Amended Information.

Additional current offenses are attached in Appendix 2.1.

A special verdict/finding for use of a **deadly weapon** which was a **firearm** was returned on Court(s) I, II
RCW 9.94A.125, 310.; 9.41.010.

A special verdict/finding for use of **deadly weapon** which was not a firearm was returned on Court(s) _____
RCW 9.94A.125,310.

A special verdict/finding of **sexual motivation** was returned on Court(s) _____ RCW 9.94A.127.

A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Court(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, in a public transit vehicle, or in a public transit stop shelter.; or in, or within 1000 feet of the perimeter of, a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine **when a juvenile was present in or upon the premises of manufacture** was returned on Court(s) _____
RCW 9.94A, RCW 69.50.401(a), RCW 69.50.440.

The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030

This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.

The court finds that the offender has a **chemical dependency** which contributed to the offense and imposes as a condition of sentence that defendant shall participate in the rehabilitative program/affirmative conduct:

RCW 9.94A.129.

The crime charged in Count(s) _____ involve(s) **domestic violence**.
 The offense in Count(s) _____ was **committed in a county jail or state correctional facility**. RCW 9.94A.310(5).
 The court finds that in Count _____ a **motor vehicle was used in the commission of this felony**. The Department of Licensing shall revoke the defendant's driver's license. RCW 26.20.285.

Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400):

Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

| | <u>CRIME</u> | <u>DATE OF SENTENCE</u> | <u>SENTENCING COURT (County & State)</u> | <u>DATE OF CRIME</u> | A or J Adult, Juv. | <u>TYPE OF CRIME</u> |
|---|-------------------------------|-------------------------|--|----------------------|--------------------|----------------------|
| 1 | Take Motor Veh w/o Permission | 3/23/95 | Snohomish Co. | | J | C |
| 2 | 2° Unlawful Poss of Firearm | 3/5/98 | Snohomish Co. | | J | |
| 3 | 2° Poss of Stolen Property | 3/5/98 | Snohomish Co. | | J | C |

Additional criminal history is attached in Appendix 2.2.
 The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.360.
 The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.360):
 The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 **SENTENCING DATA:**

| COUNT NO. | OFFENDER SCORE | SERIOUSNESS LEVEL | STANDARD RANGE (not including enhancements) | PLUS ENHANCEMENTS | TOTAL STANDARD RANGE (not including enhancements) | MAXIMUM TERM |
|-----------|----------------|-------------------|---|-------------------|---|--------------|
| 1 | 3 | IX | 46 - 61 months | 60 months | 106 - 121 months | Life |
| 2 | 3 | VII | 31 - 41 months | 60 months | 91 - 101 months | Life |

*Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520,
 (JP) Juvenile Present

Additional current offense sentencing data is attached in Appendix 2.3.

2.4 **EXCEPTIONAL SENTENCE.** Substantial and compelling reasons exist which justify an exceptional sentence

above within below the standard range for Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. The prosecuting attorney did did not recommend a similar sentence.

2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.142
 The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.142):

2.6 The prosecutor's recommendation was 46 (months) / days on Count 1, 41 (months) / days on Count 2, _____ months / days on Count 3, _____ months / days on Count 4. The prosecutor recommended counts _____ run concurrently/consecutively.

III. JUDGMENT

- 3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.
- 3.2 The Court DISMISSES Counts _____
- 3.3 The defendant is found NOT GUILTY of Counts _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court:
 \$ T.B.D. Restitution to: _____

JASS CODE \$ _____ Restitution to: _____

RTN/RJN \$ _____ Restitution to: _____
(Name and Address--address may be withheld and provided confidentially to Clerk's Office).

RMA \$ 15/\$25/\$50 Restitution Monitoring Fee SCC 4.94.010
 The Clerk shall collect this fee before collecting restitution or any other assessed legal financial obligations. RCW 9.94A.145

PCV \$ 100/\$500 Victim assessment RCW 7.68.035
\$100.00 crimes committed prior to June 6, 1996.
\$500.00 crimes committed on or after June 6, 1996.

CRC \$ waived Court costs, including RCW 9.94A.030, 9.94A.120, 10.01.160, 10.46.190
 Criminal filing fee \$ _____ FRC
 Witness costs \$ _____ WFR
 Sheriff service fees \$ _____ SFR/SFS/SFW/SRF
 Jury demand fee \$ _____ JFR
 Other \$ _____

PUB \$ 790 waived Fees for court appointed attorney RCW 9.94A.030
 PUB \$ 790, 620, 530 Fees for all appointed conflict cases RCW 9.94A.030
 WFR \$ _____ Court appointed defense expert and other defense costs RCW 9.94A.030
 FCM \$ _____ Fine RCW 9A.20.021; VUCSA additional fine deferred due to indigency RCW 69.50.430
 CDF/LDI/ \$ _____ Drug enforcement fund of _____ RCW 9.94A.030
 FCD/INTF/SAD/SDI
 CLF \$ _____ Crime lab fee deferred due to indigency RCW 43.43.690
 EXT \$ _____ Extradition costs RCW 9.94A.120
 \$ _____ Emergency response costs (Vehicular Assault, Vehicular Homicide only, \$1000 maximum) RCW 38.52.430
 \$ _____ Other costs for: _____
 \$ _____ TOTAL RCW 9.94A.145

The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.142.

RESTITUTION. Schedule attached, Appendix 4.1.
 Restitution ordered above shall be paid jointly and severally with:
 NAME of other defendant CAUSE NUMBER (Victim name) (Amount-\$)
 R/JN Todd Bush 00-1-00225-9 Thomas Gibler
Jacoba Cole 00-1-00226-7 " "
Guadalupe Vargas 00-1-00228-3 " "

The Department of Corrections may immediately issue a Notice of Payroll Deduction. RCW 9.94A.200010

Joshua Bundy 00-1-00224-1 Thomas Gibler

* Any attorney's fees incurred after 1/30/07 defendant is responsible for

All payments shall be made in accordance with the policies of the clerk and on a schedule established by the Department of Corrections, commencing immediately, unless the court specifically sets forth the rate here: Not less than

\$ _____ per month commencing _____, RCW 9.94A.145

All payments shall be made within 24 months of: release of confinement; entry of judgment; Other _____

In addition to the other costs imposed herein the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.145

The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190.

The financial obligations imposed in this judgment shall bear interest from the date of the Judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

4.2 HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. The defendant, if out of custody, shall report to the HIV/AIDS Program Office at 3020 Rucker, Suite 206, Everett, WA 98201 within one (1) hour of this order to arrange for the test. RCW 70.24.340

DNA TESTING. The defendant shall have a blood sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or Department of Corrections, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754

4.3 The defendant shall not have contact with Thomas Gibling (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for life years (not to exceed the maximum statutory sentence). EVEN IF THE PERSON WHO THIS ORDER PROTECTS INVITES OR ALLOWS CONTACT, YOU CAN BE ARRESTED AND PROSECUTED. ONLY THE COURT CAN CHANGE THIS ORDER. YOU HAVE THE SOLE RESPONSIBILITY TO AVOID OR REFRAIN FROM VIOLATING THIS ORDER.

(Check for any domestic violence crime as defined by RCW 10.99.020(3)): VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE UNDER CHAPTER 10.99 RCW AND WILL SUBJECT A VIOLATOR TO ARREST. ANY ASSAULT, DRIVE-BY SHOOTING, OR RECKLESS ENDANGERMENT THAT IS A VIOLATION OF THIS ORDER IS A FELONY. RCW 10.99.050.

(Check for any harassment crime as defined by RCW 9A.46.060): VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE UNDER CHAPTER 9A.46 AND WILL SUBJECT A VIOLATOR TO ARREST. RCW 9A.46.080.

(For Domestic Violence orders only:) The clerk of the court shall forward a copy of this order on or before the next judicial day to the _____ County Sheriff's Office or _____ Police Department (where the protected person above-named lives), which shall enter it in a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants.

4.4 OTHER: _____

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC): For weapons enhancement

* 61 + 60 months I months on Count _____ months on Count _____
41 months on Count II months on Count _____
_____ months on Count _____ months on Count _____

Actual number of months of total confinement ordered is: 121 months
(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data above)

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively with the sentence in cause number(s) _____ but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.400

Confinement shall commence immediately unless otherwise set forth here: _____

(b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.120. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: _____

4.6 COMMUNITY PLACEMENT is ordered as follows: Count I for 12 months; Count II for 12 months; Count _____ for _____ months.
 COMMUNITY CUSTODY is ordered as follows:
Count _____ for a range from _____ to _____ months;
Count _____ for a range from _____ to _____ months;
Count _____ for a range from _____ to _____ months;

or for the period of earned release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A for community placement offenses -- serious violent offense, second degree assault, any crime against a person with a deadly weapon finding. Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders may be extended for up to statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The defendant shall not consume any alcohol.
 Defendant shall have no contact with: Thomas Cible
 Defendant shall remain within outside of a specific geographical boundary, to wit: _____

* Court imposing one deadly weapon enhancement

The defendant shall participate in the following crime-related treatment or counseling services:

The defendant shall undergo an evaluation for treatment for domestic violence substance abuse mental health
 anger management and fully comply with all recommended treatment.

The defendant shall comply with the following crime-related prohibitions: _____

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: _____

4.7 **WORK ETHIC CAMP.** RCW 9.94A.137, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.7 **OFF LIMITS ORD:** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

V. NOTICES AND SIGNATURES

- 5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090
- 5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.145 and RCW 9.94A.120(13).
- 5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in paragraph 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.200010. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.200030.
- 5.4 **RESTITUTION HEARING.**
 Defendant waives any right to be present at any restitution hearing (sign initials): _____
 Defendant waives any right to a restitution hearing within 6 months RCW 9.94A.140.
 A restitution hearing shall be set for _____
 The Prosecutor shall provide a copy of the proposed restitution order and supporting affidavit(s) of victim(s) 21 judicial days prior to the date set for said restitution hearing. The defendant's presence at said restitution hearing may be excused only if a copy of the proposed restitution order is signed by both defendant and defense counsel and returned to the Court and Prosecutor no later than 10 judicial days prior to said hearing.
- 5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.200

Cross off if not applicable:

5.6 **FIREARMS.** You may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification, to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047

If this is a crime enumerated in RCW 9.41.040 which makes you ineligible to possess a firearm, you must surrender any concealed pistol license at this time, if you have not already done so.

(Pursuant to RCW 9.41.047(1), the Judge shall read this section to the defendant in open court. The Clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the department of licensing along with the date of conviction).

5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW where the victim is a minor and you are not the minor's parent), you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this State's Department of Corrections.

If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving, register with that sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must also send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required

to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier.

Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 14 days after ceasing to have a fixed residence. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report in person to the sheriff of the county where you are registered on a weekly basis if you have been classified as a risk level II or III, or on a monthly basis if you have been classified as a risk level I. The lack of a fixed residence is a factor that may be considered in determining a sex offender's risk level. If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

Cross off if not applicable:

5.8 RIGHT TO APPEAL. If you plead not guilty, you have a right to appeal this conviction. If the sentence imposed was outside of the standard sentencing range, you also have a right to appeal the sentence.

This right must be exercised by filing a notice of appeal with the clerk of this court within 30 days from today. If a notice of appeal is not filed within this time, the right to appeal is IRREVOCABLY WAIVED.

If you are without counsel, the clerk will supply you with an appeal form on your request, and will file the form when you complete it.

If you are unable to pay the costs of the appeal, the court will appoint counsel to represent you, and the portions of the record necessary for the appeal will be prepared at public expense.

5.9 OTHER: _____

DONE in Open Court and in the presence of the defendant this date: January 30th, 2001

Gerard L. Knight
JUDGE
Print name: GERARD L. KNIGHT

Craig Matheson
CRAIG S. MATHESON, #18556
Deputy Prosecuting Attorney

David F. Shayne
DAVID F. SHAYNE, # 19068
Attorney for Defendant

James Taylor Eastmond
JAMES TAYLOR EASTMOND
Defendant

Interpreter signature/Print name: _____
I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.
CAUSE NUMBER of this case: 00-1-00227-5

I, Pam L. Daniels, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action, now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____

Clerk of said County and State, by: _____, Deputy Clerk

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

EASTMOND, JAMES TAYLOR

Defendant.

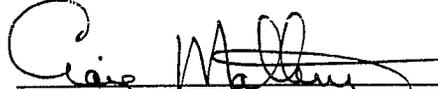
No. 00-1-00227-5

STATEMENT OF DEPUTY
PROSECUTING ATTORNEY TO
BOARD OF PRISON TERMS
AND PAROLES

Attached hereto is a copy of the Affidavit of Probable Cause (or Presentence Report if available) in reference to the above cause.

It is this writer's opinion that these reports accurately reflect the facts of this case.

Dated this 7 day of December, 2000.


CRAIG S. MATHESON, #18556
Deputy Prosecuting Attorney

ORDER OF COMMITMENT

THE STATE OF WASHINGTON to the Sheriff of the County of Snohomish; State of Washington, and to the Secretary of the Department of Corrections, and the Superintendent of the Washington Corrections Center of the State of Washington, GREETINGS:

WHEREAS, JAMES TAYLOR EASTMOND, has been duly convicted of the crime(s) of Count 1 First Degree Robbery, Count 2 First Degree Burglary, as charged in the Amended Information filed in the Superior Court of the State of Washington, in and for the County of Snohomish, and judgment has been pronounced against him/her that he/she be punished therefore by imprisonment in such correctional institution under the supervision of the Department of Corrections, Division of Prisons, as shall be designated by the Secretary of the Department of Corrections pursuant to RCW 72.02.210, for the term of 121 months all of which appears of record in this court; a certified copy of said judgment being endorsed hereon and made a part thereof, Now, Therefore,

THIS IS TO COMMAND YOU, the said Sheriff, to detain the said defendant until called for by the officer authorized to conduct him to the Washington Corrections Center at Shelton, Washington, in Mason County, and this is to command you, the said Superintendent and Officers in charge of said Washington Corrections Center to receive from the said officer the said defendant for confinement, classification, and placement in such corrections facilities under the supervision of the Department of Corrections, Division of Prisons, as shall be designated by the Secretary of the Department of Corrections.

And these presents shall be authority for the same. HEREIN FAIL NOT.

WITNESS the Honorable GERALD L. KNIGHT, Judge of the said Superior Court and the seal thereof, this

30th day of January, 2000.

Pam L. Daniels
CLERK OF THE SUPERIOR COURT

By: _____

Toreen Cole
Deputy Clerk

ROBBERY, FIRST DEGREE

(RCW 9A.56.200)

CLASS A FELONY

VIOLENT

11/21/00 (gp)
EASTMOND, James Taylor

(If sexual motivation finding/verdict, use form on page III-37)

I. OFFENDER SCORING (RCW 9.94A.360 (8))

In the case of multiple prior convictions for offenses committed before July 1, 1986, for purposes of computing the offender score, count all adult convictions served concurrently as one offense and all juvenile convictions entered on the same date as one offense (RCW 9.94A.360).

ADULT HISTORY:

Enter number of serious violent and violent felony convictions..... 0 x 2 = 0

Enter number of nonviolent felony convictions..... 0 x 1 = 0

JUVENILE HISTORY:

Enter number of serious violent and violent felony dispositions..... 0 x 2 = 0

Enter number of nonviolent felony dispositions..... 3 x 1/2 = 1 1/2

OTHER CURRENT OFFENSES: (Other current offenses which do not encompass the same conduct count in offender score)

Enter number of other serious violent and violent felony convictions..... 1 x 2 = 2

Enter number of nonviolent felony convictions..... 0 x 1 = 0

STATUS: Was the offender on community placement on the date the current offense was committed? (If yes), + 1 = 0

Total the last column to get the Offender Score
(Round down to the nearest whole number)

3

II. SENTENCE RANGE

A. OFFENDER SCORE:
STANDARD RANGE
(LEVEL IX)

| 0 | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 or more |
|----------------|----------------|----------------|----------------|----------------|----------------|-----------------|-----------------|------------------|------------------|
| 31 - 41 months | 36 - 48 months | 41 - 54 months | 46 - 61 months | 51 - 68 months | 57 - 75 months | 77 - 102 months | 87 - 116 months | 108 - 144 months | 129 - 171 months |

- B. The range for attempt, solicitation, and conspiracy is 75% of the range for the completed crime (RCW 9.94A.410).
- C. If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-18 or III-19 to calculate the enhanced sentence.
- D. One year of community placement must be served following release from state prison (RCW 9.94A.120).

IDENTIFICATION OF DEFENDANT

SID No. WA19545109
(If no SID take fingerprint card for State Patrol)

Date of Birth: 10/17/1980

FBI No. _____

Local ID No. _____

PCN No. _____

DOC _____

Alias name, SSN, DOB: _____

Race: White

Ethnicity:
 Hispanic
 Non-Hispanic

Sex: M

Height: 6'0

Weight: 140

Hair: Brown

Eyes: Hazel

FINGERPRINTS I attest that I saw the same defendant who appeared in Court on this document affix his or her fingerprints

and signature thereto. Clerk of the Court: Kareem Poole, Deputy Clerk. Dated: 1-30-2001

DEFENDANT'S SIGNATURE: James Eastmond

ADDRESS: DOL

Left four fingers taken simultaneously

Left Thumb

Right Thumb

Right four fingers taken simultaneously

APPENDIX A TO PLEA AGREEMENT
PROSECUTOR'S UNDERSTANDING OF DEFENDANT'S CRIMINAL HISTORY
(SENTENCING REFORM ACT)

DATE: November 21, 2000 (da/gp)
DEFENDANT: EASTMOND, James Taylor
DOB: 10/17/80 W/M
SID: WA19545109 FBI: DOC: DOL: EASTM-JT-207PP

| <u>CRIME</u> | <u>DATE OF CONVICTION</u> | <u>PLACE OF CONVICTION</u> | <u>Incarceration/Probation DISPOSITION</u> |
|--------------|---------------------------|----------------------------|--|
|--------------|---------------------------|----------------------------|--|

ADULT FELONIES:

None.

ADULT MISDEMEANORS:

| | | |
|----------------------------------|----------|------------------|
| No Valid License/Expired License | 12/21/98 | Oregon |
| No Valid License/Expired License | 1/18/99 | Snohomish County |
| No Valid License/Expired License | 1/28/99 | Snohomish County |
| Driving While Suspended/Revoked | 7/15/98 | Snohomish County |
| Driving While Suspended/Revoked | 7/19/99 | Snohomish County |

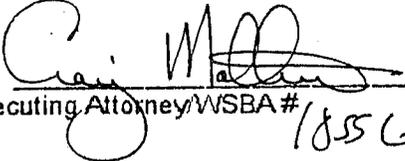
JUVENILE FELONIES:

| | | | |
|--|---------|------------------|-----------------------|
| Take Motor Vehicle w/o Permission | 8/29/95 | Snohomish County | Community Supervision |
| Second Degree Unlawful Possession of Firearm | 3/5/98 | Snohomish County | Community Supervision |
| Second Degree Poss. Stolen Property | 3/5/98 | Snohomish County | Detention |

JUVENILE SERIOUS TRAFFIC:

None.

1/30/01
DATE


Deputy Prosecuting Attorney/WSBA # 18556

Snohomish County Prosecuting Attorney
White: Court
Canary: Defense
Pink: Prosecutor

BURGLARY, FIRST DEGREE

(RCW 9A.52.020)

CLASS A FELONY

BURGLARY 1 (VIOLENT)

11/21/00 (gp)

EASTMOND, James Taylor

(If sexual motivation finding/verdict, use form on page III-22)

I. OFFENDER SCORING (RCW 9.94A.360 (10))

In the case of multiple prior convictions for offenses committed before July 1, 1986, for purposes of computing the offender score, count all adult convictions served concurrently as one offense and all juvenile convictions entered on the same date as one offense (RCW 9.94A.360).

ADULT HISTORY:

| | | | |
|---|---|-------|---|
| Enter number of serious violent and violent felony convictions..... | 0 | x 2 = | 0 |
| Enter number of Burglary 2 or Residential Burglary convictions..... | 0 | x 2 = | 0 |
| Enter number of other nonviolent felony convictions..... | 0 | x 1 = | 0 |

JUVENILE HISTORY:

| | | | |
|--|---|---------|-------|
| Enter number of serious violent and violent felony dispositions..... | 0 | x 2 = | 0 |
| Enter number of Burglary 2 or Residential Burglary dispositions..... | 0 | x 1 = | 0 |
| Enter number of other nonviolent felony dispositions..... | 3 | x 1/2 = | 1 1/2 |

OTHER CURRENT OFFENSES: (Other current offenses which do not encompass the same conduct count in offender score)

| | | | |
|---|---|-------|---|
| Enter number of other serious violent and violent felony convictions..... | 1 | x 2 = | 2 |
| Enter number of Burglary 2 or Residential Burglary convictions..... | 0 | x 2 = | 0 |
| Enter number of other nonviolent felony convictions..... | 0 | x 1 = | 0 |

STATUS: Was the offender on community placement on the date the current offense was committed? (If yes), + 1 = 0

Total the last column to get the Offender Score
(Round down to the nearest whole number)

| |
|---|
| 3 |
|---|

II. SENTENCE RANGE

A. OFFENDER SCORE:
STANDARD RANGE
(LEVEL VII)

| 0 | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 or more |
|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|-----------------|-----------------|
| 15 - 20 months | 21 - 27 months | 26 - 34 months | 31 - 41 months | 36 - 48 months | 41 - 54 months | 57 - 75 months | 67 - 89 months | 77 - 102 months | 87 - 116 months |

- B. The range for attempt, solicitation, and conspiracy is 75% of the range for the completed crime (RCW 9.94A.410).
- C. If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-18 or III-19 to calculate the enhanced sentence.
- D. One year of community placement must be served following release from state prison (RCW 9.94A.120).

GENERAL DEADLY WEAPON ENHANCEMENT - FORM A

Firearm or Other Deadly Weapon Enhancements**

For offenses committed after July 23, 1995

21/00 (gp)
TMOND, James Taylor

Use of this form: Only for offenses committed after July 23, 1995 that have a firearm or other deadly weapon finding.

CLASS A FELONY DEADLY WEAPON ENHANCEMENTS:

| | | | |
|--|---------|--------------------------------------|----------|
| First Deadly Weapon/Firearm Offense**: | | Subsequent*** Deadly Weapon Offense: | |
| Firearm | 5 years | Firearm | 10 years |
| Other Deadly Weapon | 2 years | Other Deadly Weapon | 4 years |

CLASS B FELONY DEADLY WEAPON ENHANCEMENTS:

| | | | |
|--|---------|--------------------------------------|---------|
| First Deadly Weapon/Firearm Offense**: | | Subsequent*** Deadly Weapon Offense: | |
| Firearm | 3 years | Firearm | 6 years |
| Other Deadly Weapon | 1 year | Other Deadly Weapon | 2 years |

CLASS C FELONY DEADLY WEAPON ENHANCEMENTS:

| | | | |
|--|-----------|--------------------------------------|---------|
| First Deadly Weapon/Firearm Offense**: | | Subsequent*** Deadly Weapon Offense: | |
| Firearm | 18 months | Firearm | 3 years |
| Other Deadly Weapon | 6 months | Other Deadly Weapon | 1 year |

* Excluded offenses: Possession of a Machine Gun, Possessing a Stolen Firearm, Drive-by Shooting, Theft of a Firearm, Unlawful Possession of a Firearm 1 and 2, Use of a Machine Gun in a felony, or any offense committed on or before July 23, 1995 with a deadly weapon finding.

** This enhancement is limited to offenses committed after July 23, 1995.

*** To be sentenced as a subsequent deadly weapon finding, the offense in history with a deadly weapon finding must also have been committed after July 23, 1995.

STANDARD RANGE CALCULATION

| CURRENT OFFENSE BEING SCORED | SERIOUSNESS LEVEL | OFFENDER SCORE | BASE STANDARD SENTENCE RANGE | |
|--|----------------------|-------------------|---------------------------------|--|
| FIRST DEGREE BURGLARY (Firearm) | VIII | 3 | 31 mos <small>LOW</small> | TO 41 mos <small>HIGH</small> |
| DEADLY WEAPON ENHANCEMENT | | | 60 mos | 60 mos |
| STANDARD RANGE | | | 91 mos <small>LOW</small> | TO 101 mos <small>HIGH</small> |

NOTE: The "base standard sentence range" is the appropriate standard sentence without the deadly weapon enhancement.

*For anticipatory offenses with a deadly weapon finding, add the enhancement after reducing the standard sentence range by 25%.

GENERAL DEADLY WEAPON ENHANCEMENT - FORM A

Firearm or Other Deadly Weapon Enhancements*1

For offenses committed after July 23, 1995

L/21/00 (gp)

ASTMOND, James Taylor

Use of this form: Only for offenses committed after July 23, 1995 that have a firearm or other deadly weapon finding.

CLASS A FELONY DEADLY WEAPON ENHANCEMENTS:

| | | | |
|--|---------|--------------------------------------|----------|
| First Deadly Weapon/Firearm Offense**: | | Subsequent*** Deadly Weapon Offense: | |
| Firearm | 5 years | Firearm | 10 years |
| Other Deadly Weapon | 2 years | Other Deadly Weapon | 4 years |

CLASS B FELONY DEADLY WEAPON ENHANCEMENTS:

| | | | |
|--|---------|--------------------------------------|---------|
| First Deadly Weapon/Firearm Offense**: | | Subsequent*** Deadly Weapon Offense: | |
| Firearm | 3 years | Firearm | 6 years |
| Other Deadly Weapon | 1 year | Other Deadly Weapon | 2 years |

CLASS C FELONY DEADLY WEAPON ENHANCEMENTS:

| | | | |
|--|-----------|--------------------------------------|---------|
| First Deadly Weapon/Firearm Offense**: | | Subsequent*** Deadly Weapon Offense: | |
| Firearm | 18 months | Firearm | 3 years |
| Other Deadly Weapon | 6 months | Other Deadly Weapon | 1 year |

* Excluded offenses: Possession of a Machine Gun, Possessing a Stolen Firearm, Drive-by Shooting, Theft of a Firearm, Unlawful Possession of a Firearm 1 and 2, Use of a Machine Gun in a felony, or any offense committed on or before July 23, 1995 with a deadly weapon finding.

** This enhancement is limited to offenses committed after July 23, 1995.

*** To be sentenced as a subsequent deadly weapon finding, the offense in history with a deadly weapon finding must also have been committed after July 23, 1995.

STANDARD RANGE CALCULATION

| CURRENT OFFENSE BEING SCORED | SERIOUSNESS LEVEL | OFFENDER SCORE | BASE STANDARD SENTENCE RANGE | |
|--|----------------------|-------------------|---------------------------------|---------|
| FIRST DEGREE ROBBERY | IX | 3 | 46 mos | 61 mos |
| (Firearm) | | | LOW | HIGH |
| | | | 60 mos | 60 mos |
| DEADLY WEAPON ENHANCEMENT | | | | |
| <div style="border: 1px solid black; padding: 5px; width: fit-content;"> NOTE: The "base standard sentence range" is the appropriate standard sentence without the deadly weapon enhancement. </div> | | | STANDARD RANGE | |
| | | | 106 mos | 121 mos |
| | | | LOW | HIGH |

* For anticipatory offenses with a deadly weapon finding, add the enhancement after reducing the standard sentence range by 25%.

COUNTY OF SNOHOMISH
JURY MANAGEMENT

DATE: 11-13-2000
PAGE: 1

CASE INFO SHEET -- R A N D O M

1
CASE ID: 001002275

STATE VS EASTMOND

DEPARTMENT: 6

JURORS REQUESTED THIS GROUP: 30

JURORS SENT THIS GROUP: 30

| JURORS IN GROUP: | PER | STP | CSE | NR | SWN | ALT | BADGE |
|------------------|-----|-----|-----|----|-----|-----|-----------|
| SEAT NAME | 1 | 2 | 3 | 4 | 5 | 6 | |
| 1 | | | | | | | 210034182 |
| 2 | | | | | | | 210046504 |
| 3 | | | | | | | 210036274 |
| 4 | | | | | | | 200037392 |
| 5 | | | | | | | 210064808 |
| 6 | | | | | | | 210047204 |
| 7 | | | | | | | 200029458 |
| 8 | | | | | | | 210077425 |
| 9 | | | | | | | 200069693 |
| 10 | | | | | | | 210073990 |
| 11 | | | | | | | 200085072 |
| 12 | | | | | | | 200032180 |
| 13 | | | | | | | 200070750 |
| 14 | | | | | | | 200048092 |
| 15 | | | | | | | 210035386 |
| 16 | | | | | | | 210018460 |
| 17 | | | | | | | 210032610 |
| 18 | | | | | | | 210021608 |
| 19 | | | | | | | 210013572 |
| 20 | | | | | | | 210039567 |
| 21 | | | | | | | 210046081 |
| 22 | | | | | | | 200085990 |
| 23 | | | | | | | 210063368 |
| 24 | | | | | | | 200052710 |
| 25 | | | | | | | 210023979 |
| 26 | | | | | | | 200045001 |
| 27 | | | | | | | 210079624 |
| 28 | | | | | | | 200080512 |
| 29 | | | | | | | 210072798 |
| 30 | | | | | | | 200078057 |

Kathleen or Sally

Joe Daggard?

300-

308-3086

was in the jail

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

James Taylor Eastmond

Defendant.

No. 00-1-00227-5

TEMPORARY ORDER OF
COMMITMENT

TO: SHERIFF OF SNOHOMISH COUNTY and/or
SNOHOMISH COUNTY DEPARTMENT OF CORRECTIONS

You are instructed to receive and hold in custody the above-identified defendant until such time as formal commitment papers are received. The reason the defendant is referred to your custody is as stated below:

- () Personal recognizance revoked, bail set for \$ _____
- () Bail revoked.
- () Sentenced to Snohomish County Jail for _____

Sentenced to the State Department of Corrections; hold for transport to Shelton or Purdy.

Other: Defendant to be held at Snohomish County Jail ~~for~~ for two weeks

DATED this 30 day of January, 1995. 2001

[Signature]
JUDGE

Original: Court File
Yellow: Jail
Pink: Prosecutor

Appendix 7

Unpublished Opinion

The Court of Appeals

RICHARD D. JOHNSON,
Court Administrator/Clerk

of the
State of Washington
Seattle
98101-4170

DIVISION I
One Union Square
600 University Street
(206) 464-7750
TDD: (206) 587-5505

February 3, 2003

RECEIVED
FEB 03 2003
NIELSEN & BROMAN

Nielsen Broman Koch PLLC
810 Third Avenue
320 Central Building
Seattle, WA. 98104

Constance Mary Crawley
Snohomish Co Courthouse
3000 Rockefeller Ave
Everett, WA. 98201

Catherine E. Glinski
Attorney At Law
PO Box 761
Manchester, WA. 98353

Christopher Gibson
Nielsen Broman & Koch PLLC
810 3rd Ave Ste 320
Seattle, WA. 98104

CASE #: 48151-7-1
State of Washington, Respondent / Cross Appellant vs
James T. Eastmond, Appellant / Cross Respondent

Snohomish County, Cause No. 00-1-00227-6

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"We affirm Eastmont's convictions, but vacate his sentence and remand for resentencing in accordance with this opinion."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

Page 2 of 2
Case No. 48151-7-1
February 3, 2003

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish must be filed within 20 days of the date of this letter.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

emp

Enclosure

c: The Honorable Gerald Knight
James Eastmont

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate reports but will be filed for public record pursuant to RCW 2.06.040. IT IS SO ORDERED

Mary Kay Becker

FILE
CLERK'S OFFICE
COURT OF APPEALS
STATE OF WASHINGTON-DIVISION 1
DATE FEB 03 2003
Mary Kay Becker
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | | |
|----------------------|---|---------------------|
| STATE OF WASHINGTON, |) | NO. 48151-7-1 |
| |) | |
| Respondent, |) | DIVISION ONE |
| |) | |
| v. |) | |
| |) | |
| JAMES T. EASTMOND, |) | Unpublished Opinion |
| |) | |
| Appellant. |) | FILED: FEB 03 2003 |

COLEMAN, J. — James Eastmond appeals his convictions for first degree robbery and first degree burglary, with firearm enhancements on both counts. Finding no reversible prosecutorial misconduct, erroneous jury instructions, or lack of sufficient evidence, we affirm the convictions, but remand for resentencing.

Eastmond's offender score should not have included juvenile convictions that washed out or were the "same criminal conduct," but the trial court can exercise its discretion on remand whether to score Eastmond's current burglary and robbery convictions as one crime or two. Under the "Hard Time for Armed Crime" initiative, however, the trial court erred when it failed to impose the two firearm enhancements consecutively to the underlying base sentence and each other.

FACTS

On December 30, 1999, at approximately 1:20 A.M., a group of young men committed a home invasion robbery at the home of Thomas Gibler in Everett, Washington. The target of the robbery was Gibler's marijuana grow operation. Five men were implicated in the crime—Todd Bush, Joshua Bundy, Jake Cote, Guadalupe "JJ" Vargas, and James Eastmond. Bush, Bundy, Cote and Vargas all accepted plea bargains, and Cote and Vargas agreed to testify against Eastmond in exchange for reduced charges. They received sentences of 31 months and 36 months, respectively. Bush's plea bargain was not conditioned on testimony, but he did testify at trial. Bush's sentence was 96 months. Bundy was sentenced to 91 months, but did not testify.

The main dispute at trial was whether Eastmond was involved in the crime. At trial, Eastmond testified on his own behalf and denied any involvement. He testified that he had lent his white 1992 Chevy Blazer to his friend, JJ Vargas, on December 29, 1999, with instructions to return it later that day. Eastmond testified that he and Vargas were good friends who frequently swapped vehicles. Eastmond also testified that he accidentally left his SKS assault rifle in the Blazer after target practice. Vargas admitted borrowing the Blazer, but claimed he returned it prior to the robbery. Eastmond disagreed, stating that he tried phoning and paging Vargas on December 29 after Vargas failed to return the vehicle, but he received no response. Eastmond testified that he gave up waiting for Vargas and took the bus to a friend's house where he stayed overnight on December 29. The next night, Eastmond became ill and spent a second night at his friend's house. Eastmond's friend, Jake Dick, and Dick's mother both

testified that Eastmond spent at least one night at their house between Christmas and New Year's Eve, but both were unsure of the exact date.

At trial, Eastmond also retracted an earlier statement that he had given the police. A few days after the robbery, Eastmond phoned the police to report the Blazer stolen. He initially told the police that he had traveled to California for a New Year's Eve party with a friend and did not know who might have taken his SUV. He also denied any involvement in the robbery and gave the police his consent to search the vehicle. There were many flaws with the California story, however, and the police suspected at that time that it was false. At trial, Eastmond explained that he gave the false California story to the police because he had received a phone threat not to disclose who had taken his car and he did not want to get Vargas in trouble. Eastmond also claimed that on December 31, Vargas returned the keys to the Blazer to him, but gave false information about where the Blazer was parked. Eastmond and another friend, Matt Chimienti, testified that they looked for the Blazer on New Year's Eve, but could not find it, which led to Eastmond phoning the police to report it stolen.

While Eastmond denied involvement in the robbery, Jake Cote and JJ Vargas testified to a different version of events. They both testified that Eastmond was actively involved in the robbery and that he drove the group to and from Gibler's house in the Blazer. In addition, Cote and Vargas provided details about the events surrounding the robbery in a consistent manner. Cote admitted that he devised the robbery scheme because he was acquainted with Gibler and knew about the marijuana. Cote prepared for the robbery by taking Bush to Gibler's house and describing the marijuana grow

operation. Bush then recruited Bundy and Vargas, who told Bush that he knew where to get a gun for the crime.

At the beginning of the robbery, Bush, armed with Eastmond's SKS rifle, and Bundy, armed with a police baton and handcuffs, were the first to approach Gibler's house. Bush rang the doorbell and he and Bundy forced their way into the house after Gibler answered. Once inside, there was a scuffle. Bush fired shots into the ceiling and chased after Bundy and Gibler upstairs to the living room. In the living room, Gibler grabbed a samurai sword from the wall and struck Bundy's arm, cutting him badly. Cote and Vargas testified that they hid outside waiting for Bush and Bundy to enter the house, after which they ran inside and to the basement where they grabbed several marijuana plants. They also testified that Eastmond hid outside with them. They said that it was Eastmond's job to cut the phone lines and, although neither of them saw Eastmond do so, several days after the robbery Gibler reported that his phone lines had been cut. Cote said that Eastmond followed him into the house to grab the marijuana, but Vargas could not recall seeing Eastmond in Gibler's house.

While Cote and Vargas were downstairs, Gibler managed to escape the house through the open front door. At this point, the robbers fled the scene, running out of the house, piling into the Blazer, and eluding pursuit by Gibler, who followed them briefly in a neighbor's van. The robbers dropped Bundy off at a nearby hospital, where he was found by the police, but he refused to provide any information regarding the robbery. The police later discovered the Blazer abandoned in a rural location with traces of marijuana and blood inside.

Todd Bush's version of the facts was similar to Cote's and Vargas's in terms of the planning and execution of the robbery. But Bush claimed that there were only four robbers involved and that Eastmond was not one of them. He stated that he never saw Eastmond on December 29. Bush said that the group met at his house before the crime and that he drove the Blazer from Gibler's house, but he could not remember who drove to it. Bush also admitted that he and the other robbers had been consuming large amounts of alcohol and hallucinogenic drugs before the robbery.

Several neighbors who witnessed the robbers leaving the scene of the crime testified at trial, but they, too, disagreed on the number of robbers that they saw. One neighbor, Pamela Leno, said that from her bedroom window she saw a total of four men run by. Another neighbor, Kathleen King, testified that five men ran by her driveway. Gibler testified that while knocking on a neighbor's door for help he saw five men fleeing to the Blazer—a group of four and one separate from the others.

During closing argument, the prosecutor made the following comment:

The evidence in this trial as to whether the defendant is guilty as he's charged can be summed up real easily. If there were five guys there, he was one of them and he's guilty. There has been zero suggestion that anybody else other than the defendant was the fifth person with those four guys, other guys that went in and committed the robbery and the burglary. There's been no suggestion by the defense there is anybody else named James or any other accomplice that was present that would be that fifth person. So if you find there was a fifth person, I would suggest that all of the evidence viewed logically indicate that the fifth person is him.

Eastmond's attorney did not object to the comment. On November 17, 2000, after a five-day trial, a jury convicted Eastmond of first degree burglary and first degree robbery. The jury found by special verdict that Eastmond or an accomplice was armed with a firearm on each count.

At the sentencing hearing, the State argued that the court should apply the anti-merger statute and score each current conviction as 1 point (with a total score of 3½ including prior juvenile convictions). Eastmond's attorney argued that the burglary and robbery were the "same criminal conduct" and should be scored as a single offense. The defense also argued that the court could impose only one firearm enhancement, because imposition of two enhancements for the same criminal conduct would violate double jeopardy. The trial court agreed with the State on the scoring issue and the defense on the enhancement issue. The court stated:

I apply the anti-merger statute, and I believe the anti-merger statute prohibits me from saying it's the same criminal conduct for scoring purposes. I score it the same as the State scores, robbery with a range of 46 to 61, burglary with a range of 31 to 41.

I impose a sentence for the first degree robbery of 61 months. I impose a sentence for the burglary of 41 months. Those two sentences to run concurrently with one weapons enhancement, because it is all the same criminal conduct. But I decide to, in my discretion, to apply the anti-merger statute. And therefore the sentence, sir, that you have is 121 months.

. . . And if I'm wrong in my first analysis, then I decline to apply the anti-merger statute, I stand by my total feeling that it's the same criminal conduct. Therefore, the scoring becomes different. The robbery range becomes 41 to 54, the burglary becomes 26 to 34. And I then impose a sentence of 54 months on the robbery to run concurrent with the sentence of 34 months on the burglary and impose one weapons enhancement, because I've merged the two offenses. And then that would be a sentence of 114 months.

Eastmond was sentenced to 121 months, consisting of 61 months for first degree robbery and 41 months for burglary, served concurrently, plus 60 months for the firearm enhancement to be served consecutively to the base sentence.

DISCUSSION

1. Prosecutorial Misconduct

When prosecutorial misconduct is alleged, the defendant bears the burden of establishing the impropriety of the prosecutor's argument as well as its prejudicial effect. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995). Allegedly improper comments are reviewed "in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given." State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998). Reversal is required only if there is a substantial likelihood that the misconduct affected the verdict. State v. Lord, 117 Wn.2d 829, 887, 822 P.2d 177 (1991). However, the failure to object to a prosecutor's improper remark constitutes a waiver of the error "unless the remark is deemed to be so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Gentry, 125 Wn.2d at 640.

While it is improper to imply a defense duty to present evidence, the State may comment on the evidence presented. See State v. French, 101 Wn. App. 380, 389, 4 P.3d 857 (2000), review denied, 142 Wn.2d 1022 (2001); State v. Traweek, 43 Wn. App. 99, 107-08, 715 P. 2d 1148 (1986).

Eastmond claims that the prosecutor's comment, "[t]here's been no suggestion by the defense there is anybody else named James or any other accomplice that was present that would be that fifth person," improperly shifted the burden of proof to him. He argues that this case is similar to French, which held that it was improper for the State to comment that the defendant had given the jury "no reason" to believe he did not

commit the crime. French, 101 Wn. App. at 386-88.¹ In response, the State claims that its closing was a proper comment on the differences between the State's and Eastmond's evidence. The State points that out that in some limited circumstances, it is permissible to comment on a defendant's failure to present evidence, such as when a defendant testifies but fails to present exculpatory evidence within the defendant's control. State v. Contreras, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). See also State v. Barrow, 60 Wn. App. 869, 872--73, 809 P.2d 209 (1991).

Here, the prosecutor was referring to the State's evidence supporting its theory that there were five robbers, one of whom must have been Eastmond. The prosecutor also referred to the fact that Eastmond presented no evidence regarding the identity of the fifth robber, if indeed there was one. Eastmond believes that it was flatly impermissible to refer to his failure to present exculpatory evidence when such evidence was not in his control. Washington courts have held that the prosecutor may comment on the absence of certain evidence if persons other than the defendant could have testified regarding that evidence. See State v. Ashby, 77 Wn.2d 33, 37-38, 459 P.2d 403 (1969). But even if we accept Eastmond's claim that the State's comment was improper, we find no reason to conclude that the State's comment was prejudicial.

¹ Eastmond argues that French conflicts with this court's decision in Fleming, which reversed a conviction of second degree rape because of the prosecutor's "flagrant and ill-intentioned multiple acts of misconduct" criticizing defendants' failure to testify. State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996). Fleming is distinguishable from Division Three's decision in French because it directly implicated the defendants' constitutional right to remain silent and consisted of more than just an isolated improper comment. State v. Fleming, 83 Wn. at 214-16. Burden shifting is a corollary of the State's duty to prove every element of the crime.

First, when read in context, the State's closing argument consisted primarily of appropriate characterizations of the State's evidence. Second, the disputed comment was a minor, isolated remark in a lengthy closing argument that was directed more at the credibility dispute facing the jury, rather than a lack of evidence presented by the defendant. Third, the jury instructions properly instructed the jury that the State had the burden of proof of each element of the crime. We presume that the jury follows the jury instructions. See State v. Hanna, 123 Wn.2d 704, 711, 871 P.2d 135 (1994).

Finally, even if the jurors believed Eastmond's theory that there were only four robbers, they could have found Eastmond guilty as an accomplice who knowingly provided the gun and vehicle to the robbers. Thus, there is no indication that without the disputed comment, the jury's verdict would have been different. For all of the above reasons, the State's comment was harmless. Because there was no prejudice from the State's comment, Eastmond's claim that he was denied effective assistance of counsel also fails. See State v. Sherwood, 71 Wn. App. 481, 483, 860 P.2d 407 (1993) (a criminal defendant claiming ineffective assistance of counsel must show that counsel's performance fell below an objective standard of reasonableness and prejudice resulting therefrom).

2. Accomplice Liability

Arguing pro se, Eastmond claims his convictions should be reversed on the basis of five erroneous jury instructions. First, Eastmond claims that instructions 9, 13, and 14 improperly defined first degree burglary and first degree robbery in a manner that

permitted the jury to attribute the intent of the principal to the accomplice.² Under Washington law, accomplice liability is established by showing that the actor aided or abetted the crime with the knowledge that he was promoting or facilitating that crime. State v. Haack, 88 Wn. App. 423, 958 P.2d 1001 (1997). "The legislature has said that anyone who participates in the commission of a crime is guilty of the crime and should be charged as a principal, regardless of the degree or nature of his participation." State v. Carothers, 84 Wn.2d 256, 264, 525 P.2d 731 (1974). If the State can prove that at least one person intended to commit the crime, accomplice liability extends to all who knowingly participated. Haack, 88 Wn. App. at 429. Here, there was no error in splitting the intent element in instructions 9, 13, and 14, because Washington law

² Instruction 9 stated in pertinent part:
"To convict the defendant of the crime of robbery in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
"(1) That on or about the 30th day of December, 1999, the defendant or an accomplice unlawfully took personal property from the person or in the presence of another;
"(2) That the defendant or an accomplice intended to commit theft of the property."

Instruction 13 stated:
"A person commits the crime of burglary in the first degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person or an accomplice is armed with a deadly weapon."

Instruction 14 stated in pertinent part:
"To convict the defendant of the crime of burglary in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
"(1) That on or about the 30th day of December, 1999, the defendant or an accomplice entered or remained unlawfully in a building;
"(2) That the entering or remaining was with intent to commit a crime against a person or property therein."

permits an accomplice to be held liable even if only the principal intended to commit the crime. We also conclude that instruction 9 properly stated the elements of first degree robbery.

Eastmond also challenges the definitions of intent and accomplice liability set forth in instructions 11 and 10, respectively, claiming that in failing to identify the specific crimes charged, they improperly permitted the jury to convict him even if the State proved only intent to commit a lesser crime, such as theft. Instruction 11 was recently approved, however, in State v. Brown, 132 Wn.2d 529, 605-06, 940 P.2d 546 (1997) as consistent with the statutory definition of intent, and we agree that intent was properly defined.³ Intent here was as an element of the crimes of burglary and robbery. Therefore, as a general definition of an element of the crimes charged, it was not necessary to expressly state which crimes were charged in instruction 11.

Eastmond's challenge to instruction 10 is based upon the Washington Supreme Court's recent decision rejecting an accomplice liability instruction that permitted an accomplice to be convicted for aiding "any" crime committed by the principal, not just "the" crime charged. See State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000). But here, there was no error in referring to the crimes charged in the instructions as "the crime," instead of listing the crimes individually. Instruction 10 stated:

A person who is an accomplice in the commission of the crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission or the crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

³ Instruction 11 stated: "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime."

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that the person present is an accomplice.

The crimes charged were first degree robbery and burglary, and the jury was properly instructed that it could only convict if the State proved beyond a reasonable doubt that Eastmond or an accomplice intended to commit those crimes. The jury instructions were not erroneous.

3. Sufficiency of the Evidence

Eastmond also challenges the sufficiency of the evidence showing that he entered Gibler's house and thus committed burglary, claiming that Cote was not a credible witness.⁴ When the sufficiency of the evidence is challenged, the reviewing court accepts the State's evidence as true and all inferences that can reasonably be drawn therefrom. City of Bremerton v. Widell, 146 Wn.2d 561, 51 P.3d 733, cert. denied, 123 S. Ct. 497 (2002). Credibility determinations are for the finder of fact and cannot be reviewed on appeal. See State v. Camrillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

⁴ After the robbery, Gibler persuaded Cote to turn himself in. Gibler testified that he told Cote to be truthful with the police, but Cote said that he and Gibler colluded to minimize Cote's culpability. In his initial statement to the police, Cote claimed that there were only four robbers and he gave the police a false name. When pressed for additional information, Cote provided the names of Bush, Bundy, Vargas, and "James."

Eastmond claimed at trial that he was not involved with the robbery and presented alibi witnesses, including one of the robbers, to support his claim of being elsewhere when the robbery took place. Two of the robbers, Vargas and Cote, flatly contradicted this testimony. The jury apparently rejected Eastmond's defense and believed Vargas and Cote. Moreover, even if Cote's testimony is disbelieved, there is sufficient evidence for the jury to infer that Eastmond knowingly supplied the gun and the getaway car for the robbery and burglary and can thus be held liable as an accomplice for both of those crimes, even if he did not go inside Gibler's house. Accordingly, we affirm Eastmond's convictions.

4. Offender Score

Eastmond contends that his sentence must be reversed because the trial court erred in calculating his offender score. Under the Sentencing Reform Act of 1981 (SRA), a defendant's sentence range is determined through computation of an offender score, which consists of the defendant's current and prior adult and juvenile convictions. RCW 9.94A.400(1). The greater the number of convictions, the higher the score will be. We conduct a de novo review of a sentencing court's offender score calculation. State v. McCraw, 127 Wn.2d 281, 289, 898 P.2d 838 (1995).

a. Juvenile Convictions

Eastmond first argues that his juvenile score should be a ½ point, not 1½ points. He assigns error to inclusion of his juvenile conviction for taking a motor vehicle without permission. He argues that when that conviction occurred, he was under 15 years old and that conviction should have washed out under the prior definition of "criminal

history” in former RCW 9.94A.030(12)(1996). See State v. Smith, 144 Wn.2d 665, 674, 30 P.3d 1245 (2001).

The State concedes that Smith prohibits inclusion of the motor vehicle conviction, and it should not count toward Eastmond’s offender score. The State argues, however, that a ½ point reduction would be academic, since it would reduce Eastmond’s total score from 3½ to 3, and the SRA already requires rounding down to the next whole number. Eastmond raises other meritorious arguments, however, that require remand for resentencing.

Next, Eastmond argues that his two 1998 juvenile convictions for possession of stolen property and illegal possession of a firearm were the “same criminal conduct” which should be scored as ½ point combined. See Reply Brief of Appellant. Although Eastmond did not expressly raise this argument in his opening brief, he implied it by claiming that his juvenile conviction score should be ½ and explaining the basis for his calculations. See Pro Se Supplemental Brief of Appellant, at 34–35 nn. 7, 8. Upon seeing the offender score sheet attached as Exhibit A to the State’s response brief, Eastmond elaborated on this argument. See Reply Brief of Appellant, at 2–3 n.1. Because Eastmond raised the trial court’s error by setting forth his argument about what should have been the correct offender score, we consider his argument on appeal.

The State has the burden of proving prior convictions by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). If the State has not proven that each individual conviction should be counted separately, then it has not met its burden. Nothing in the record here indicates that the trial court considered whether Eastmond’s 1998 juvenile convictions were the same criminal conduct. Since

they occurred on the same day, it is highly likely that Eastmond's juvenile convictions for second degree unlawful possession of firearm and second degree possession of stolen property arose from the same criminal conduct and were sentenced concurrently. Thus, they should count as ½ point towards Eastmond's offender score unless the State can prove otherwise.

b. Current Convictions

Eastmond also argues that the trial court erred when it counted his burglary and robbery convictions as two separate crimes toward his offender score. Under Washington law, multiple convictions which arise out of the "same criminal conduct," count as a single offense for the purposes of the offender score. RCW 9.94A.400(1)(a) provides in pertinent part:

Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. . . .

"Crimes are the same criminal conduct when the defendant has the same criminal intent in each and they occur at the same time and place and involve the same victim." State v. Davis, 90 Wn. App. 776, 781, 954 P.2d 325 (1998). The effect of counting the convictions as one offense is to lower the sentence ranges for those crimes, and the resulting sentences are served concurrently. There is an exception, however, to the "same criminal conduct" provision when burglary is one of the offenses being sentenced. The burglary anti-merger statute, RCW 9A.52.050, provides sentencing

courts with the discretion to punish burglary separately from other crimes, even if the crimes constituted the "same criminal conduct" under RCW 9.94A.400(1)(a). State v. Lessey, 118 Wn.2d 773, 782, 827 P.2d 996 (1992). RCW 9A.52.050 states: "Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately." The discretionary element of the burglary anti-merger statute permits the trial court to decline to apply it based upon the facts of the case. Davis, 90 Wn. App. at 783-84.

Here, the court stated that it was applying the burglary anti-merger statute and was therefore prohibited from scoring Eastmond's robbery and burglary convictions as if they were the same criminal conduct under RCW 9.94A.400(1)(a), but that the same criminal conduct provision required it to impose the base sentences concurrently and apply only one firearm enhancement. But then the court expressed some doubt as to its analysis and stated that if its first analysis was incorrect, that it would decline to apply the anti-merger statute.

We agree with the trial court that Eastmond's two crimes constituted the same criminal conduct. Based upon the sentencing hearing record, however, it is unclear whether the trial court fully understood the sentencing options at its disposal under RCW 9A.52.050. Lessey and the cases that have followed it have held that "the antimerger statute gives the sentencing judge discretion to punish for burglary, even where it and an additional crime encompass the same criminal conduct." Lessey, 118 Wn.2d at 781. Here, the court had the discretion to punish Eastmond's crimes separately by counting the robbery and burglary as two convictions and therefore

obtaining a higher sentencing range for the two crimes. And the court also had the discretion to punish the two crimes as one and score the crimes as one point, resulting in a lower standard range for both offenses. On remand it may exercise its discretion as it deems appropriate.

5. Firearm Enhancement

The last question presented is how to apply multiple firearm enhancements when a single firearm was used to commit two crimes consisting of the "same criminal conduct." A firearm enhancement is not a separate sentence or a separate substantive crime but a statutorily imposed sentence increase for a particular crime based upon certain factors involved in the crime. In re Post Sentencing Review of Charles, 135 Wn.2d 239, 253, 955 P.2d 798 (1998). The trial court believed that under the facts of this case, where the burglary and robbery constituted the same criminal conduct, it would be contrary to legislative intent to impose two firearm enhancements and thereby violate the double jeopardy clause.⁵ In its cross-appeal, the State argues that the trial

⁵ Eastmond argued below that imposing two firearm enhancements for the same conduct would violate the double jeopardy clauses of the United States and Washington Constitutions, as well as their equal protection clauses (prohibiting grossly disproportionate sentences for different offenders involved in the same crime), but these constitutional arguments appear to have been abandoned on appeal. We note, nevertheless, that challenges on double jeopardy grounds to weapon enhancements and multiple sentences for robbery and burglary convictions have been previously rejected. See State v. Caldwell, 47 Wn. App. 317, 320, 734 P.2d 542 (1987) (weapon enhancements do not violate double jeopardy because the legislature is simply extending the sentence for the underlying crime); State v. Michielli, 132 Wn.2d 229, 238, 937 P.2d 587 (1997) (double jeopardy does not prohibit multiple charges from same criminal conduct); see also Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Because the crimes of robbery and burglary are separate offenses and can be punished separately, there is no double jeopardy violation when firearm enhancements are imposed for both crimes.

court's failure to impose two firearm enhancements of five years on each count violated former RCW 9.94A.310(3)(e), which states,

Notwithstanding any other provision of law, any and 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.

RCW 9.94A.310(3)(e) (subsequently recodified as RCW 9.94A.510(e)). The State cites State v. Spandel, 107 Wn. App. 352, 27 P.3d 613, review denied, 145 Wn.2d 1013

(2001), in support of its position that the firearm enhancement statute is unambiguous and requires multiple enhancements to be added consecutively to all other sentencing provisions and each other, regardless of whether the underlying offenses are sentenced concurrently.

In response, Eastmond argues that it is impermissible to impose double enhancements premised on the same criminal conduct. Eastmond relies on Division Three's decision in State v. DeSantiago, 108 Wn. App. 855, 33 P.3d 394 (2001), review granted 146 Wn.2d 1007, 51 P.3d 86 (2002), which held that "double counting" weapons enhancements premised on the same conduct was improper (citing United States v. Haines, 32 F.3d 290, 293 (7th Cir. 1994)). DeSantiago's rationale was that the deadly weapon enhancement statute was intended to enhance sentences for crimes committed "while armed" and that, once there was a finding of "while armed," it was not logical to impose additional enhancements for a single crime committed with two or more weapons.

This case is distinguishable from both DeSantiago and Spandel because neither of those cases implicated RCW 9.94A.400(1)(a) (subsequently codified as RCW

9.94A.589(1)(a)). Only one crime was charged in DeSantiago and Spandel—here there are two. Because Spandel addressed multiple enhancements imposed for multiple weapons possessed during a single crime, it did not reach the question of how to harmonize multiple weapons enhancements derived from possession of a single weapon during multiple crimes encompassing the same criminal conduct. Spandel, 107 Wn. App. at 358.

The Washington Supreme Court addressed this question in In re Post Sentencing Review of Charles, 135 Wn.2d 239, 955 P.2d 798 (1998), and held that enhancements could be imposed concurrently due to an ambiguity in the SRA. In Charles, two offenses were sentenced, but the firearm enhancement applied to the lesser offense, and that total sentence was less than the standard range for the second offense, thus imposition of the enhancement had no effect on the defendant's total sentence. The court reached this result by first computing the offender score, then adding any enhancements to a given base sentence under RCW 9.94A.310, and then determining whether the total sentences for multiple offenses (including base sentences and enhancements) should run concurrently or consecutively under RCW 9.94A.400(1)(a). Charles, 135 Wn.2d at 254. See also United States v. Finley, 245 F.3d 199 (2nd Cir. 2001) (holding that only federal firearm enhancements could be imposed based on possession of a single gun, even though there were two predicate offenses, because Congress did not clearly intend to impose multiple consecutive enhancements for a single act).

Following Charles, the Legislature amended the firearm enhancement statute, RCW 9.94A.310(e), to require that all firearm enhancements "run consecutively to all

other sentencing provisions, including other deadly weapon or firearm enhancements, for all offenses sentenced under this chapter,” notwithstanding any other provision of law. State v. Thomas, 113 Wn. App. 755, 761, 54 P.3d 719 (2002). The legislature's intent in amending the firearm enhancement statute was to ensure that firearm enhancements were imposed consecutively, thereby expressly overruling Charles.

Here, Eastmond was convicted of two crimes, with one firearm enhancement on each charge. The State argued below that the two crimes should be sentenced concurrently, but that the firearm enhancements should be imposed consecutively to the underlying base sentences and to each other. Eastmond claims that, despite the legislature's amendment to the firearm enhancement statute, the language of RCW 9.94A.310(e) remains ambiguous because it does not expressly address the “same criminal conduct” statute, RCW 9.94A.400. Although we are not unmindful of the harsh result caused by imposition of multiple enhancements, RCW 9.94A.400 does not help Eastmond's argument. The same criminal conduct provision applies only to computation of offender score, not imposition of sentences. RCW 9.94A.310(e) plainly states that firearm enhancements must be served consecutively, “[n]otwithstanding any other provision of law.” This court is required to give plain statutory language its full effect, notwithstanding its harsh results. State v. Pope, 100 Wn. App. 624, 628, 999 P.2d 51 (2000). The court erred when it determined that only one 60-month firearm enhancement could be imposed.

Regardless of whether the court applies the burglary anti-merger statute and scores the offenses as two crimes—or does not apply the anti-merger statute and scores them as one crime—there are two convictions here and the two enhancements

must be imposed to run consecutively to the underlying base sentence. We affirm Eastmond's convictions, but vacate his sentence and remand for resentencing in accordance with this opinion.

Coleman, J

WE CONCUR:

COX, ACT

Stone

Appendix 8

Transcript of Sentencing
(1/16/04)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON,)
)
 Plaintiff,) NO. 00-1-00227-5
)
 v.) APPEALS COURT NO.
) 53836-5
 JAMES EASTMOND,)
)
 Defendant.)

VERBATIM REPORT OF PROCEEDINGS

Re-Sentencing
January 16, 2004

HONORABLE GERALD L. KNIGHT
Judge

Department No. 6
Snohomish County Courthouse
Everett, Washington 98201

APPEARANCES

FOR THE STATE: MR. CRAIG MATHESON
Deputy Prosecuting Attorney

FOR THE DEFENDANT: MR. BRIAN PHILLIPS
Attorney at Law

Reported by:
MARGUERITE D. GOSHORN, Official Court Reporter
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(January 16, 2004)
(2:15 p.m.)

MR. MATHESON: If we could next go on the record in the matter of State of Washington v. James Taylor Eastmond, Cause No. 00-1-00227-5. That comes back on for resentencing after a remand from the Court of Appeals.

Present in the courtroom currently are Craig Matheson for the State. Brian Phillips is here for Mr. Eastmond, and Mr. Eastmond is here in custody. I also note in the back of the courtroom there are a large number of what I believe are friends and family of Mr. Eastmond's who have sent in letters to the Court.

Initially, in attacking this particular issue that the Court of Appeals sent us back, we probably need to figure out Mr. Eastmond's criminal history prior to his convictions on November 17th, 2000 of first degree robbery and first degree burglary.

He had two juvenile convictions, a TMV from August 28th of 1995; unlawful possession of firearm in the second degree; and a second degree possession of stolen property, both of which were sentenced on March 5, 1998.

With the decision in Smith and Kruz, the State

1 concedes that the taking a motor vehicle without
2 permission that was sentenced in 1995 should wash
3 since Mr. Eastmond was under the age of 15 when he
4 committed that offense.

5 As to the unlawful possession of a firearm in
6 the second degree and a second degree possession of
7 stolen property that were both sentenced on

8 March 5th of 1998, I believe that both of these
9 should count as one-half point for one total point
10 towards his criminal history.

11 If the Court looks on Page 2, both of them were
12 ordered to run consecutive to one another by the
13 same judge, who I believe was Judge Thorpe.

14 MR. PHILLIPS: Can I interject at this point and
15 address that specific issue?

16 THE COURT: Yes.

17 MR. PHILLIPS: Mr. Matheson did provide me with
18 a copy of the judgment and sentence in both those
19 cases, and thereafter I did get a copy of the
20 information, the informations and the affidavits of
21 probable cause in those cases, because I don't think
22 the fact that the Judge said to run them consecutive
23 means that they would count. But looking at the
24 affidavit--

25 THE COURT: It shows that they were on different

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dates.

MR. PHILLIPS: Correct. And different victims. So I would concede that he has two juvenile convictions which count, and therefore his offender's score is one. Thank you, Mr. Matheson.

THE COURT: Thank you. And I'm currently serving out in Juvenile Court, and I know from being out there for four months that they don't-- I have yet to see any where there have been two separate files for offenses that occurred on the same day. So I could tell from that that they were different dates. One was an R0-40 and one was R0-50. And they just don't operate that way in Juvenile Court. So thank you. Go ahead.

MR. MATHESON: So coming into this case, Your Honor, Mr. Eastmond had an offender's score of one.

The next issue is whether the Court was going to apply the anti-merger statute between the robbery and the burglary. After the original trial back-- By the time we got to sentencing, it was 2001. I asked the Court to apply the anti-merger statute to these two crimes. I'm going to at this point continue to ask the Court to do that based upon the facts of this case.

The Court sat through the trial and heard all

1 the evidence. I'm not going to belabor that fact.
2 But I asked the Court to do it then, and I'm going
3 to ask the Court to do it again.

4 If the Court does apply the anti-merger statute,
5 because both of these are classified as violent
6 offenses, on the robbery in the first degree, which
7 is the count that has the highest standard range,
8 his standard-- He would be a three, the other
9 current offense of two counting on the standard
10 range of 46 to 61 months.

11 If the Court declines to impose the anti-merger,
12 his offender's score would be a one, with a standard
13 range of 36 to 48 months. And I'd ask the Court to
14 again do the same thing it did back at the original
15 sentencing and impose the anti-merger statute based
16 on the facts of this case.

17 THE COURT: When you say 36 to 48, that's for
18 which offense or for both offenses or what?

19 MR. MATHESON: The 36 to 48, as a one, would be
20 on the robbery in the first degree. On the burglary
21 in the first degree, as a one, the standard range
22 would be 21 to 27.

23 THE COURT: 21 to 27 on the what?

24 MR. MATHESON: On the burg in the first degree
25 as a one.

1 THE COURT: Thank you. And the robbery is 36 to
2 48--

3 MR. MATHESON: Correct.

4 THE COURT: --if I don't apply the statute?

5 MR. MATHESON: Correct.

6 THE COURT: Okay. Go ahead. Continue on.

7 MR. MATHESON: And then probably the main thing

8 that we're here for today is that the Court of
9 Appeals indicated that the statute regarding the
10 firearm enhancements essentially indicated that the
11 firearm enhancements that the jury did find by jury
12 verdict need to run consecutively to one another.

13 Wherever the Court ends up as far as Mr.
14 Eastmond's offender's score, whether he's a one or a
15 three, there is going to be a total of 120 months
16 for the firearm enhancements.

17 And again, I received Mr. Phillips' brief
18 regarding his request for an exceptional sentence
19 down. I would just indicate to the Court I don't
20 believe there's any facts regarding the crime itself
21 that warrant an exceptional sentence.

22 Mr. Eastmond was treated exactly like every
23 other co-defendant in this robbery. He was made the
24 same offer that Mr. Bush and Mr. Bundy were.

25 Mr. Bush and Mr. Bundy did pled guilty; Mr. Eastmond

1 did not take responsibility as they did. It went to
2 trial; the jury convicted him. That's all I've got.

3 THE COURT: So if I accept your argument to
4 apply the anti-merger statute and it's 46 to 61
5 months, then you are asking that I impose what
6 sentence within that range?

7 MR. MATHESON: I would ask the Court to impose
8 the low end, which would be--

9 THE COURT: 36.

10 MR. MATHESON: Correct.

11 THE COURT: Plus 120.

12 MR. MATHESON: Correct.

13 THE COURT: And if I apply-- If I decline to
14 apply the anti-merger statute, the burglary merges
15 in the robbery and the range is 36 to 48?

16 MR. MATHESON: Correct.

17 THE COURT: Plus the 120.

18 MR. MATHESON: Correct. My recommendation would
19 be the high end of that range, 48 months.

20 THE COURT: Thank you. Mr. Phillips?

21 MR. PHILLIPS: Thank you, Your Honor.

22 Mr. Matheson indicated he was asking the Court
23 to-- That he was making the same recommendation
24 that he had made before. And I'm asking the Court
25 to reach the same result the Court had reached

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before.

Frankly, Your Honor, I sit back and I look at these cases and I go, you know, what's an appropriate sentence. And there's lots of reasons to argue that lots of things are an appropriate sentence.

I'm kind of taking the position-- I can't remember which justice of our Federal Supreme Court said of pornography, "I know it when I see it." Just from my gut, it seems to me that a sentence of 156 to 168-- And that's what we believe the range to be. We believe the Court should not apply the anti-merger statute.

So I think we should all be looking at the 156 to 168. It seems a bit-- I would say quite a bit, I would say excessive in comparison to the co-defendants, for Mr. Eastmond having exercised his right to go to trial.

One of the things that I think is true at this point, as opposed to what was true three years, is the Court has the benefit of Mr. Eastmond's performance in custody. And it certainly appears to be quite good. I mean he's involved himself in the educational programs.

I included two letters of recommendation from

1 staff regarding his performance as a worker in the
2 law library. I think that was pretty extraordinary
3 actually for him to get such letters.

4 It appears-- And, you know, I'm not going to
5 say we know for certain, but it certainly appears
6 that he is taking care of himself in prison, that is
7 not getting involved in activities that he shouldn't
8 get involved in and pursuing the relatively few
9 opportunities for education and work and so forth.
10 I mean he's doing well in prison.

11 I have a couple more things that I want to say,
12 but before I do that, specifically with respect to
13 the argument about an exceptional sentence, on the
14 range to get him to a sentence of 120 months or 121,
15 which is what Your Honor sentenced him to before,
16 but if I may at this point have Mr. Eastmond address
17 the Court, and his mother.

18 I'm not going to ask everybody behind me to
19 address the court. But his mother, who I believe
20 may have addressed the Court three years ago - I
21 wasn't here - would like to address the Court as
22 well.

23 THE COURT: Okay.

24 MR. PHILLIPS: Thank you. Mr. Eastmond, why
25 don't you go ahead and tell the judge what you want

1 to.

2 THE DEFENDANT: Since I've been in, like he
3 said, I've did all the schooling that I can do,
4 stayed out of trouble, no drugs, just trying to keep
5 myself involved in things and not involved in other
6 things, you know, drugs and the violence that goes
7 on in there.

8 And I see guys in there that have come in and
9 out three or four times since I've been in. And I
10 kind of appreciate freedom more and don't understand
11 why they would take their-- Excuse me. Their
12 second--

13 THE COURT: Take your time.

14 THE DEFENDANT: Take their second chance-- I'm
15 sorry.

16 THE COURT: That's all right.

17 MR. PHILLIPS: That's okay.

18 THE DEFENDANT: I told myself I wasn't going to
19 do this.

20 THE COURT: That's all right. Take a deep
21 breath.

22 THE DEFENDANT: I just-- I've worked real hard
23 to better myself. And I would like the chance to
24 prove to myself, my family, and of course the
25 courts, because they wouldn't see me again if I was

1 out, and put to work what I've learned since I've
2 been in. That's about it.

3 THE COURT: Okay. Thank you. Where is your
4 mother? Wherever you can speak that we can hear you
5 and you feel most comfortable. If you can speak
6 back there, that's fine. But if, not come up here.

7 MR. PHILLIPS: She will be kind of quiet. Why
8 don't you come over and stand right here. Okay.

9 THE COURT: Its very important that I hear you
10 and the court reporter can hear you.

11 MS. COOPER: I understand the wrongs that my son
12 has done, and I know that he's made a lot of bad
13 choices. But in the four years that he's been in
14 custody, he's a completely different person.

15 I truly believe in my heart that if given the
16 chance, he would make the best use of his time as
17 possible on the out. I know he needs to be
18 accountable for his actions, and I feel that he has.

19 And my biggest concern is the more influence
20 he's around, there will be more detrimental to him
21 than benefit. I'm afraid that he will have a harder
22 time adjusting to society if he's incarcerated
23 longer.

24 You know, he's-- He's never had a chip on his
25 shoulder, even though, you know, he took it to

1 trial. He's made account for his actions. You
2 know, he knows he's done wrong. And every day I see
3 him grow more as a person and as a man, you know.

4 And I just hope that, I guess in my heart, that
5 he can have the same sentence as his other
6 co-defendants. I don't understand why he's being
7 given more, even though he does have his juvenile
8 record. I'm just asking the Court to take that into
9 consideration.

10 THE COURT: Thank you.

11 MS. COOPER: Thank you.

12 MR. PHILLIPS: Your Honor, present in the
13 courtroom are Shelly Cooper - that was Ms. Cooper,
14 the mother - Robert Cooper, his stepfather; Jessie
15 Eastmond, a brother; Joshua Hill, another brother;
16 Jeremy Hill, that would be the third brother; Julie
17 Eastmond, a sister-in-law; Aurora Eastmond, a niece;
18 Savannah Johnson, a friend; Amber Ashenbrenner, a
19 friend; Carla Preest, a friend; Cory Preest, a
20 friend; and Katie Nideigh.

21 Some of them provided letters. You've seen the
22 certificates that have been provided on behalf of
23 James, his education certificates.

24 THE COURT: I have.

25 MR. PHILLIPS: Thank you. As she was speaking,

1 I was thinking, oh, I know what I wanted to say
2 about James. He and I have talked over the phone on
3 several occasions, including yesterday for about a
4 half hour, and I'm impressed by his attitude. He
5 knows that he's going to get out. And I think he
6 wasn't articulate enough to talk about this, but he
7 knows he's going to get out at some point, and he
8 doesn't want to go back. And I think that's pretty
9 evident.

10 And I told him, I said, well, I admire your
11 strength, because it's a long time. I mean to
12 pursue these goals of work and educational
13 opportunity and not getting involved in drugs six
14 years before you're going to get out - and that's
15 under the old sentence essentially - is I think very
16 commendable. I mean he's got a long-range point of
17 view already.

18 And I said to him, I said, James, you know, the
19 judge can sentence you to another five years or more
20 on top of what you've already had in your mind, and
21 it's going to take a lot of strength, if the judge
22 does that, for you to maintain your attitude,
23 because now, instead of looking at five more years,
24 he's looking a ten more years all of a sudden.

25 In my brief I did ask for a-- I did ask for an

1 exceptional sentence downward. My first thought
2 when I got this case was to ask for a sentence based
3 on a violation of equal protections, so I looked at
4 the case law on that. And there isn't a violation
5 of equal protection.

6 But I would submit that there is a reason why
7 Your Honor can impose an exceptional sentence
8 downward based on the difference between
9 Mr. Eastmond and his co-defendants. Now there isn't
10 a case on that, but it is-- And as Your Honor
11 knows, the mitigating circumstances that are
12 enunciated in the statute are illustrative only.

13 And I think the Court can say, under the
14 circumstances of this case, it is appropriate to
15 sentence Mr. Eastmond below the standard range, to
16 give him a sentence of zero on the underlying
17 offense, and to sentence him to the 120 months,
18 which is mandatory. And that's what we would ask
19 Your Honor to do.

20 THE COURT: Okay. Anything further?

21 MR. MATHESON: No.

22 THE COURT: Okay. Mr. Eastmond, when I
23 sentenced you, whenever it was, three years ago, I
24 felt that it was the same criminal conduct, and
25 whether or not I apply the anti-merger statute or

1 not was discretionary. And what I tried to do is
2 that I tried to do a little equity, because I
3 thought the sentence, if I follow the law, which
4 I've taken an oath to do, that considering the
5 120-month component of it for the firearm that is
6 mandatory to run consecutively, was kind of harsh
7 when you factor that into the other parts of it.

8 So I thought by recognizing the anti-merger
9 statute, that that also would negate the 120 months.
10 And that's why I gave you the sentence that I did.
11 One of the reasons why is that applying the
12 anti-merger statute was reflecting upon the fact
13 that there were firearms involved in both offenses,
14 and burglaries can be committed without a firearm.

15 So recognizing that policy of that, and then
16 also that if you do that, then it seemed like it was
17 excessive for application of 260 months, which was
18 the 120 months. And so that was the whole thought
19 process that was going through my mind when I gave
20 the sentence.

21 And I read the Court of Appeals' opinion a
22 couple times where they quoted from me when I said
23 that if I am wrong in my analysis, that I believe
24 that is the same conduct. And I feel now as I felt
25 then, so I believe it is the same criminal conduct.

1 I am not going to apply the anti-merger statute, so
2 I reject that. My discretion. So the scoring would
3 be 36 to 48 months and 120 months plus on top of
4 that for the firearms.

5 Now what Mr. Phillips I think is touching upon
6 is that I think he probably read what I was saying
7 and that I thought that that was a fair sentence
8 when I gave it to you. And I still think it's a
9 fair sentence.

10 The only thing that's changed, however, is that
11 the Court of Appeals has now said two things to me.
12 One, Judge, even though nobody raised it in front of
13 me at the time of sentencing in regards to the
14 juvenile scoring history, both counsel said this is
15 the way it scores, Judge. Here's the argument on
16 anti-merger, and here's the argument on who the two
17 run consecutively in regards to the firearm.

18 But that issue wasn't even raised. But now that
19 the issue has been appealed, the Court of Appeals
20 has said that there was error in the scoring of the
21 juvenile offenses. And secondly, that I was wrong
22 in not imposing two consecutive 60 months, and to
23 send it back to me for resentencing considering
24 those errors and also the fact is that I could, if I
25 wanted to, decide that it's the same criminal

1 conduct or not and apply the anti-merger statute.

2 Of course, I can also declare an exceptional
3 sentence, if there are legal grounds to do so. And
4 that's the big-- That's the big problem. I didn't
5 see then and I don't see now any legal grounds that
6 will support an exceptional sentence.

7 I still believe the sentence to be excessive,
8 but I see no legal grounds to declare an exceptional
9 sentence. There has been one judge in this State
10 who imposed, in essence, an exceptional sentence
11 because other defendants, co-defendants, got a
12 lesser sentence. And that judge said, well, I'm
13 going to give the defendant in front of me a
14 sentence more in line with those. That judge was
15 reversed on that.

16 I see no legal grounds to declare an exceptional
17 sentence. I took an oath to apply the law. I take
18 that oath very seriously. It turns out that I was
19 wrong, when I sentenced you the first time, from a
20 legal standpoint. I did not feel that there were
21 grounds for an exceptional sentence then; I don't
22 feel there are now.

23 I have changed my decision in regards to the
24 anti-merger statute. I'm not applying that. But
25 that scores then-- It leaves the 36 to 48 range and

1 120 months. And I impose the minimum sentence that
2 I can impose, which is 156 months. So that exceeds
3 the amount that I originally sentenced you.

4 And I don't know if-- I don't know if the State
5 would have appealed if you hadn't appealed, but
6 that's done. It's over with. There was an appeal.
7 There was a decision by the Court of Appeals. It
8 was sent back for re-sentencing. And now I
9 resentence you to the low end of the range, which is
10 36 months, plus 120 months, which is 156 months.

11 The same financial obligations that I imposed, I
12 impose the same. Nothing has changed on that. And
13 in regards to community placement or supervision,
14 whatever I imposed then. The same law applies now,
15 and I impose those same conditions.

16 Is the sentence of the Court. You do have the
17 right, as you have now been re-sentenced, you do
18 have the right to appeal again. The appeal would be
19 based, however limited my understanding would be, on
20 the sentencing, because the issues in regards to the
21 trial and what have you, unless there are new
22 issues, I think that it may be limited to the
23 re-sentence.

24 But you do have the right to appeal. And if you
25 can't afford one, one will be supplied to you at

1 public expense. And if you wish to appeal, that
2 notice of appeal must be filed within 30 days from
3 today. I'm sure Mr. Phillips can explain that for
4 you, if he hasn't already. Do you have any
5 questions?

6 THE DEFENDANT: No.

7 THE COURT: Mr. Phillips?

8 MR. PHILLIPS: The Court said one can be
9 supplied to you, and the Court neglected to include
10 the word "attorney." Just so the record is clear
11 that he's advised that an attorney, if he can't
12 afford one, will be supplied to him.

13 THE COURT: Not only is the transcript free, but
14 legal counsel would be appointed to represent you.

15 MR. PHILLIPS: I have no questions, Your Honor.
16 Mr. Eastmond, you have the right to be present when
17 the judge actually signs the Judgment and Sentence,
18 or you and I can simply review it and make sure that
19 it's accurate. And then the Judge can leave the
20 bench, go back into chambers, and he will sign it
21 after we've had the chance to review it. Is that
22 agreeable to you?

23 THE DEFENDANT: Yeah.

24 MR. PHILLIPS: Thank you, Your Honor.

25 THE COURT: I'll treat that as a valid waiver.

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That concludes this matter.

(Hearing concluded.)

Appendix 9

Judgment and Sentence
(1/20/04)

FILED

**CERTIFIED
COPY**

JAN 20 2004

PAM L. DANIELS
SNOHOMISH COUNTY CLERK
EX OFFICIO CLERK OF COURT

2004 JAN 21 A 9:39

R.R. BART
SNOHOMISH CO. SHERIFF
EVERETT WA

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

v.

EASTMOND, JAMES TAYLOR

SID: WA19545109
If no SID, use DOB: 10/17/1980

Plaintiff,

Defendant.

No. 00-1-00227-5

JUDGMENT AND SENTENCE

- Prison
- Jail One Year or Less
- First Time Offender
- Special Sexual Offender Sentencing Alternative
- Special Drug Offender Sentencing Alternative
- Clerk's Action Required, restraining order entered para. 4.3
- Clerk's action required firearms rights revoked, para. 4.3 and 5.6
- Clerk's action required, para 5.4 Restitution Hearing set.

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on November 17, 2000 by jury-verdict of:

| COUNT | CRIME | RCW | INCIDENT # | DATE OF CRIME |
|-------|-----------------------|-----------|--------------|---------------|
| I | First Degree Robbery | 9A.56.200 | SSO, 0000509 | 12/30/99 |
| II | First Degree Burglary | 9A.52.020 | SSO, 0000509 | 12/30/99 |

as charged in the Amended Information.

Additional current offenses are attached in Appendix 2.1.

- A special verdict/finding for use of a **deadly weapon** which was a **firearm** was returned on Court(s) I and II RCW 9.94A.602, 510.; 9.41.010.
 - A special verdict/finding for use of **deadly weapon** which was not a firearm was returned on Court(s) _____, RCW 9.94A.602,510.
 - A special verdict/finding of **sexual motivation** was returned on Court(s) _____, RCW 9.94A.835.
 - A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Court(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, in a public transit vehicle, or in a public transit stop shelter.; or in, or within 1000 feet of the perimeter of, a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
 - A special verdict/finding that the defendant committed a crime involving the manufacture of **methamphetamine when a juvenile was present in or upon the premises of manufacture** was returned on Court(s) _____, RCW 9.94A, RCW 69.50.401(a), RCW 69.50.440.
 - The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030(45)
 - This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
 - The court finds that the offender has a **chemical dependency** which contributed to the offense and imposes as a condition of sentence that defendant shall participate in the rehabilitative program/affirmative conduct: _____
_____ RCW 9.94A.607.
 - The crime charged in Count(s) _____ involve(s) **domestic violence**.
 - The offense in Count(s) _____ was committed in a county jail or state correctional facility. RCW 9.94A.510(5).
 - The court finds that in Count _____ a **motor vehicle was used in the commission of this felony**. The Department of Licensing shall revoke the defendant's driver's license. RCW 46.20.285.
 - Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
 - Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):
- 2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

| CRIME | DATE OF SENTENCE | SENTENCING COURT (County & State) | DATE OF CRIME | A or J | TYPE OF CRIME |
|--|------------------|-----------------------------------|---------------|-------------|---------------|
| | | | | Adult, Juv. | |
| 1 Second Degree Unlawful Possession of Firearm | 03/05/98 | Snohomish County, WA | | J | Felony |
| 2 Second Degree Possession of Stolen Property | 03/05/98 | Snohomish County, WA | | J | Felony |

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

- The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):
- The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 SENTENCING DATA:

| COUNT NO. | OFFENDER SCORE | SERIOUS LEVEL | STANDARD RANGE (not including enhancements) | PLUS ENHANCEMENTS | TOTAL STANDARD RANGE (including enhancements) | MAXIMUM TERM |
|-----------|-----------------|---------------|---|-------------------|---|--------------|
| I | 8 <i>CSM</i> | IX 36-48 | 46-61 months <i>CSM</i> | 60 mos | 156 - 168 mos | Life |
| II | 8 | VII 21-27 | 31-41 months <i>CSM</i> | 60 mos | 141 - 147 | Life |

*
*
*Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile Present

- Additional current offense sentencing data is attached in Appendix 2.3.

2.4 **EXCEPTIONAL SENTENCE [For Determinate Sentence]**. Substantial and compelling reasons exist which justify an exceptional sentence above within below the standard range for Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. The prosecuting attorney did did not recommend a similar sentence.

EXCEPTIONAL MINIMUM TERM [For Maximum and Minimum Term Sentence] Substantial and compelling reasons exist which justify an exceptional minimum term above within below the standard range for Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. The prosecuting attorney did did not recommend a similar sentence.

2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753
 The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.142):

2.6 The prosecutor's recommendation was 166 months/days on Count 1, 151 months/days on Count 2, _____. The prosecutor recommended counts I, II run concurrently/consecutively.
except for weapon enhancements

* Court does not apply Anti-Merger Statute

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [] The Court DISMISSES Counts _____

3.3 [] The defendant is found NOT GUILTY of Counts _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

All Financial conditions same as imposed in original judgement sentence

4.1 Defendant shall pay to the Clerk of this Court: \$ 0 Restitution to: _____

JASS CODE \$ _____ Restitution to: _____

RTN/RJN \$ _____ Restitution to: _____ (Name and Address--address may be withheld and provided confidentially to Clerk's Office).

RMA \$15/\$25/\$50 Restitution Monitoring Fee SCC 4.94.010
The Clerk shall collect this fee before collecting restitution or any other assessed legal financial obligations. RCW 9.94A.760

PCV \$100/\$500 Victim assessment RCW 7.68.035
\$100.00 crimes committed prior to June 6, 1996.
\$500.00 crimes committed on or after June 6, 1996.

CRC \$ Waived Court costs, including RCW 9.94A.030, 9.94A.505, 10.01.160, 10.46.190
Criminal filing fee \$ _____ FRC
Witness costs \$ _____ WFR
Sheriff service fees \$ _____ SFR/SFS/SFW/SRF
Jury demand fee \$ _____ JFR
Other \$ _____

PUB \$790 Waived Fees for court appointed attorney RCW 9.94A.030
PUB \$790, 620, 530 Fees for all appointed conflict cases RCW 9.94A.030
WFR \$ Court appointed defense expert and other defense costs RCW 9.94A.030
FCM \$ Fine RCW 9A.20.021; [] VUCSA additional fine deferred due to indigency RCW 69.50.430
Drug enforcement fund of _____ RCW 9.94A.030

CDF/LDI/ FCD/NTF/SAD/SDI \$ Crime lab fee [] deferred due to indigency RCW 43.43.690
CLF \$ Extradition costs RCW 9.94A.505
EXT \$ Emergency response costs (Vehicular Assault, Vehicular Homicide only, \$1000 maximum) RCW 38.52.430
Biological Sample Fee RCW 43.43.7541
Other costs for: _____
TOTAL RCW 9.94A.760

[] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753.
[] RESTITUTION. Schedule attached, Appendix 4.1.
[] Restitution ordered above shall be paid jointly and severally with:
NAME of other defendant CAUSE NUMBER (Victim name) (Amount-\$)

RJN

- The Department of Corrections may immediately issue a Notice of Payroll Deduction.
RCW 9.94A.7602

All payments shall be made in accordance with the policies of the clerk and on a schedule established by the Department of Corrections, commencing immediately, unless the court specifically sets forth the rate here: Not less than

\$ _____ per month commencing _____.

RCW 9.94A.760

All payments shall be made within 24 months of: release of confinement;
 entry of judgment; Other _____.

- In addition to the other costs imposed herein the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.760
 The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190.

- The financial obligations imposed in this judgment shall bear interest from the date of the Judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

- 4.2 HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. The defendant, if out of custody, shall report to the HIV/AIDS Program Office at 3020 Rucker, Suite 206, Everett, WA 98201 within one (1) hour of this order to arrange for the test. RCW 70.24.340

DNA TESTING. The defendant shall have a blood sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or Department of Corrections, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754

- 4.3 The defendant shall not have contact with Thomas Gibley including, but not limited to, personal, verbal, telephonic, written or contact through a third party for life years (not to exceed the maximum statutory sentence). EVEN IF THE PERSON WHO THIS ORDER PROTECTS INVITES OR ALLOWS CONTACT, YOU CAN BE ARRESTED AND PROSECUTED. ONLY THE COURT CAN CHANGE THIS ORDER. YOU HAVE THE SOLE RESPONSIBILITY TO AVOID OR REFRAIN FROM VIOLATING THIS ORDER.

- (Check for any domestic violence crime as defined by RCW 10.99.020(3)): VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE UNDER CHAPTER 26.50 RCW AND WILL SUBJECT A VIOLATOR TO ARREST. ANY ASSAULT, DRIVE-BY SHOOTING, OR RECKLESS ENDANGERMENT THAT IS A VIOLATION OF THIS ORDER IS A FELONY. RCW 10.99.050.

- (Check for any harassment crime as defined by RCW 9A.46.060): VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE UNDER CHAPTER 9A.46 AND WILL SUBJECT A VIOLATOR TO ARREST. RCW 9A.46.080.

- (For Domestic Violence orders only:) The clerk of the court shall forward a copy of this order on or before the next judicial day to the _____ County Sheriff's Office or _____ Police Department (where the protected person above-named lives), which shall enter it in a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants.

- 4.4 OTHER: All conditions other than prison sentence in Doc the same as in original judgement and sentence

4.5 CONFINEMENT OVER ONE YEAR.

CONFINEMENT [Determinate Sentences]. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

36 mos + 60 mos months on Count I
21 mos + 60 mos months on Count II

CONFINEMENT [Maximum Term And Minimum Term]. Defendant is sentenced to total confinement as follows. The maximum and minimum terms of confinement shall be served in a facility or institution operated, or utilized under contract, by the State of Washington.

Count _____: maximum term of _____ years AND minimum term of _____ months

Count _____: maximum term of _____ years AND minimum term of _____ months

FURTHER PROVISIONS APPLICABLE TO ALL SENTENCES:

The minimum term of actual total confinement ordered on all counts cumulatively is 156 months ^{CSM}
(Add mandatory firearm and deadly weapon enhancement time to run consecutively to other counts. See Sec. 2.3, Sentence Data above.)

The maximum term of total confinement ordered on all counts cumulatively is 156 months

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively with the sentence in cause number(s) _____
but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589

Confinement shall commence immediately unless otherwise set forth here: _____

The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court:

4.6 COMMUNITY PLACEMENT [For Determinate Sentences] is ordered as follows: Count I for 12 months; Count II for 12 mos months; Count _____ for _____ months.

COMMUNITY CUSTODY RANGE [For Determinate Sentences] is ordered as follows:
Count _____ for a range from _____ to _____ months;
Count _____ for a range from _____ to _____ months;

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A for community placement offenses -- serious violent offense, second degree assault, any crime against a person with a deadly weapon finding. Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

COMMUNITY CUSTODY [For Maximum And Minimum Term Sentences]: For each count, the defendant is sentenced to community custody under the supervision of the Department of Corrections (DOC) and the authority of the Indeterminate Sentence Review Board for any period of time that the defendant is released from total confinement before expiration of the maximum sentence. In addition to other conditions, the defendant shall comply with any conditions imposed by the Indeterminate Sentence Review Board under RCW 9.94A.713; 9.95.420, .425, .430, .435.

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders may be extended for up to statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The defendant shall not consume any alcohol.

Defendant shall have no contact with: _____

Defendant shall remain within outside of a specific geographical boundary, to wit: _____

The defendant shall participate in the following crime-related treatment or counseling services: _____

The defendant shall undergo an evaluation for treatment for domestic violence substance abuse mental health

anger management and fully comply with all recommended treatment.

The defendant shall comply with the following crime-related prohibitions: _____

Other conditions may be imposed by the court or DOC during community custody, or are set forth here:

4.7 **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections:

4.9 Unless otherwise ordered, all conditions of this sentence shall remain in effect notwithstanding any appeal.

V. NOTICES AND SIGNATURES

5.1 COLLATERAL ATTACK ON JUDGMENT. Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090

5.2 LENGTH OF SUPERVISION. For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.753(4); RCW 9.94A.760 and RCW 9.94A.505(4).

5.3 NOTICE OF INCOME-WITHHOLDING ACTION. If the court has not ordered an immediate notice of payroll deduction in paragraph 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.7606.

5.4 RESTITUTION HEARING. Defendant waives any right to be present at any restitution hearing (sign initials): _____
 Defendant waives any right to a restitution hearing within 6 months RCW 9.94A.750.
 A restitution hearing shall be set for _____
The Prosecutor shall provide a copy of the proposed restitution order and supporting affidavit(s) of victim(s) 21 judicial days prior to the date set for said restitution hearing. The defendant's presence at said restitution hearing may be excused only if a copy of the proposed restitution order is signed by both defendant and defense counsel and returned to the Court and Prosecutor no later than 10 judicial days prior to said hearing.

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.634

Cross off if not applicable:

5.6 FIREARMS. You may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification, to the Department of Licensing along with the date of conviction or commitment): RCW 9.41.040, 9.41.047

If this is a crime enumerated in RCW 9.41.040 which makes you ineligible to possess a firearm, you must surrender any concealed pistol license at this time, if you have not already done so.

(Pursuant to RCW 9.41.047(1), the Judge shall read this section to the defendant in open court. The Clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the department of licensing along with the date of conviction).

5.7 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.575, 10.01.200. Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW where the victim is a minor and you are not the minor's parent), you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must

register within 24 hours of your release.

If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this State's Department of Corrections.

If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving, register with that sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must also send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier.

Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 14 days after ceasing to have a fixed residence. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report in person to the sheriff of the county where you are registered on a weekly basis if you have been classified as a risk level II or III, or on a monthly basis if you have been classified as a risk level I. The lack of a fixed residence is a factor that may be considered in determining a sex offender's risk level. If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

Cross off if not applicable:

5.8 **RIGHT TO APPEAL.** If you plead not guilty, you have a right to appeal this conviction. If the sentence imposed was outside of the standard sentencing range, you also have a right to appeal the sentence.

This right must be exercised by filing a notice of appeal with the clerk of this court within 30 days from today. If a notice of appeal is not filed within this time, the right to appeal is IRREVOCABLY WAIVED.

If you are without counsel, the clerk will supply you with an appeal form on your request, and will file the form when you complete it.

If you are unable to pay the costs of the appeal, the court will appoint counsel to represent you, and the portions of the record necessary for the appeal will be prepared at public expense.

5.9 OTHER: _____

DONE in Open Court and in the presence of the defendant this date: January 16, 2003

Gerald L. Knight
JUDGE
Print name: GERALD L. KNIGHT

Craig S. Matheson
CRAIG S. MATHESON, #18556
Deputy Prosecuting Attorney

Brian Reed Phillips
BRIAN REED PHILLIPS, #9374
Attorney for Defendant

James Taylor Eastmond
JAMES TAYLOR EASTMOND
Defendant

Interpreter signature/Print name: _____
I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____
language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that
language.
CAUSE NUMBER of this case: 00-1-00227-5

I, Pam L. Daniels, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and
Sentence in the above-entitled action, now on record in this office.

JAN 20 2004

WITNESS my hand and seal of the said Superior Court affixed this date: _____
Clerk of said County and State, K. Glendon, Deputy Clerk

ORDER OF COMMITMENT

THE STATE OF WASHINGTON to the Sheriff of the County of Snohomish; State of Washington, and to the Secretary of the Department of Corrections, and the Superintendent of the Washington Corrections Center of the State of Washington, GREETINGS:

WHEREAS, JAMES TAYLOR EASTMOND, has been duly convicted of the crime(s) of as charged in the Amended Information filed in the Superior Court of the State of Washington, in and for the County of Snohomish, and judgment has been pronounced against him/her that he/she be punished therefore by imprisonment in such correctional institution under the supervision of the Department of Corrections, Division of Prisons, as shall be designated by the Secretary of the Department of Corrections pursuant to RCW 72.02.210, for the term(s) as provided in the judgment which is incorporated by reference, all of which appears of record in this court; a certified copy of said judgment being endorsed hereon and made a part thereof, Now, Therefore,

THIS IS TO COMMAND YOU, the said Sheriff, to detain the said defendant until called for by the officer authorized to conduct him to the Washington Corrections Center at Shelton, Washington, in Mason County, and this is to command you, the said Superintendent and Officers in charge of said Washington Corrections Center to receive from the said officers the said defendant for confinement, classification, and placement in such corrections facilities under the supervision of the Department of Corrections, Division of Prisons, as shall be designated by the Secretary of the Department of Corrections.

And these presents shall be authority for the same. HEREIN FAIL NOT.

WITNESS the Honorable Gerald L. Knight, Judge of the said Superior Court and the seal thereof, this 16th day of January, 2008.4

Pam L. Daniels
CLERK OF THE SUPERIOR COURT

By: Nancy Albert
Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID No. WA19545109
(If no SID take fingerprint card for State Patrol)

Date of Birth: 10/17/1980

FBI No. _____

Local ID No. _____

PCN No. _____

DOC 821591

Alias name, SSN, DOB: _____

Race: White

Ethnicity:
 Hispanic
 Non-Hispanic

Sex: M

Height: 6'0

Weight: 140

Hair: Brown

Eyes: Hazel

FINGERPRINTS I attest that I saw the same defendant who appeared in Court on this document affix his or her fingerprints and signature thereto. Clerk of the Court: Nancy Albert, Deputy Clerk.
Dated: 1-16-2004

DEFENDANT'S SIGNATURE: [Signature]

ADDRESS: _____

Left four fingers taken simultaneously

Left Thumb

Right Thumb

Right four fingers taken simultaneously

APPENDIX A TO PLEA AGREEMENT
PROSECUTOR'S UNDERSTANDING OF DEFENDANT'S CRIMINAL HISTORY
(SENTENCING REFORM ACT)

DATE: December 22, 2003 (da/gp/dhw)
DEFENDANT: EASTMOND, James Taylor
DOB: 10/17/80 W/M
SID: WA19545109 FBI: 231741MB6 DOC: 821591 DOL: EASTM-JT-207PP

| <u>CRIME</u> | <u>DATE OF CONVICTION</u> | <u>PLACE OF CONVICTION</u> | <u>Incarceration/Probation DISPOSITION</u> |
|--------------|---------------------------|----------------------------|--|
|--------------|---------------------------|----------------------------|--|

ADULT FELONIES:

None

ADULT MISDEMEANORS:

| | | | |
|-------------------------------------|----------|------------------|--|
| 1. No Valid License/Expired License | 12/21/98 | Oregon | |
| 2. No Valid License/Expired License | 1/18/99 | Snohomish County | |
| 3. No Valid License/Expired License | 1/26/99 | Snohomish County | |
| 4. Driving While Suspended/Revoked | 7/15/98 | Snohomish County | |
| 5. Driving While Suspended/Revoked | 7/19/99 | Snohomish County | |
| 6. Possession Drug Paraphernalia | 2/8/00 | Utah | |
| 7. VUCSA - Possession | 2/8/00 | Utah | |

JUVENILE FELONIES:

*Take Motor Vehicle w/o Permission 8/29/95 Snohomish County Community Supervision

*Conviction "washes" Defendant was Under Age 15 on the Date of Offense

**Second Degree Unlawful Possession of Firearm 3/5/98 Snohomish County Community Supervision

**Second Degree Poss. Stolen Property 3/5/98 Snohomish County Detention

**Court Ordered Sentences to Run Consecutive

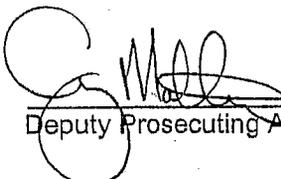
JUVENILE SERIOUS TRAFFIC:

None.

OTHER: (NOT COUNTED AS CRIMINAL HISTORY)

DATE

1/16/04


Deputy Prosecuting Attorney/WSBA # 10554

Appendix 10

State v. Eastmond, No. 53836-5-I

Not Reported in P.3d, 125 Wash.App. 1028, 2005 WL 221889 (Wash.App. Div. 1)

View Washington Reports version
Briefs and Other Related Documents

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington,
Division 1.
STATE of Washington, Respondent,
v.
James EASTMOND, Appellant.
No. **53836-5-I**.
Jan. 31, 2005.

Appeal from Superior Court of Snohomish County; Hon. Gerald L. Knight, J.
James Eastmond, Stafford Creek Correction Center, # 821591, Aberdeen, WA, Pro se.

Gregory Charles Link, Washington Appellate Project, Seattle, WA, for Appellant.

Constance Mary Crawley, Prosecutors Office, Snohomish Co Courthouse, Everett, WA, for Respondent.

UNPUBLISHED

PER CURIAM.

*1 To impose a sentence outside the standard range under the Sentencing Reform Act, a trial court must find that substantial and compelling reasons justify such a sentence.^{FN1} James Eastmond appeals his standard range sentences for his convictions of first degree robbery and first degree burglary, each with a firearm enhancement. He argues that the trial court erroneously believed that there were no legally available mitigating factors to impose a mitigated exceptional sentence. We disagree and affirm.

FN1. RCW 9.94A.120(1).

A jury convicted Eastmond on one count of first degree robbery and first degree burglary, each with a special verdict finding that he or an accomplice was armed with a firearm in the commission of the crime. The trial court imposed a sentence of 121 months-concurrent sentences for the robbery and burglary, and a single firearm enhancement. Eastmond appealed the sentence, and the State cross-appealed. In an unpublished decision, this court concluded that Washington's firearm enhancement statute was unambiguous and required firearm enhancements to be imposed and served consecutively.^{FN2} This court remanded for re-sentencing.^{FN3}

FN2. State v. Eastmond, 115 Wn.App. 1021, 2003 WL 220929 at *10, review denied, 149 Wn.2d 1036 (2003).

FN3. Eastmond, 115 Wn.App. 1021, 2003 WL 220929 at *10.

At the re-sentencing hearing, defense counsel requested that the trial court impose an exceptional sentence below the standard range. The court concluded Eastmond's two offenses comprised the same criminal conduct, but declined to invoke the anti-merger statute.^{FN4} The court imposed a sentence of 156 months. The court also ordered Eastmond to provide a biological sample for DNA

Identification.

FN4. RCW 9A.52.050

Eastmond appeals.

MITIGATED EXCEPTIONAL SENTENCE

Eastmond first argues that the sentencing court erroneously believed that it lacked authority to impose a mitigated exceptional sentence and thereby failed to exercise its discretion.

Under the Sentencing Reform Act of 1981, chapter 9.94A RCW, a sentence within the standard range generally is not appealable.^{FN5} However, the statute does not prevent an appellant from challenging the procedure used by the court to impose a standard range sentence.^{FN6} A sentence within the standard range may only be appealed 'where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.'^{FN7} The second basis is at issue here.

FN5. Former RCW 9.94A.210(1) (2000).

FN6. State v. Ammons, 105 Wn.2d 175, 183, 713 P.2d 719; 718 P.2d 796, cert. denied, 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986).

FN7. State v. Garcia-Martinez, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997).

To impose an exceptional sentence, the court must determine that there are substantial and compelling reasons to do so.^{FN8} The trial court's subjective determination that sentencing ranges are unwise, or that they do not adequately advance the goals of the SRA, is not a substantial and compelling reason to justify a departure.^{FN9}

FN8. RCW 9.94A.535.

FN9. See State v. Pascal, 108 Wn.2d 125, 137-38, 736 P.2d 1065 (1987).

Eastmond cites *State v. McGill*,^{FN10} for the proposition that a standard range sentence may be reviewed if the sentencing court mistakenly believed it could not deviate from the standard range. The court in McGill stated, 'the trial court refused to exercise its discretion to consider an exceptional sentence because it erroneously believed it lacked the authority to do so.' 'But here the court's comments indicate it would have considered an exceptional sentence had it known it could.'^{FN11}

FN10. 112 Wn.App. 95, 100, 47 P.3d 173 (2002).

FN11. 112 Wn.App. at 100.

*2 Here, there is no indication in the record that the sentencing court believed that it could not deviate from the standard range. The sentencing court was aware that it had the discretion to impose an exceptional sentence. Rather, it saw no legal grounds that would support such a sentence. The court concluded:

Of course, I can also declare an exceptional sentence, if there are legal grounds to do so. And that's the big-That's the big problem. I didn't see then and I don't see now any legal grounds that will support an exceptional sentence.

searches, and his privacy rights under article I, section 7 of the Washington Constitution. He also contends that there is no authority for the collection of DNA samples via a cheek swab. We disagree.

*3 These arguments were rejected in, and are controlled by, our decisions in *State v. Surge* ^{FN18} and *State v. S.S.* ^{FN19}

FN18. 122 Wn.App. 448, 94 P.3d 345 (2004) (holding that *State v. Olivas*, 122 Wn.2d 73, 856 P.2d 1076 (1993), is controlling on this issue and binding on this court).

FN19. 122 Wn.App. 725, 94 P.3d 1002 (2004) (cheek swabs are authorized method of collecting biological samples for the DNA databank).

RETALIATORY PROSECUTION

Eastmond argues, in his statement of additional grounds for review, that the prosecutor's charging decision was retaliation for Eastmond's decision to go to trial. Thus, Eastmond claims that he should receive an exceptional sentence downward. We disagree.

Prosecutorial vindictiveness is the] intentional filing of a more serious crime in retaliation for a defendant's lawful exercise of a procedural right.... But an initial charging decision does not freeze prosecutorial discretion. A prosecutor may increase an initial charge when a fully informed and represented defendant refuses to plead guilty to a lesser charge. ^{FN20}]

FN20. *State v. Bonisio*, 92 Wn.App. 783, 790, 964 P.2d 1222 (1998) (quoting *State v. Lee*, 69 Wn.App. 31, 35, 847 P.2d 25 (1993)), review denied, 137 Wn.2d 1024 (1999).

'A defendant in a pretrial setting bears the burden of proving either (1) actual vindictiveness, or (2) a realistic likelihood of vindictiveness which will give rise to a presumption of vindictiveness.'
FN21 The mere appearance of vindictiveness is insufficient to establish a due process violation. ^{FN22}
Under CrR 2.1(d), the State can amend the information anytime before the verdict if the defendant's substantial rights are not prejudiced. ^{FN23}

FN21. *Bonisio*, 92 Wn.App. at 791 (quoting *United States v. Wall*, 37 F.3d 1443, 1447 (10th Cir.1994)); *United States v. Goodwin*, 457 U.S. 368, 378-80, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982).

FN22. *State v. Bockman*, 37 Wn.App. 474, 682 P.2d 925, review denied, 102 Wn.2d 1002 (1984); *State v. McKenzie*, 31 Wn.App. 450, 642 P.2d 760 (1981).

FN23. *State v. Vangerpen*, 125 Wn.2d 782, 788-89, 888 P.2d 1177 (1995); CrR 2.1(d).

Here, the State initially charged Eastmond with first degree robbery. An amended information filed on August 14, 2000 added a count of first degree burglary. These charges were filed nearly three months in advance of Eastmond's trial which began on November 12, 2000. The State charged all the defendants in the case with the same crimes. Eastmond's co-defendants pleaded guilty to either first degree burglary, or first degree robbery. Eastmond was the only defendant who chose to go to trial facing both burglary and robbery charges.

The prosecution did not increase the charges against Eastmond when he decided to go to trial-both the burglary and robbery charges against him had existed months before trial.

We affirm the judgment and sentence.

Wash.App. Div. 1, 2005.

Appendix 11

Order Denying Petition for Review

Westlaw.

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161 Wash.2d 1015, 171 P.3d 1056 (Table)
161 Wash.2d 1015

H

State v. Eastmond
Wash. 2007.
(The Court's decision is referenced in a Pacific Reporter table captioned "Supreme Court of Washington Table of Petitions for Review.")

Supreme Court of Washington
State

v.
James Eastmond
NO. 76777-7

October 02, 2007

Appeal From: 53836- 5-I

Petition For Review: Denied.

Wash. 2007.
State v. Eastmond
161 Wash.2d 1015, 171 P.3d 1056 (Table)

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