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SUPREME COURT NO. 92060-5

RECEIVED BY E-MAIL
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

CLIFFORD PORTER, JR.,

Respondent.

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

The Honorable Frank E. Cuthbertson, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE

Is it an essential element of stolen property crimes that the possessor of the stolen property “withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto,” RCW 9A.56.140(1), and, if so, must this essential element appear in the State’s charging document?

B. STATEMENT OF THE CASE

The State charged Clifford Melvin Porter, Jr., with unlawful possession of a stolen vehicle. CP 1. The information stated

That CLIFFORD MELVIN PORTER, JR., in the State of Washington, on or about the 27th day of August, 2011, did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing that it had been stolen, contrary to RCW 9A.56.068 and 9A.56.140, and against the peace and dignity of the State of Washington.

CP 1.

The State, despite not charging Porter with any other crime, elicited significant evidence at trial that Porter possessed other stolen property and had also committed malicious mischief, residential burglary, and theft. 2RP¹ 75, 80, 119-20, 152, 167, 192-95. Defense counsel did not object to any of this evidence.

¹ Consistent with his briefing below, Porter refers to the verbatim reports of proceedings as follows: 1RP—November 18, 2013; 2RP—November 18, 19, 20, 21, and 22, 2013; 3RP—December 20, 2013.

The jury found Porter guilty of possession of a stolen vehicle. CP 23; 2RP 396-98. The trial court imposed a 45-day sentence. CP 30; 3RP 8.

Porter appealed. CP 41. He contended his lawyer rendered ineffective assistance for failing to object under ER 404(b) to the State's evidence of other stolen property, burglary, theft, and malicious mischief. Br. of Appellant at 7-14; Reply Br. at 1-9.

Eight days after Porter's reply brief was filed, on March 2, 2015, Division Two decided State v. Satterthwaite, 186 Wn. App. 359, 364-65, 344 P.3d 738 (2015), which held (1) RCW 9A.56.140(1)'s "withhold or appropriate" language was an essential element of stolen property offenses and (2) the State must plead the "withhold or appropriate" language in the information. Because the State failed to include this essential element in Satterthwaite's information, the court reversed. Id. at 366.

The day after Satterthwaite issued, Porter sought leave to file a supplemental brief containing a supplemental assignment of error, which Division Two granted. In light of Satterthwaite, Porter argued that the State failed to allege Porter withheld or appropriated a stolen vehicle to the use of someone other than the true owner and that this failure required reversal. Suppl. Br. of Appellant at 2-5. Division Two agreed with Porter, reversed

his conviction, and remanded for further proceedings.² State v. Porter, noted at 188 Wn. App. 1051, 2015 WL 4252605, at *1 (2015).

C. ARGUMENT

1. WITHHOLDING OR APPROPRIATING STOLEN PROPERTY TO THE USE OF ANY PERSON OTHER THAN THE TRUE OWNER IS AN ESSENTIAL ELEMENT OF ALL POSSESSION OF STOLEN PROPERTY CRIMES

“In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him” CONST. art. I, § 22. An information is constitutionally sufficient “only if all essential elements of a crime, statutory and nonstatutory, are included in the document.” State v. Johnson, 180 Wn.2d 295, 300, 325 P.3d 135 (2014) (quoting State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995)). “An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.” State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (internal quotation marks omitted) (quoting State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992))). In other words, essential elements include those facts that must be proved beyond a reasonable doubt to convict a defendant of the crime charged. Zillyette, 178 Wn.2d at 158.

² Given the reversal, the Court of Appeals declined to address Porter’s ineffective assistance claim regarding counsel’s complete failure to object to the State’s repeated introduction of evidence that Porter possessed other stolen property and had also committed uncharged crimes. Porter, 2015 WL 4252605, at *1 n.1.

Six possession of stolen property crimes appear in chapter 9A.56 RCW: first, second, and third degree possession of stolen property (RCW 9A.56.150–.170), possession of a stolen vehicle (RCW 9A.56.068), possessing a stolen firearm (RCW 9A.56.310), and possession of stolen mail (RCW 9A.56.380). The scheme also provides a common definition for “possessing stolen property,” which “means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold the same to the use of any person other than the true owner or person entitled thereto.” RCW 9A.56.140(1).

RCW 9A.56.140(1)’s definition of “possessing stolen property” lists three essential elements of possessing stolen property offenses. First, RCW 9A.56.140(1) establishes that the person who possesses the stolen item must knowingly receive, retain, possess, conceal, or dispose of stolen property. This establishes that the possession (or its alternatives) cannot be unknowing. Second, the statute requires that the possessor of stolen property “know[] that it has been stolen.”³ *Id.* Third, and most importantly here, the possessor of stolen property must “withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.” *Id.* These three features of RCW 9A.56.140(1) provide what the State must

³ As discussed below in greater detail, this court has already held that the information must include the essential element that the defendant knew the property had been stolen. *State v. Moavenzadeh*, 135 Wn.2d 359, 363-64, 956 P.2d 1097 (1998) (per curiam).

prove beyond a reasonable doubt to convict a defendant of possession of stolen property offenses. These are therefore essential elements of all possession of stolen property crimes.

RCW 9A.56.068, the possession of a stolen vehicle statute at issue here, necessarily incorporates the provisions of RCW 9A.56.140 as essential elements of the crime. RCW 9A.56.068(1) provides in its entirety, “A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle.” This does not provide every essential element of the crime. If it did, simple possession of a stolen vehicle alone would give rise to criminal liability. RCW 9A.56.068 would be a strict liability crime.⁴ RCW 9A.56.068 does not create strict liability because it incorporates the definition of “possessing stolen property” in RCW 9A.56.140 as essential elements.

This conclusion is also compelled by the pattern to-convict instruction for possessing a stolen vehicle and its commentary. The pattern instructions generally delineate the essential elements of a crime, as this court has recognized. State v. Kjorsvik, 117 Wn.2d 93, 102 n.13, 812 P.2d

⁴ The same is true of the first and second degree possessing stolen property statutes, both of which state a “person is guilty of possessing stolen property . . . if he or she possesses stolen property, other than a firearm . . . or a motor vehicle” RCW 9A.56.150(1); RCW 9A.56.160(1)(a). RCW 9A.56.170(1)(a), which provides one means of committing the third degree offense, similarly states a “person is guilty of possessing stolen property in the third degree if he or she possesses (a) stolen property which does not exceed [\$750] in value”

86 (1991) (“Imposing the responsibility to include all essential elements of a crime on the prosecution should not prove unduly burdensome since the ‘to convict’ instructions found in the Washington Pattern Jury Instructions . . . delineate the elements of the most common crimes.”).

Here, the trial court gave the standard to-convict instruction, WPIC 77.21. CP 17 (Instruction No. 8); 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 77.21, at 177-78 (3d ed. 2008). Per that instruction, the State was required to prove beyond a reasonable doubt

(1) That . . . the defendant knowingly received, retained, possessed, concealed or disposed of a stolen motor vehicle;

(2) That the defendant acted with knowledge that the motor vehicle had been stolen[;]

(3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto[.]

CP 17. This instruction lists all three of the essential elements enumerated in the statute that defines “possessing stolen property,” RCW 9A.56.140(1). This demonstrates that, although definitional, RCW 9A.56.140(1) provides the essential elements of stolen property crimes. Among these essential elements is RCW 9A.56.140(1)’s requirement that the defendant withhold or appropriate stolen property.

The Court of Appeals has acknowledged that the pattern instruction shows RCW 9A.56.140(1) “suppl[ies] the mens rea element the legislature must have intended” for possession a stolen vehicle. State v. Hayes, 164 Wn. App. 459, 480, 262 P.3d 538 (2011). The comment to WPIC 77.21 expressly states as much:

The instruction incorporates the definition of “possessing stolen property” from RCW 9A.56.140. Although the Legislature did not expressly incorporate this definition into the crime of possession of stolen motor vehicle (compare with RCW 9A.56.310, which expressly incorporates this definition into possession of a stolen firearm⁵), the Legislature must have intended this definition to apply. This definition applies to the other crimes relating to possessing stolen property in RCW Chapter 9A.56, and the definition is the source of the *mens rea* element for all these possession offenses. If the definition did not apply, the Legislature would have created a strict liability offense for simple possession.

WPIC 77.21 cmt., at 178. The essential elements of possession of a stolen vehicle are spelled out in the pattern to-convict instruction given in this case and in its commentary. Withholding or appropriating stolen property is unquestionably among these essential elements.

This court has also recited the essential elements of possessing stolen property crimes to include withholding or appropriating. In State v.

⁵ Likewise, the legislature expressly incorporated an almost identical definition into the possession of stolen mail statute: “‘Possesses stolen mail’ means to knowingly receive, retain, possess, conceal, or dispose of stolen mail knowing that it has been stolen, and to withhold or appropriate to the use of any person other than the true owner, or the person to whom the mail is addressed.” RCW 9A.56.380(2).

McKinsey, 116 Wn.2d 911, 912, 810 P.2d 907 (1991), the “issue [wa]s whether a prior conviction for first degree possession of stolen property is per se admissible for impeachment purposes under ER 609(a)(2).” In addressing the pertinent statutes, this court provided its view of the statutory elements of first degree possession of stolen property:

Under RCW 9A.56.140 and .150, first degree possession of stolen property involves knowingly receiving, retaining, possessing, concealing, or disposing of stolen property of a value in excess of \$1500^[6] knowing that it has been stolen and withholding or appropriating the property to the use of anyone other than the true owner or person entitled to the property.

McKinsey, 116 Wn.2d at 913 (emphasis added). McKinsey supports Porter’s position that RCW 9A.56.140(1) supplies essential elements of possessing a stolen vehicle, including withholding stolen property from the true owner or appropriating it to a wrongful party.

Moreover, in State v. Moavenzadeh, 135 Wn.2d 359, 361, 363, 956 P.2d 1097 (1998) (per curiam), this court considered an information charging three counts of first degree possession of stolen property that “contain[ed] no language which c[ould] fairly be read to allege that Moavenzadeh knew the property was stolen.” Instead, the information alleged simply that Moavenzadeh possessed stolen property. Id. This court reversed, stating,

⁶ The legislature has since amended RCW 9A.56.150(1) to establish that, for first degree possession of stolen property, the property must exceed \$5000 in value. LAWS OF 2009, ch. 431, § 12(1).

“There is no . . . reason to believe that anyone reading the information in the present case would understand that knowledge that the property is stolen is an element of first degree possession of stolen property.” Id. at 363-64.

Moavenzadeh established that knowing an item of property had been stolen was an essential element of possession of stolen property crimes that must be pleaded in an information, even though this element appears in RCW 9A.56.140, the definitional statute common to all possession of stolen property crimes.⁷ Under Moavenzadeh, it would be incongruous to hold that RCW 9A.56.140’s “withhold or appropriate” provision is not also an essential element of possession of stolen property offenses, especially when the withhold-or-appropriate clause is separated from the knowing-that-it-has-been-stolen clause by the conjunctive word “and.” This court’s recognition that one of the RCW 9A.56.140(1) provisions is an essential element and must be included in the charging document signifies that the other RCW 9A.56.140(1) provisions must also be included as essential elements. Withhold or appropriate is an essential element of possession of stolen property crimes.

⁷ The State also recognizes that knowing possession of the property and knowing the property has been stolen are essential elements, given that it alleged Porter “knowingly possess[ed] a stolen motor vehicle, knowing that it had been stolen” CP 1; Suppl. Br. of Pet’r at 7. Yet the State does not explain why it must include these essential elements from RCW 9A.56.140(1) in the information but need not include the withhold-or-appropriate element from the same statute.

The State attempts to liken this case to Johnson, 180 Wn.2d at 301-03, which distinguished between essential elements and mere definitions of essential elements. Suppl. Br. of Pet'r at 7-8. In essence, the State contends that because RCW 9A.56.140(1) provides a definition, it is impossible for it also to contain the essential elements of a crime. This was not Johnson's holding. And this logic inappropriately elevates form over substance. The legislature is empowered to include essential elements even in definitional statutes, as evidenced by RCW 9A.56.140 and other definitional statutes that provide essential elements.

In Johnson, this court considered an information that charged unlawful imprisonment, alleging that the defendant “‘did knowingly restrain [J.J.], a human being.’” 180 Wn.2d at 301 (alteration in original) (quoting clerk’s papers). Johnson argued that the information was deficient because it did not include the statutory definitions of “restraint”—that is, the information did not state the restraint was “(1) without consent and (2) without legal authority, in a manner that interfered substantially with the victim’s liberty.” Id. Rejecting Johnson's argument, this court held that the “State need not include definitions of the elements in the information” and that it “was enough that the State alleged all of the essential elements found in the unlawful imprisonment statute” Id. at 302.

In so holding, this court relied primarily on State v. Allen, 176 Wn.2d 611, 294 P.3d 679 (2013). Johnson, 180 Wn.2d at 302 (discussing Allen). Allen challenged an information charging felony harassment, asserting the State’s language omitted the “constitutional limitation that only true threats may be charged.” Allen, 176 Wn.2d at 626-27. This court disagreed, noting, “We have never held the true threat requirement to be an essential element of a harassment statute.” Id. at 628. Rather, “the constitutional concept of “true threat” merely defines and limits the scope of the essential threat element in the felony telephone harassment statute and is not itself an essential element of the crime.” Id. at 630 (internal quotation marks omitted) (quoting State v. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007)).

Allen and Johnson differ from this case and Satterthwaite in a very straightforward way. In contrast to the possession of stolen property statutes, the statutes at issue in Allen and Johnson contained all essential elements of harassment and unlawful imprisonment in a single statute, and the charging documents were cast in that single statute’s language. Compare Johnson, 180 Wn.2d at 301 (information providing the defendant “did knowingly restrain”) with RCW 9A.40.040(1) (“A person is guilty of unlawful imprisonment if he or she knowingly restrains another person.”); compare Allen, 176 Wn.2d at 627 (information providing the defendant “knowingly

and without lawful authority, did threaten to cause bodily injury”) with RCW 9A.46.020(1)(a)(i) (“A person is guilty of harassment if . . . [w]ithout lawful authority, the person knowingly threatens . . . [t]o cause bodily injury . . .”).

Unlike the harassment and unlawful imprisonment statutes, the essential elements of possession of stolen property offenses appear in two separate statutory sections—RCW 9A.68.140 and whatever provision corresponds to the State’s charge. The fact that the legislature chose to include essential elements of a crime in a definitional statute does not somehow render those elements nonessential.

The robbery statutes confirm that the legislature sometimes places essential elements in definitional statutes. Like the unlawful possession of stolen property statutes, the definition of robbery is provided in its own statute followed by the first and second degree offenses. RCW 9A.56.190–.210. The definitional statute provides, in part,

A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone.

RCW 9A.56.190. There can be little question that this definitional statute provides the essential elements of the crime of robbery: to commit any robbery, the defendant must (1) take personal property from the person of another (2) in his or her presence (3) against his or her will (4) by the use or

threatened use of immediate force, violence, or fear of injury to that person, his or her property, or the person or property of anyone. Although these elements appear in a definitional statute, the courts have confirmed they are essential elements. E.g., Kjorsvik, 117 Wn.2d at 110-11 (concluding information that included language “that the defendant unlawfully, with force, and against the [person]’s will, took the money” adequately contained “all of the essential elements of robbery”); State v. Witherspoon, 171 Wn. App. 271, 294-95, 286 P.3d 996 (2012) (concluding information stating the defendant “did unlawfully take personal property that the Defendant did not own from the person of another . . . or in said person’s presence against said person’s will by the use or threatened use of immediate force, violence, or fear of injury to said person or the property of said person or the person or property of another” properly contained all “essential elements for the crime of second degree robbery”), aff’d, 180 Wn.2d 875, 329 P.3d 888 (2014); 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 37.02 & 37.04, at 667-68, 672-73 (3d ed. 2008) (listing RCW 9A.56.190 elements in to-convict instructions for first and second degree robbery).

Moreover, the second degree robbery statute provides, “A person is guilty of robbery in the second degree if he or she commits robbery.” RCW 9A.56.210(1); compare id. with RCW 9A.56.068(1) (“A person is guilty of

possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle.”). Applying the State’s logic in this case, the State would need to allege only that a defendant “committed robbery” to constitutionally charge robbery in the second degree given that all the other elements of robbery are contained in a definitional statute. This is not a tenable proposition.

The State mischaracterizes Johnson, reading it much too simplistically. Johnson merely held that the “State need not include definitions of elements in the information.” 180 Wn.2d at 302. It does not follow that the State need not include essential elements in the information if the legislature chose to place these essential elements in definitional statutes. Rather, the information is constitutionally adequate “only if all essential elements of a crime . . . are included in the document.” Id. at 301 (quoting Vangerpen, 127 Wn.2d at 787). The essential elements of possessing stolen property are established by the definition of possessing stolen property provided in RCW 9A.68.140(1). Johnson did not address, nor did it foreclose, this reality.

Instead, Johnson recited the rule that an essential element is one whose specification is necessary to establish the illegality of the charged behavior. 180 Wn.2d at 300. Applying this standard, the Satterthwaite court correctly concluded that withholding or appropriating a stolen item is an essential element of possession of stolen property offenses:

It is the withholding or appropriation of a stolen item of property to the use of someone other than the owner that ultimately makes the possession illegal, thus differentiating between a person attempting to return known stolen property and a person choosing to keep, use, or dispose of known stolen property.

Satterthwaite, 186 Wn. App. at 364.

A couple of hypotheticals illustrate how and why this reasoning is sound. Envision a mother who arrives home from work to discover her teenager shoplifted clothing from a local store.irate, the mother takes all of the stolen clothing from her child until she can return it to the store the following day. At the point the mother takes the clothing, she knowingly possesses the clothing and she knows it is stolen. Yet she has not withheld the clothing from the store or appropriated it to someone other than the store. To the contrary, the mother plans to return the stolen property as soon as the store opens the following morning. If withholding or appropriating were not an essential element of possession of stolen property crimes, the mother could successfully be charged and prosecuted for possession of stolen property because she knowingly possessed the clothing and knew it was stolen, even though she never withheld the stolen property from the store or appropriated it to her use, to her teenager's use, or to anyone else's. By including the "withhold or appropriate" language in RCW 9A.56.140(1) as

an essential element of possessing stolen property crimes, the legislature foreclosed this absurd result.

Next consider a tow truck operator who has been contacted by law enforcement to transport a stolen vehicle to the nearest impound lot. The operator arrives, hooks the stolen vehicle up for towing, and then drives away with it. At this point, the tow truck driver knowingly possesses the vehicle and also knows the vehicle is stolen. But the driver is not withholding the stolen vehicle from the rightful owner or appropriating it to the use of some other person. The driver is merely assisting law enforcement. However, under the State's logic that RCW 9A.56.140(1)'s "withhold or appropriate" language does not constitute an essential element of the crime, the driver is guilty of possession of a stolen vehicle. The legislature could not have intended to countenance this ridiculous result, which is precisely why it included the "withhold or appropriate" clause in RCW 9A.56.140(1) as an essential element of all possession of stolen property offenses.

Withholding or appropriating stolen property is an essential element of possession of a stolen vehicle. The pattern instructions, case law, the analogy to the robbery statutes, and common sense confirm that the withhold-or-appropriate element is essential. This court has never held that

essential elements enumerated in a definitional statute are ipso facto nonessential. Porter requests that this court affirm.

2. UNDER THE LIBERAL CONSTRUCTION RULE, THE STATE FAILED TO ALLEGE THE ESSENTIAL “WITHHOLD OR APPROPRIATE” ELEMENT, WHICH REQUIRES REVERSAL

Where, as here, a challenge to the constitutional sufficiency of a charging document is raised for the first time on appeal, the reviewing court applies the “liberal construction” test. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). Under this test, the charging document “will be construed liberally and will be found sufficient if the necessary elements appear in any form, or by fair construction may be found, on the face of the document.” Id. (citing Kjorsvik, 117 Wn.2d at 105). However, if “the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it.” State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). “If the necessary elements are not found or fairly implied, however, [courts] presume prejudice and reverse without reaching the question of prejudice.” McCarty, 140 Wn.2d at 425; see also City of Auburn v. Brooke, 119 Wn.2d 623, 636, 836 P.2d 212 (1992) (“One does not reach the . . . prejudice prong unless there is some language relating to the element—however inartful—in the [charging] document.”)

Here, the information did not mention Porter's withholding or appropriating the stolen vehicle to the use of a person other than the owner or other person entitled to it. CP 1. Nor can this element be found by fair construction.

Without the withhold or appropriate language, the aforementioned hypothetical mother and tow truck driver would not be given the required constitutional notice that they must have withheld the clothes or vehicle from or must have appropriated them to an improper person in order for their actions to be criminal. Cf. Moavenzadeh, 135 Wn.2d at 363-64 (holding that without the essential knowing-the-property-was-stolen element, no one "would understand that knowledge that the property is stolen is an element of first degree possession of stolen property").

Likewise, nothing in the information apprised Porter of the essential withhold-or-appropriate element. Although the information cited RCW 9A.56.140, where the withhold-or-appropriate element is found, "[m]erely citing to the proper statute and naming the offense is insufficient to charge a crime unless the name of the offense apprises the defendant of all the essential elements of the crime." Vangerpen, 125 Wn.2d at 787. As discussed at length above, the crime "possession of a stolen vehicle" does not apprise a defendant of all of the essential elements, namely the withholding or appropriating that makes possession of a stolen vehicle a

crime. The Court of Appeals correctly concluded that the State's information in this case was constitutionally deficient because it did not set out all essential elements of possession of a stolen vehicle. Porter, 2015 WL 4252605, at *2. This court should accordingly affirm its decision.

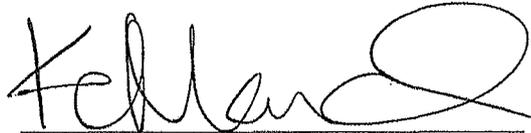
D. CONCLUSION

Because withholding or appropriating stolen property to the use of anyone other than the true owner is an essential element of possessing a stolen vehicle and because this essential element did not appear in the State's charging document, Porter asks that this court affirm the Court of Appeals.

DATED this 19th day of February, 2016.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "K. March", written over a horizontal line.

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Subject: State v. Clifford Porter, Jr. No. 92060-5 / Supplemental Brief of Respondent

Attached for filing today is a supplemental brief of respondent for the case referenced below.

State v. Clifford Porter, Jr.

No. 92060-5

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