

64126-3

64126-3

NO. 64126-3-I

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

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STATE OF WASHINGTON,

Respondent,

v.

DONALD COCHRANE,

Appellant.

---

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

The Honorable Catherine Shaffer

---

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Donald Cochran was convicted of the felony version of driving while under the influence (DUI). The existence of four or more prior convictions, as defined by statute, raises the offense from a gross misdemeanor to a felony and is therefore an essential element which the State must prove beyond a reasonable doubt.

The information charging Mr. Cochran with felony DUI cited to the wrong section of the statute to define the prior offenses, failed to allege the particular offenses the State intended to prove or that the arrests for those offenses occurred within ten years of the current offense, as required by statute. Because Mr. Cochran objected to the information pre-verdict, it must be strictly construed on appeal. Because it failed to accurately state the prior conviction element on its face or to identify the conduct which constituted that element, the information was constitutionally insufficient.

To prove the existence of four prior qualifying convictions, the State offered certified copies of court dockets. Two of these dockets showed misdemeanors which were tried and convicted in municipal court, under municipal code. Statute provides that prior offenses which elevate a misdemeanor DUI to a felony must be violations of designated sections of RCW 46.61 or their foreign or

local equivalents. The State offered no proof, and the trial court did not find, that the municipal codes in two of the prior offenses were equivalent to designated state laws. Because that fact was necessary to convict Mr. Cochrane of felony DUI, the State failed to prove each element of the crime beyond a reasonable doubt.

**B. ASSIGNMENTS OF ERROR**

1. Because it omitted an essential element of the felony version of driving while under the influence, the information deprived Donald Cochrane of due process.

2. The State failed to provide sufficient evidence that Mr. Cochrane committed felony driving while under the influence.

3. The trial court erroneously entered Finding of Fact 25, which is unsubstantiated or contradicted by the evidence on the record.

4. The trial court erroneously entered Finding of Fact 26, which is unsubstantiated or contradicted by the evidence on the record.

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The "essential elements" rule requires the information set forth every essential element of the crime. Under RCW 46.61.502(6), driving while under the influence is elevated from a

gross misdemeanor to a felony if the defendant has four or more prior offenses, of the types designed in RCW 46.61.5055(14)(a), for which the arrests occurred within ten years of the arrest for the current offense. Did the information violate the essential elements rule by citing to the wrong section of the statute to define the prior offenses, failing to allege the particular prior offenses the State intended to prove, and omitting the required ten-year timeframe?

2. To prove Mr. Cochrane's prior underlying offenses, the State offered dockets for those convictions. Two were entered in municipal court and charged and tried under municipal codes; the State offered no proof to establish that those convictions were of the type specified in RCW 46.61.5055(14). Did the State fail to prove each element of the crime beyond a reasonable doubt?

#### D. STATEMENT OF THE CASE

The State charged Mr. Cochrane with felony DUI and failure to obey a law enforcement officer (a misdemeanor). CP 1-6.

After a bench trial, the court found that on January 9, 2009, Mr. Cochrane was driving a vehicle under the influence of alcohol and willfully failed or refused to obey the lawful order of a police officer. CP 36 (CL A.1, A.2, B.1, B.2). The court also found Mr. Cochrane stipulated to four prior criminal convictions within ten

years of the current offense, which were of the types designated by the felony DUI statute. CP 35 (FF 25-26, CL A.3). The court rejected Mr. Cochrane's argument that the information actually charged him with only misdemeanor DUI, and found him guilty as charged. CP 37.

The court imposed a standard range sentence of 60 months on the felony and 90 days on the misdemeanor, to be served concurrently. CP 42-52.

E. ARGUMENT

1. THE INFORMATION WAS CONSTITUTIONALLY DEFECTIVE BECAUSE IT OMITTED AN ESSENTIAL ELEMENT OF THE CRIME

In Count One of the information, the State charged Mr.

Cochrane as follows:

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse DONALD HARER COCHRANE of the crime of Felony DUI, committed as follows:

That the defendant DONALD HARER COCHRANE in King County, Washington, on or about January 9, 2009, drove a vehicle within this state and while driving had an amount of alcohol in his body sufficient to cause a measurement of his blood to register 0.08 percent or more by weight of alcohol within two hours after driving, as shown by analysis of the person's blood; while under the influence of or affected by intoxicating liquor or any drug; while under

the combined influence of or affected by intoxicating liquor and any drug; having at least four prior offenses, as defined under RCW 46.61.5055(13)(a);

Contrary to RCW 46.61.502 and 46.61.5055, and against the peace and dignity of the State of Washington.

CP 1 (emphasis added).

Mr. Cochrane challenged the information before the verdict was rendered. Defense counsel argued in closing that the information, for the reasons discussed below, failed to allege every element of the crime and therefore violated Article I, § 22,<sup>1</sup> the Sixth Amendment,<sup>2</sup> and CrR 2.1, and at best charged only the misdemeanor version of DUI, not the felony. 8/26/09RP 50-54, 57. The State did not move to amend the information, but insisted in rebuttal that the information was adequate. 8/26/09RP 56. The court ruled the information was sufficient, finding the incorrect statutory citation was a mere "scrivener's error," and the ten-year timeframe for the qualifying prior offenses was not an element of

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<sup>1</sup> Article I, § 22 of the Washington Constitution guarantees that "In criminal prosecutions, the accused shall have the right to appear and . . . to demand the nature and cause of the accusation against him (and) to have a copy thereof."

<sup>2</sup> The Sixth Amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of accusation." In addition, the Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law."

felony DUI. 8/26/09RP 57-59. For the reasons discussed below, that ruling was wrong on both counts. Even at sentencing, defense counsel reminded the court of the information's deficiencies and asked that Mr. Cochrane be sentenced for misdemeanor rather than felony DUI. 9/4/09RP 5. The court refused, and sentenced Mr. Cochrane within the standard range for the felony. 9/4/09RP 9.

As discussed below, the language alleging "at least four prior offenses, as defined under RCW.46.61.5055(13)(a)" is constitutionally deficient. The information fails to set forth an essential element of the crime: the existence of at least four prior offenses, as defined in RCW 46.61.5055 (14)(a), the arrests for which occurred within ten years of the arrest for the current offense. The information also fails to specify the four prior offenses which are alleged to prove felony DUI. And the statutory citation is incorrect, such that a person of common understanding would not reasonably know what was intended.

a. An information challenged pretrial must be strictly construed. Where a defendant challenges the sufficiency of the charging document before the verdict is rendered, the charging language must be strictly construed. State v. Johnson, 119 Wn.2d 143, 149, 829 P.2d 1079 (1992) (citing State v. Kjorsvik, 117 Wn.2d

93, 106, 812 P.2d 86 (1991); State v. Hopper, 118 Wn.2d 151, 155-56, 822 P.2d 775 (1992)).

If the information is first challenged post-verdict,

the charging documents... are [] examined to determine whether the missing elements appear in any form, or by fair construction can be found, and the language must not be “inartful or vague” with respect to the elements of the crime.

Johnson, 119 Wn.2d at 150 (citing Kjorsvik, 117 Wn.2d at 106).

“But where, as here, the information is challenged before or during trial, we construe the charging language strictly,” judging whether the information, on its face, clearly contains each and every element of the crime charged. Johnson, 119 Wn.2d at 150 (emphasis added). (See e.g. cases applying strict construction analysis where defendant challenged information after State rested but before verdict, e.g. State v. Borrero, 147 Wn.2d 353, 363-64, 58 P.3d 245 (2002); State v. Ralph, 85 Wn.App. 82, 84-85, 930 P.2d 1235 (1997); State v. Chaten, 84 Wn.App. 85, 87, 925 P.2d 631 (1996); State v. Vangerpen, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995); State v. Bacani, 79 Wn.App. 701, 703, 902 P.2d 184 (1995), rev. denied, 129 Wn.2d 1001, 914 P.2d 66 (1996)).

Furthermore, prejudice does not figure into the strict construction analysis. “Whether a defendant was prejudiced by a

defective information is only to be considered if the information is challenged for the first time after a verdict.” Johnson, 119 Wn.2d at 149 (citing Kjorsvik, 117 Wn.2d at 106 and Hopper, 118 Wn.2d at 151, 155-56).

There can be no question that Mr. Cochrane’s pre-verdict challenge to the information requires the strict construction analysis announced in Johnson.

b. An information is constitutionally sufficient only if it sets forth every essential element of the crime. It is a fundamental principle of criminal procedure, embodied in Article I, § 22 and the Sixth Amendment, that the accused in a criminal case must be formally apprised of the nature and cause of the accusations before the State may prosecute and convict him of a crime. The “essential elements rule” – ensuring constitutionally adequate notice by requiring a charging document set forth the essential elements of the alleged crime – has long been settled law in Washington and is constitutionally mandated. State v. Quismundo, 164 Wn.2d 499, 503, 192 P.3d 342 (2008) (citing Vangerpen, 125 Wn.2d at 788.; State v. Taylor, 140 Wn.2d 229, 236, 996 P.2d 571 (2000)).

All essential elements of the crime must be included in the information, “that the defendant be apprised of the elements of the

crime charged and the conduct of the defendant which is alleged to have constituted that crime.” Kjorsvik, 117 Wn.2d at 98 (citing . State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989)); State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000) (citing CrR 2.1(a)(1) and Kjorsvik, 117 Wn.2d at 97). The charging document must provide the defendant with “a plain, concise and definite written statement of the essential facts constituting the offense charged” and enable a person of common understanding to know what is intended. CrR 2.1(a)(1); RCW 10.37.050(6); State v. Long, 19 Wn.App. 900, 903, 578 P.2d 871 (1978).

A charging document is constitutionally adequate only if all essential elements are included on the face of the document, regardless of whether the accused received actual notice of the charge. Quismundo, 164 Wn.2d at 504; Vangerpen, 125 Wn.2d at 790; State v. Markle, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992); State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). If the reviewing court concludes the necessary elements are not found or fairly implied in the charging document, the court must presume prejudice. McCarty, 140 Wn.2d at 425.

c. The information omitted an essential element of the charge of felony driving under the influence by failing to allege the four prior qualifying offenses.

i. The requisite four prior qualifying convictions constitute an essential element of the felony DUI. RCW 46.61.502

provides in relevant part:

(1) A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state:

(a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or

(b) While the person is under the influence of or affected by intoxicating liquor or any drug; or

.....

5) Except as provided in subsection (6) of this section, a violation of this section is a gross misdemeanor.

6) It is a class C felony punishable under chapter 9.94A RCW . . . if:

(a) The person has four or more prior offenses within ten years as defined in RCW 46.61.5055[.]

(Emphasis added).

Where a prior conviction elevates an offense from a misdemeanor to a felony, that prior conviction is an element of the offense rather than merely a sentencing factor. State v. Roswell, 165 Wn.2d 186, 194, 196 P.3d 705 (2008). The only factor that distinguishes felony DUI from gross misdemeanor DUI is the

existence of those four prior qualifying offenses. That factor can only be described as an essential element.

Washington courts have repeatedly held that where commission of an underlying offense is an element of the crime charged, the underlying offense must be specified in the information. For the crime of felony murder, for instance, Washington courts have long recognized that the underlying felony is itself an element of felony murder, which must be set forth in the information, even though each element of the underlying felony need not be alleged. State v. Medlock, 86 Wn.App. 89, 101, 935 P.2d 693 (1997); State v. Bryant, 65 Wn.App. 428, 438, 828 P.2d 1121 (1992); State v. Anderson, 10 Wn.2d 167, 180, 116 P.2d 346 (1941); State v. Ryan, 192 Wash. 160, 164-65, 73 P.2d 735 (1937); State v. Fillpot, 51 Wash. 223, 228, 98 P. 659 (1908).

A helpful analysis is found in this Court's recent decision in City of Bothell v. Kaiser, 152 Wn.App. 466, 217 P.3d 339 (2009). There as here, the defendant challenged the complaint pre-verdict, so the Court applied a strict construction analysis. Id. at 472. The complaint charged violation of no-contact order by alleging the defendant "knowingly violated the order, that the order stated that a violation of its terms is a criminal offense and will subject him to

arrest, and cited the relevant statutes.” Id. at 476. But because it failed to specify the underlying order, the scope of the order, or the protected person, it omitted an essential element and was constitutionally deficient under either a strict construction or liberal analysis. Id. at 476-77. This Court dismissed the conviction without inquiring into prejudice. Id. at 473, 476.

In Kaiser, this Court relied heavily on its earlier decision in State v. Termain, 124 Wn.App. 798, 103 P.2d 209 (2004). The complaint in that case, also charging violation of no-contact order, tracked the statutory language and specified the dates of the order in question, but failed to identify the order or the person it protected. Id. at 803. This Court reaffirmed that a charging document must apprise the defendant of both the elements “and the conduct... which is alleged to have constituted the crime... These critical facts must be found within the four corners of the charging document.” Id. (emphasis in the original; citing Leach, 112 Wn.2d at 688-89 and Kjorsvik, 117 Wn.2d at 98-99). In the case of a violation of no-contact order, the proscribed conduct “is determined by the scope of the predicate order... A conviction cannot be obtained without producing the order[.]” Termain, 124 Wn.App. at 804.

Here, too, the proscribed conduct is determined by the

predicate prior offenses. With four prior qualifying offenses, driving under the influence is a felony; otherwise it is a misdemeanor. A conviction for the felony cannot be obtained without producing proof of at least four prior qualifying offenses. In Termain, the Court admonished the City of Seattle:

There are many simple ways the City could have included bare facts in the charging document so that Termain could fairly imply what actual conduct was being charged. To fail to do so makes Termain guess at the crime alleged to have committed.

Id. at 806. The same is true here.

The State was required to include a citation to the correct defining statute, the ten-year timeframe, and a recitation of the four prior qualifying offenses which the State intended to offer in order to prove the felony. Just as in Termain and Kaiser, the State was required to allege every element and every act which constituted the crime charged. As the Supreme Court has noted, this requirement is not “unduly burdensome” on the State. Vangerpen, 125 Wn.2d at 791 n. 17 (citing Kjorsvik, 117 Wn.2d at 102 n.13).

*ii. Mere citation to the statute was not sufficient to allege the missing element.* Due process requires that the information specify the acts constituting the crime charged in ordinary and concise language, precluding the State from simply

including a statutory citation in place of an essential element.

"[D]efendants should not have to search for the rules or regulations they are accused of violating." Kjorsvik, 117 Wn.2d at 101 (citing State v. Jeske, 87 Wn.2d 760, 765, 558 P.2d 162 (1976)). Thus, where a prior conviction is an essential element of the crime charged, the State may not merely cite to the underlying statute allegedly violated but must specify the particular underlying offense.

For example, in State v. Johnstone, 96 Wn.App. 839, 982 P.2d 119 (1999), the charged crime was intentional interference with owner's control, which required proof that the defendant unlawfully took or retained, or attempted to take or retain, property used in "any enterprise described in RCW 9.05.060." Former RCW 9.05.070. Johnstone held the information must specify the nature of the enterprise alleged and could not simply refer to the numerical code section defining the term "enterprise." Id. at 845-46. That is because the defendant should not have "the burden of locating the relevant code . . . and determining the elements of the offense from the proper code section," which is "an unfair burden to place on an accused." Id. at 845 (quoting City of Auburn v. Brooke, 119 Wn.2d 623, 634-35, 836 P.2d 212 (1992)).

Similarly, in State v. Green, 101 Wn.App. 885, 6 P.3d 53 (2000), the Court of Appeals reversed a conviction for bail jumping where the information merely set forth the cause number of the underlying crime but did not specify the crime.

The Supreme Court has repeatedly held that an information may charge in the language of a statute only if the statute defines the offense with certainty. Kjorsvik, 117 Wn.2d at 98-99; Leach, 113 Wn.2d at 686, 689. The question is whether the information "state[s] the acts constituting the offense in ordinary and concise language, not the name of the offense, but the statement of the acts constituting the offense." Leach, 113 Wn.2d at 689 (quoting State v. Royse, 66 Wn.2d 552, 557, 403 P.2d 838 (1965)). In other words, the information must "allege facts supporting every element of the offense," which is not the same as listing every statutory element, much less relying on a citation. Leach, 113 Wn.2d at 689.

The statutory language stated in the information in this case did not define the offense with certainty. First, the citation was wrong. Second, even the intended citation would not have fully apprised Mr. Cochrane of the elements and alleged conduct.

There is no RCW 46.61.5055(13)(a). RCW 46.61.5055(13) allows for extraordinary medical placement of offenders serving a

sentence for DUI. A person of common understanding would be quite confused by this reference, which is clearly no help in understanding the crime charged. If this person were to search through the statute, as the Johnstone Court said they should not have to do, they would find RCW 46.61.5055(14)(a), the section the State presumably intended to cite, providing:

(14) For purposes of this section and RCW 46.61.502 and 46.61.504:

(a) A "prior offense" means any of the following:

(i) A conviction for a violation of RCW 46.61.502 or an equivalent local ordinance;

(ii) A conviction for a violation of RCW 46.61.504 or an equivalent local ordinance;

(iii) A conviction for a violation of RCW 46.61.520 committed while under the influence of intoxicating liquor or any drug;

(iv) A conviction for a violation of RCW 46.61.522 committed while under the influence of intoxicating liquor or any drug;

(v) A conviction for a violation of RCW 46.61.5249, 46.61.500, or 9A.36.050 or an equivalent local ordinance, if the conviction is the result of a charge that was originally filed as a violation of RCW 46.61.502 or 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or 46.61.522;

(vi) An out-of-state conviction for a violation that would have been a violation of (a)(i), (ii), (iii), (iv), or (v) of this subsection if committed in this state;

(vii) A deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.502, 46.61.504, or an equivalent local ordinance; or

(viii) A deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.5249, or an equivalent local ordinance, if the charge under which the deferred prosecution was granted was originally filed as a violation of RCW 46.61.502 or 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or 46.61.522;

This section does not provide notice of the particular prior offenses alleged. To the contrary, RCW 46.61.5055(14)(a) lists, by reference, nine possible offenses,<sup>3</sup> as well as deferred prosecutions for two of them, not to mention local and foreign equivalents. Thus a mere citation was insufficient to apprise Mr. Cochrane of the underlying prior offenses he was alleged to have committed.

Even if (14)(a) named only a single offense, however, it would still be inadequate. RCW 46.61.5055(14)(c) explains:

“Within ten years” means that the arrest for a prior offense occurred within ten years of the arrest for the current offense.

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<sup>3</sup> Felony and misdemeanor DUI (46.61.502); felony and misdemeanor physical control under the influence (46.61.504); vehicular homicide and vehicular assault under the influence (46.61.520, .520); or negligent driving in the first degree (46.61.5249), reckless driving (46.61.500), reckless endangerment (9A.36.050) if originally filed as DUI, physical control, vehicular homicide, or vehicular assault.

The phrase “within ten years” appears in RCW 41.61.502 but not in RCW 46.61.5044(14)(a). Nothing in either of those statutes – or in the information – would suggest to a person of common understanding that they should search the statute for further definition. Nor does “within ten years” have such an obvious meaning as to necessarily imply a time span from the date of arrest for the prior violation to the date of violation for the current offense. To the contrary, the plain language “within ten years” suggests the timing of the violation, not the arrest, as both the trial court and the prosecutor in this case apparently assumed. See CP 35 (FF 25) (referring to “date of violation” rather than “date of arrest”); 8/26/09RP 47 (prosecutor, in closing, arguing “the statutory definition of ‘within 10 years’ means that the arrest or prior offense occurred within 10 years of the arrest for the current offense”); 8/26/09RP 69 (court’s oral ruling, stating, “[a]nd when I say ‘on,’ I’m talking about the date of crime, which is what the defendant agreed were the dates of those crimes”); 9/2/09RP 3 (defense counsel confirming that written findings would say “date of violation” to be consistent with court’s oral findings).

In State v. Sutherland, an information charging hit-and-run was deficient for failing to allege that the driver knew he was in an

accident. 104 Wn.App. 122, 15 P.3d 1051 (2001). The Court found knowledge was a nonstatutory element, and compared this situation to assault cases where knowledge was implied. Id. at 131-32 (citing State v. Tunney, 129 Wn.2d 336, 341, 917 P.2d 95 (1996) and Hopper, 118 Wn.2d at 159). In Tunney and Hopper, the Court explained, the term “assault” was construed to imply the knowledge element. Sutherland, 104 Wn.App. at 132. But in the hit-and-run context, “there is no such word as ‘assault’ from which we can imply knowledge... We find nothing in the information reasonably indicating that the State must prove that Sutherland knew he was in an accident.” Id.; see also State v. Courneya, 132 Wn.App. 347, 352-53, 131 P.3d 343 (2006) (under strict construction analysis, hit-and-run information omitted an essential nonstatutory element of knowledge). The Court relied on State v. Simon, concerning an information which charged promoting prostitution of a minor but failed to allege the defendant knew the person was under 18 years old. 120 Wn.2d 196, 840 P.2d 172 (1992). The Supreme Court in Simon found, “No one of common understanding reading the information would know that knowledge of age is an element[.]” Id. at 197.

As in Sutherland, Courneya, and Simon, no one of common understanding reading this information would know anything about the prior qualifying offenses, except that there must be four of them. The reader would be forced to look up the statute – a dead end, since the citation is incorrect. If the reader guessed the correct citation, that would only lead to another question: which of the nine types of offenses are alleged? An equally important question would probably go unasked, because the average layperson would not think to search for a definition of the phrase “within ten years.” In sum, the information utterly failed to allege an essential statutory element of the crime – critically, the only element elevating the crime from a misdemeanor to a felony.

*iii. Incorrect statutory citation further rendered the information defective.* As noted above, the information’s citation to RCW 46.61.5055(13)(a) was clearly incorrect. The trial court acknowledged this mistake, but found it was a “scrivener’s error.” 8/26/09RP 59. This ruling was error.

The omission of an essential element, even if inadvertent, cannot be “a mere technical error.” Vangerpen, 125 Wn.2d at 790.

Sometimes errors made in charging documents are oversights in omitting an element of the crime, but for sound policy reasons founded in our state and federal

constitutions, this court has nonetheless consistently adhered to the essential elements rule.

Id. (citing Hopper, 118 Wn.2d at 160; Pelkey, 109 Wn.2d at 490-91; State v. DeBolt, 61 Wn.App. 58, 61-62, 808 P.2d 794 (1991)).

In Vangerpen, the defendant was charged with attempted first degree murder by an information which inadvertently omitted the element of premeditation. 125 Wn.2d at 785. The information was otherwise correct, and properly cited to RCW 9A.32.030(1)(a), providing that “premeditated intent” elevates a murder to the first degree. But the information itself alleged only intent, not premeditation. State v. Vangerpen, 71 WnApp. 94, 97, 856 P.2d 1106 (1993). Although recognizing that an information which contains only technical defects will generally not require reversal, the Court held this “scrivener’s error” was constitutional error requiring dismissal. Vangerpen, 125 Wn.2d at 790, n. 16, 791 (citing Simon, 120 Wn.2d at 199; Johnson, 119 Wn.2d at 145; Leach, 113 Wn.2d at 691). Without the omitted element, the information effectively charged only attempted murder in the second degree, just as the omitted element here was needed to elevate the misdemeanor DUI to a felony. 125 Wn.2d at 791.

The State cannot argue that Mr. Cochrane was not prejudiced by the defective information. First, Vangerpen addressed this question. There, unlike the instant case, the information was amended, before the verdict but after the State rested its case. Id. Nonetheless, the Court held the amendment was improper, and was per se prejudicial error, even though the defendant conceded he had adequate notice of the charges against him. Id. (cf. State v. Weiding, 60 Wn.App. 184, 186-87, 803 P.3d 17 (1991) (information, citing statute that went into effect four weeks after date of offense, was erroneous but not fatally defective because defendant had full notice of crime charged)).

Secondly, as discussed above, strict construction analysis does not consider prejudice. In Courneya, the defendant was tried twice (the first trial resulting in a mistrial) with the same faulty information. 132 Wn.App. at 354. But the Court held

Washington and federal courts have strictly applied the [essential elements] rule. Without amendment of the charging documents, the sufficiency of other sources of the elements of the crime, such as the jury instructions, as the State urges here, the parties' closing argument, a separate but similar count in the same information, and a discussion with the defendant's attorney of the elements, have all been rejected if the information itself does not include all essential elements of the crime. See McCarty, 140 Wn.2d at 426 (information charging conspiracy to

deliver methamphetamine was insufficient because it did not allege the essential element that three people be involved in the conspiracy); State v. Franks, 105 Wn.App. 950, 958-59, 22 P.3d 269 (2001) (information insufficient when it included defendant's name in the caption of the information, but not in the document's charging language); State v. Gill, 103 Wn.App. 435, 442, 13 P.3d 646 (2000) (a missing element in one count cannot be drawn from its proper inclusion in another, similar count). Despite the arguable satisfaction here of the notice policy explained in Kjorsvik, allowing such exceptions would soon eclipse the rule and likely erode the notice requirement entirely or embroil the courts and litigants in endless disputes about whether and when proper notice of the charged crime's elements were given to the defendant. Accordingly, we reject the State's invitation to begin eroding Kjorsvik's bright line rule that requires the information to advise the defendant of every essential element of the charged crime.

Courneya, 132 Wn.App. at 353-54. This Court should not now erode that rule.

d. Because the information only charged misdemeanor DUI, the proper remedy is reversal of the DUI conviction and remand for entry of a misdemeanor DUI conviction. Although the information was challenged pre-verdict, the State chose not to amend it, despite ample opportunity. As the Supreme Court has held, "a facial deficiency in [an information] is even more intolerable because the government had actual notice of the defect well before trial[.]" Johnson, 119 Wn.2d at 151 (quoting United

States v. Hooker, 841 F.2d 1225, 1233 (4th Cir.1988)). Rational policy considerations favor dismissal in this situation.

A bright line rule mandating dismissal of defective information's challenged before trial is workable and not unduly harsh, given the liberal amendment rule and the ease with which prosecutors can discern the elements of most common crimes... In addition, such a rule will guide prosecutors and provide them with an incentive to see to it that the charging document is constitutionally sufficient from the time of filing and beyond. This should result in fewer dismissals, since the prosecutors will presumably be more careful if they know an error could result in dismissal of the charge.

Johnson, 119 Wn.2d at 150 (citing Kjorsvik, 117 Wn.2d at 102 n.14 and 199 (Utter, J., dissenting)).

Although the same policy considerations are at play here, this situation requires a different remedy. The information's errors pertain only to the felony charge, not the lesser-included misdemeanor. Mr. Cochrane assigns no error to the portion of the information alleging:

That the defendant DONALD HARER COCHRANE in King County, Washington, on or about January 9, 2009, drove a vehicle within this state and while driving had an amount of alcohol in his body sufficient to cause a measurement of his blood to register 0.08 percent or more by weight of alcohol within two hours after driving, as shown by analysis of the person's blood; while under the influence of or affected by intoxicating liquor or any drug; while under the

combined influence of or affected by intoxicating liquor and any drug[.]

CP 1. This portion of the information properly charges Mr. Cochrane with misdemeanor DUI under RCW 46.61.502. Similarly, as discussed in the next section, the State proved every element of the misdemeanor, but not the felony, beyond a reasonable doubt.

Therefore, this Court should reverse, not dismiss, the felony DUI conviction but remand for entry of a judgment and sentence for the lesser-included misdemeanor DUI. This remedy would serve the objectives of deterrence and fairness discussed in Johnson and would obviate the need for further proceedings, in the interests of finality and judicial efficiency.

*i. Remand is the appropriate remedy because the State effectively charged and prosecuted, and the trial court effectively found, the misdemeanor instead of the felony.* No published Washington case has addressed a scenario where a defective charging document omits the element that would elevate it to the intended greater offense and the defendant is convicted of the greater offense. However, a comparable situation is found in State v. Sanders, 65 Wn.App. 28, 827 P.2d 354, rev. denied, 119 Wn.2d 1024, 838 P.2d 691 (1992). The information in that case

charged Sanders with third degree malicious mischief, but did not specify the misdemeanor or gross misdemeanor or allege the fact that would elevate it to a gross misdemeanor. Id. at 30-31.

Although Sanders was convicted of the simple misdemeanor, he alleged that the vague information required reversal of his conviction. Id. at 31. This Court disagreed, noting that the information's omission led to the "logical conclusion" that it must refer to the simple misdemeanor. Id.

Furthermore, the evidence at trial supported the conclusion that he was only guilty of the misdemeanor version of the statute... Absent... proof [regarding the dollar amount of damage], Sanders simply could not have been convicted of the gross misdemeanor.

Id. at 32. The misdemeanor conviction was therefore affirmed. Id.

The instant case is similar in that absent proof of four prior qualifying convictions within ten years, Mr. Cochrane could not be convicted of the felony.

The Supreme Court reached a different result in Vangerpen, holding "the remedy for an insufficient charging document is reversal and dismissal without prejudice," but the underlying rationale for the ruling shows why that case should be distinguished. 125 Wn.2d at 792-93 (citing Simon, 120 Wn.2d at 199). The parties agreed that instead of reversal and dismissal of

the conviction for attempted murder in the first degree, the case should be remanded for entry of a conviction for the second degree crime. Vangerpen, 125 Wn.2d at 792. The Court rejected this argument, reasoning the information did not

really charge [the defendant] with attempted murder in the second degree because [it] was ambiguous on its face... And perhaps even more importantly, upon proper instructions for both first and second degree attempted murder, the jury found the defendant guilty of attempted murder in the first degree.

Id. at 792 (emphasis added). But here, there was no jury and no jury instructions.<sup>4</sup> In a bench trial, unlike a jury trial, the reasons for the verdict are set forth in written findings of fact and conclusions of law. The trial court found Mr. Cochrane had four prior convictions, but not that they were of the type designated in RCW 46.61.5055(14)(a) (as discussed in the next section, below). CP 35-36 (FF 25-26, CL 4); 8/26/09RP 69-79. Although the court made findings as to the specific prior offenses and their dates of violation, it had already made clear that it did not think these went

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<sup>4</sup> There were instructions, submitted by the State, but this being a bench trial, they have no legal impact. Mr. Cochrane notes, however, that if this had been a jury trial, he would have assigned error to the “to convict” instruction for the DUI charge. CP\_\_ (Sub No. 131). The instruction requires “at least four prior offenses for driving under the influence of intoxicating liquor and/or drugs or in physical control of a motor vehicle while under the influence of intoxicating liquor and/or drug” but omits the requirements that the prior offenses be violations of designated sections of RCW 46.61 or local equivalents, and that the arrests for those offenses occurred within ten years of the arrest for the current offense.

to an essential element, requiring proof beyond a reasonable doubt.<sup>5</sup> Thus, the record shows not only that the trial court actually found Mr. Cochrane guilty of the misdemeanor, not the felony, but specifically establishes why – because it either did not find or did not apply the proper standard of proof to the same essential factors which were omitted from the information.

Furthermore, the Vangerpen Court emphasized the strength of the State’s evidence in that case.

In a case where there is sufficient evidence to support the jury's verdict, as the trial court ruled there was here, it would be a usurpation of the jury's function for an appellate court to find the defendant guilty of a different crime than that returned in the jury's verdict.

125 Wn.2d at 794 (emphasis added). The ruling echoed this Court’s earlier ruling in the same appeal, ordering dismissal without prejudice for refiling of the first degree charge because “there was substantial evidence at the trial from which any rational jury properly could return a verdict of guilty of the higher charge.”

Vangerpen, 71 Wn.App. at 104-05. But here, as argued below, the State did not prove that Mr. Cochrane had four prior qualifying convictions, an essential element of the higher charge.

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<sup>5</sup> Defense counsel had argued in closing that the information effectively alleged only the misdemeanor and the court should therefore find only the misdemeanor, but the court refused, finding the ten-year timeframe which was omitted from the information was not an essential element. 8/26/09RP 58.

These two critical differences between the instant case and Vangerpen dispose of the problems that troubled the Court in that case. 125 Wn.2d at 794-95. The Court was concerned that the requested remedy would require the same result any time the charging document inadvertently listed only the elements of the lesser offense, “no matter how serious the crime” of conviction. Id. The Court also worried this precedent would require outright dismissal with prejudice where inadvertent omissions in the charging document led to no crime being charged at all. Id. But if, as here, the evidence of the higher charge is insufficient, these fears are unfounded. If the defendant objects to the sufficiency of the information before the verdict is rendered and the State takes this opportunity to amend it, neither scenario will come to pass.<sup>6</sup> If the defendant objects only after the verdict is rendered, the reviewing court will employ a liberal two-part analysis which directly addresses the Vangerpen Court’s concerns. Kjorsvik, 117 Wn.2d 93. However, if the defendant objects before the verdict, the State has had a full and fair opportunity to prove the higher charge. If the

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<sup>6</sup> Generally, a “criminal charge may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included offense.” Pelkey, 109 Wn.2d at 491 (emphasis added). Here, Mr. Cochrane objected to the information after the State rested, but the State still could have amended it to misdemeanor DUI.

State rests without proving the element or fact which was omitted from the information and still chooses not to conform the information to the evidence, the error cannot be blamed on procedural defect or the defendant. In this scenario, the State effectively charged and prosecuted the lesser offense, and the finder of fact actually convicted the defendant of the lesser offense.

Dismissal without prejudice would provide the State with another “bite at the apple,” even though it squandered its first chance. The result would work directly against the purposes contemplated by the Supreme Court in Johnson – complimenting the liberal amendment rule, motivating prosecutors to ensure constitutionally sufficient charging documents, deterring carelessness, and reducing dismissals over all. Johnson, 119 Wn.2d at 150 (citing Kjorsvik, 117 Wn.2d at 102 n.14 and 199 (Utter, J., dissenting)). But in this context, remand for entry of the lesser offense, would serve all of those purposes. Remand is therefore the logical and appropriate remedy.

*ii. Remand is warranted because the trial court necessarily found every element of the misdemeanor beyond a reasonable doubt in reaching its verdict on the felony.* This scenario is highly similar to one where “the evidence is insufficient

to convict of the crime charged, but sufficient to support conviction of a lesser degree crime;" in that situation, "an appellate court may remand for entry of judgment and sentence on the lesser degree." State v. Atterton, 81 Wn.App. 470, 473, 915 P.2d 535 (1996) (State did not prove sufficient damage to support first degree theft conviction, but trial court necessarily found every element for second and third degree thefts, warranting remand for entry of the lesser degree convictions); see also State v. Bucknell, 144 Wn.App. 524, 530-31, 183 P.3d 1078 (2008) (State failed to prove second degree rape only in that victim was not "physically helpless" warranting remand for entry of third degree rape conviction); State v. Garcia, 146 Wn.App. 821, 830, 193 P.3d 181 (2008), rev. denied, 166 Wn.2d 1009, 208 P.3d 1125 (2009) (State failed to prove third degree assault only in that assault was not committed in an attempt to resist lawful detention, warranting remand for entry of fourth degree assault conviction).

In State v. Gilbert, this Court reversed a conviction for first degree burglary and remanded for entry of judgment and sentence for residential burglary, which it found to be a lesser included offense on the facts of that case. 68 Wn.App. 379, 388, 842 P.2d 1029 (1993). The Court observed:

if Gilbert had been charged alternatively with the offense of residential burglary, it is well established that we could remand for resentencing because the finding of guilt on first degree burglary on these facts necessarily constituted a finding of every element of residential burglary.

Id. at 384 (citing State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)).<sup>7</sup> The same can be said of Mr. Cochrane – except that the information in this case came much closer to charging in the alternative than the straightforward charging of the higher degree offense in Gilbert. This Court concluded:

Logically... the dispositive issue should not be whether the jury was instructed on the lesser included offense, but rather whether the jury necessarily found each element of the lesser included offense in reaching their verdict on the crime charged... “We find no logical reason, when each element of the lesser included offense has been found, that the trial court’s failure to instruct on the lesser included offense should prevent this court from directing the trial court to enter such a conviction.”

68 Wn.App. at 385 (emphasis in the original; quoting State v. Plakke, 31 Wn.App. 262, 267, 639 P.2d 796 (1982), overruled on other grounds in State v. Davis, 35 Wn.App. 506, 667 P.2d 1117

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<sup>7</sup> The Court also noted that the Supreme Court in Green had previously stated, “[i]n general, a remand for simple resentencing on a ‘lesser included offense’ is only permissible when the jury has been explicitly instructed thereon.” Green, 94 Wn.2d at 234, quoted in Gilbert, 68 Wn.App. at 384. Although this Court in Gilbert dismissed that statement as dictum (id. at 385 n. 8), Mr. Cochrane notes he did explicitly urge the trial court to find the lesser included offense, and would therefore be entitled to the requested remand under Green’s standard. But Gilbert’s holding, focusing on the “necessarily” included offense, arrives at the same result through a more rational analysis.

(1983), aff'd, 101 Wn.2d 654, 682 P.2d 883 (1984)).

There can be no dispute that the trial court here necessarily found each element of misdemeanor DUI. But, as discussed below, the State did not prove and the court did not find each element of the felony. Since the information's deficiencies went only to the felony charge and not the misdemeanor, the appropriate and logical remedy is remand for entry of the misdemeanor.

2. THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE TO PROVE EACH ELEMENT OF FELONY DRIVING WHILE UNDER THE INFLUENCE.

a. Due Process requires the State prove each element of an offense beyond a reasonable doubt. A criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Green, 94 Wn.2d at 220-21. The constitutional rights to due process and a jury trial "indisputably entitle a criminal defendant to 'a jury determination that he is guilty

of every element of the crime beyond a reasonable doubt.”

Apprendi, 530 U.S. at 476-77 (quoting Gaudin, 515 U.S. at 510).

b. The State did not prove beyond a reasonable doubt that Mr. Cochrane had four prior *qualifying* convictions. As discussed above, because proof of four prior qualifying convictions elevates the crime of DUI from a misdemeanor to a felony, the existence of those convictions is an element of the crime. RCW 46.61.502(6); 46.61.5055(14)(a); see e.g. Roswell, 165 Wn.2d at 194 (where a prior conviction elevated crime of communication with a minor for immoral purposes from a gross misdemeanor to a felony, the prior offense was an essential element of the crime as opposed to an aggravator); State v. Oster, 147 Wn.2d 141, 147-48, 52 P.3d 26 (2002) (where two prior convictions for the same crime elevated violation of no-contact order from a gross misdemeanor to a felony, prior offense could be found by special verdict, but was nonetheless an essential element that must be proven beyond a reasonable doubt); State v. Bache, 146 Wn.App. 897, 906, 193 P.3d 198 (2008) (where prior convictions elevated communication with a minor for immoral purpose and indecent exposure to felonies, priors were elements that must be proven beyond a reasonable doubt and included in the “to convict” instructions);

State v. Carmen, 118 Wn.App. 655, 665, 77 P.3d 368 (2003), rev. denied 151 Wn.2d 1039, 95 P.3d 352 (2004) (in trial for felony violation of no-contact order, jury must find existence of those predicate convictions beyond a reasonable doubt).

Here, to prove the four predicate convictions, the statute required the State prove they either violated (1) one of the designated sections of RCW 46.61; (2) an equivalent local ordinance; or (3) an out-of-state law that would have been a violation in this State. RCW 46.61.502; RCW 46.61.5055(14)(a).

The court found Mr. Cochrane “had been convicted of four prior DUI or Physical Control crimes within 10 years,” specifically: DUI, date of violation May 30, 1999, convicted Feb. 21, 2001, King County District Court; Physical Control, date of violation Nov. 24, 2000[sic]<sup>8</sup>, convicted Feb. 20, 2001, Seattle Municipal Court; DUI, date of violation June 15, 2000, convicted July 12, 2000, Everett Municipal Court; and DUI, date of violation May 11, 2002, convicted April 13, 2006, Seattle Municipal Court. CP 35 (FF 25). The court also found:

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<sup>8</sup> Reference to the admitted exhibits and testimony indicate this is a scrivener’s error; the date was actually Nov. 24, 1999.

on April 24, 2008, the defendant stipulated that the above four convictions are part of his complete criminal history, are correct, and that he is the person named in those convictions.

CP 35 (FF 26) (citing CP \_\_ (Ex. 12), CP \_\_ (Ex. 13), CP \_\_ (Ex. 14), CP \_\_ (Ex 15)).<sup>9</sup> The court concluded,

the defendant had at least four prior offenses for driving under the influence of intoxicating liquor and/or drugs or in physical control of a motor vehicle while under the influence of intoxicating liquor and/or drugs.

CP 36 (CL (A)(4)) (citing CP \_\_ (Ex. 16)). But none of these findings or conclusions address the relevant Seattle Municipal codes or the comparability of those codes to the designated sections of RCW 46.61 under RCW 46.61.5055(14)(a).<sup>10</sup>

Two of the priors were violations of RCW 46.61. See CP \_\_ (Ex. 12 (Docket of King County District Court, West Division, Case No. C00295853) (charged under RCW 46.61.502, "DUI")); CP \_\_ (Ex. 14 (Docket of Everett Municipal Court, Case No. CR0043051) (charged under RCW 46.61.502, "DUI")). However, the other two

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<sup>9</sup> Exhibits 12-16 are all attached at Appendix A.

<sup>10</sup> Nor did the court make any findings about this element in its oral ruling:

So it's clear that at the time of this stop on January 9<sup>th</sup> of 2001 [sic] that the defendant had four prior offenses for either driving under the influence of intoxicating liquor or for being in physical control of a motor vehicle while under the influence of intoxicating liquor. And I find that beyond a reasonable doubt.

were from Seattle Municipal Court and involved violations of the Seattle Municipal Code. See CP \_\_\_ (Ex. 13 (Docket for Seattle Municipal Court Case No. 371777) (charged under SMC 11.56.020(B) and titled “physical control while intoxicated”)); CP \_\_\_ (Ex. 15 (Docket for Seattle Municipal Court Case No. 424116) (charged under SMC 11.56.020 and titled both “prsns under the inflnce of intxcnts/drugs” [sic] and “DUI”)). Neither docket provides the language of the relevant statute or any other information by which the trial court could determine if the violations were of an “equivalent local ordinance.” Nor did the State did present any additional evidence from which to make that determination.

RCW 46.61.502(6) requires more than mere proof that person has four prior offenses titled “driving under the influence” or “physical control.” The State must prove the offenses violated either the designated sections of RCW 46.61 or an equivalent local statute. The question before this Court now is not whether the Seattle Municipal convictions actually are equivalent to the qualifying offenses under the RCW. The only questions are whether the State proved that fact beyond a reasonable doubt. The State offered no such proof and the court made no such finding. There is no indication that the court even considered that question.

In doing so, the court violated Mr. Cochrane's Sixth and Fourteenth Amendment rights to require the state prove beyond a reasonable doubt every element of the offense.

c. Proof of this element necessarily includes proof that the prior offenses are of the type designated in the statute.

The plain text of RCW 46.61.502(6) requires proof of "four or more prior offenses within ten years as defined in RCW 46.61.5055[.]"

Therefore, the State must prove that the alleged underlying offenses are of the type defined in RCW 46.61.5055. Where any of those offenses are prosecuted under a local municipal code, the plain text of RCW 46.61.5055(14)(a) requires the state to prove that code is a "local equivalent" to the sections of RCW 46.61 designated in the statute. Roswell, and the cases affirming it, require this common sense result and also call into question an earlier decision of this Court, State v. Gray, 134 Wn.App. 547, 138 P.3d 1123 (2006).

Gray challenged his conviction for felony violation of a no-contact order, arguing the State was required to prove that the orders violated in the predicate offenses were of the type designated in the statute. Id. at 549. The Court reasoned that the statutory authority for those orders was not an element, but merely "a threshold determination of relevance, or applicability, properly

left to the court.” Id.; State v. Miller, 156 Wn.2d 23, 31, 123 P.3d 827 (2005). But this framing distorts the issue. By this logic, many essential elements can be reframed as a “threshold issue.”

To take an example from the instant case, it is a misdemeanor to “willfully fail or refuse to comply with any lawful order or direction of any duly authorized flagger or any police officer or firefighter invested by law with authority to direct, control, or regulate traffic.” RCW 46.61.015. Is the lawfulness of the order a threshold matter? What about the fact that the person giving the order is a flagger, police officer or firefighter invested with authority to direct traffic? If both those questions are threshold matters, then the State would only have to prove beyond a reasonable doubt that the defendant failed to obey some kind of order by somebody. But following Gray, why shouldn’t they be threshold questions? For a more frequently litigated example, the elements of rape of a child in the third degree are not controversial and include the facts that the victim is at least 14 but less than 16 years old and that the perpetrator is at least 48 months older than the victim. RCW 9A.44.079; see, e.g. State v. Dodd, 53 Wn.App. 178, 765 P.2d 1337 (1989); State v. Knutson, 121 Wn.2d 766, 854 P.2d 617 (1993); State v. Smith, 122 Wn.App. 294, 93 P.3d 206 (2007). But

why should these not be threshold questions? If the purported victim is 16 years old or less than 48 months younger than him, then the statute is inapplicable. By Gray's logic, the trial court could examine the victim's birth certificate and rule within its discretion; the jury need not trouble itself with age at all. This result would be not just absurd, but profoundly unconstitutional. Yet nothing in Gray distinguishes those types of facts from the type of fact at issue here: whether the relevant municipal codes were comparable to the designated statutes, as RCW 46.61.5055(14) explicitly requires.

A comparison to the sentencing context is illuminating.<sup>11</sup>

The Supreme Court has held that although Apprendi generally does not apply to the fact of a prior conviction, a foreign conviction which is not facially identical to a Washington crime does not have the necessary safeguards, and therefore the comparability of that conviction must be proven to a jury beyond a reasonable doubt. In re Personal Restraint of Lavery, 154 Wn.2d 249, 254, 256-57, 111

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<sup>11</sup> Despite the comparison to sentencing cases, Mr. Cochrane emphasizes this is not a sentencing issue. See, e.g. Bache, 146 Wn.App. at 906, citing Oster, 147 Wn.2d at 146-48 and Winship, 397 U.S. at 364 (specifically rejecting State's argument that existence of prior qualifying convictions, elevating offenses from misdemeanors to felonies, amounted to "essentially a sentencing issue," and affirming this fact was an element which must be proven beyond a reasonable doubt) and Roswell, 165 Wn.2d at 193 n.5 ("[t]he prior conviction exception referenced in Apprendi does not apply because Roswell's prior conviction is an element of the crime rather than an aggravating factor.") The existence of predicate convictions in this case is an essential element which should be treated like any other element, not like an aggravating factor.

P.3d 837 (2005). Although the Persistent Offender Accountability Act at issue in Lavery then required only proof by a preponderance of the evidence, the Court held the Sixth Amendment required proof of the comparability of any non-identical foreign convictions (or “strikes”) to a jury beyond a reasonable doubt. Id. But Gray says that the comparability of a foreign conviction – even when that conviction is an element of the crime charged – is only a threshold matter, subject to the discretion of the trial court. It cannot be true that the standard of proof is lower for an essential element than for a sentencing factor, but this is the logical result of Gray.

Two years after Gray, the Supreme Court clarified that a prior conviction, required by statute to elevate a gross misdemeanor to a felony, is an essential element and delineated the distinction between an element in that context and an aggravating factor in the sentencing context:

Despite the similarities between an aggravating factor and a prior conviction element, under RCW 9.68A.090(2), a prior sexual offense conviction is an essential element that must be proved beyond a reasonable doubt. The prior conviction is not used to merely increase the sentence beyond the standard range but actually alters the crime that may be charged.

Roswell, 165 Wn.2d at 192; see also State v. Gordon, 153 Wn.App. 516, 534 n. 10, 223 P.3d 519 (2009) (quoting Roswell to explain that aggravating factors are not elements of the substantive crime but “must be treated as elements of the aggravated form of the crime”). To the extent that Gray leads to a lower standard of proof for the comparability of foreign convictions at trial than at sentencing, it is inconsistent with Roswell, and Mr. Cochrane respectfully requests this Court reconsider it in light of the latter.

Gray is also easily distinguished, however. First, because Gray was a jury trial, the distinction between findings by a judge as opposed to a jury are not relevant here. Secondly, the Court in Gray held the defendant waived any objection to the predicate convictions by waiting until the State rested before objecting; Mr. Cochrane did make timely objections to the Seattle Municipal dockets in this case. Gray, 134 Wn.App. at 558; 8/26/09RP 35-40. Third, the trial court in Gray conducted its own inquiry, separate from the State’s evidence, and found the statutory authority for the orders was valid. Although Mr. Cochrane does not concede that procedure was proper, he does point out the trial court made no such inquiry or finding in this case.

The predicate convictions in this case constituted an essential element, not an evidentiary issue or a sentencing factor. Lowering the State's burden of proof with respect to this element violates basic principles of due process.

d. This issue is not waived. Mr. Cochrane waived his right to a jury trial (CP 32) but not his right to have the State prove each element of the crime beyond a reasonable doubt. The Supreme Court recently held, where defendant stipulated upon entry into Drug Court that the facts on the record were sufficient for the court to find him guilty, he did not waive his right "to an independent finding of guilt beyond a reasonable doubt;" the trial court was still obligated to make that determination. State v. Drum, 225 P.3d 237, 242, 2010 WL 185786 (2010) (Wn. Reporter pagination not yet available). There can be no question that Mr. Cochrane retained that right, which necessarily includes the State's burden to prove the existence of four qualifying prior offenses.

i. The stipulation to criminal history from a prior matter neither waived nor settles this issue. Over Mr. Cochrane's objection, the trial court admitted a stipulation from a Pierce County matter. Ex. 16; 8/26/09RP 39-41. On page two of that document, Mr. Cochrane stipulated to the four offenses listed above. Ex. 16.

(All other criminal history was redacted). At best, this document establishes that on April 24, 2008, Mr. Cochrane acknowledged convictions in Seattle Municipal Court for “Physical Control” and “DUI.” It does not establish the prior offense element of felony DUI.

The exchange occurred when the State offered the stipulation:

[DEFENSE COUNSEL]: So are you admitting them simply for the fact of proof of conviction –

THE COURT: Yes.

[DEFENSE COUNSEL]: – and no other fact?

THE COURT: Yes.

...

THE COURT: The dockets are simply evidence of a conviction, as a judgment and sentence is evidence of a conviction, and that’s all purposes [sic] the court is taking it for is proof that, in fact, the defendant has prior convictions for qualifying offenses.

8/26/09RP 38-39.

Thus, the stipulation was admitted only for the limited purpose of “the fact of conviction” and the court could not consider it for the statutory authority of those convictions. But even if it could, it is clear that Mr. Cochrane did not stipulate to the comparability of the Seattle Municipal offenses to the designated sections of the RCW; nor does the stipulation offer any other proof of comparability.

Sufficiency of the evidence is an issue of law and comparability is a mixed question of law and fact. Drum, 225 P.3d

at 242; State v. Knapstad, 107 Wn.2d 346, 351-52, 729 P.2d 48 (1986). The stipulation is incapable of answering either question. “A stipulation as to an issue of law is not binding on this court; it is the province of this court to decide the issues of law.” Vangerpen, 125 Wn.2d at 792 n.18 (citing Folsom v. County of Spokane, 111 Wn.2d 256, 262, 759 P.2d 1196 (1988)); see also In re Personal Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002) (defendant may not stipulate to sentence greater than that authorized by law, in keeping with general rule that defendant may not waive legal error); In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 875, 123 P.3d 456 (2005) (defendant could not stipulate to a persistent offender life sentence, a legal conclusion, if facts did not establish the appropriateness of that sentence); Barnett v. Hicks, 119 Wn.2d 151, 161, 829 P.2d 1087 (1992) (parties cannot stipulate to jurisdiction or limit a court's review).

Thus, with or without the stipulation, the status of this element is the same. The State failed to prove, and the court failed to find, the misdemeanors were qualifying offenses under RCW 46.61.5055(14)(a).

*ii. Nor did Mr. Cochrane waive this challenge by failing to object to the priors based on statutory comparability.* The State may argue that Mr. Cochrane cannot challenge the statutory comparability of the priors because he did not make that specific objection below. But a defendant is never required to make an objection to preserve his challenge to the sufficiency of the evidence; that issue can be raised for the first time on appeal. State v. Alvarez, 128 Wn.2d 1, 10, 904 P.2d 754 (1995).

A comparison to the sentencing context is again instructive. Last year, the Supreme Court considered consolidated appeals where the State offered no proof of the defendants' criminal histories and the defendants neither stipulated nor objected to the State's representation of their criminal histories. State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009). Holding the defendants had not waived their challenges to their sentences under former RCW 9.94A.500(1) and former RCW 9.94A.530, the Court emphasized:

At sentencing, the State bears the burden to prove the existence of prior convictions by a preponderance of the evidence... It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination... This reflects fundamental principles of due process, which require that a sentencing court base its decision on information bearing "some minimal indicium of reliability beyond mere allegation."

Id. at 920 (emphasis omitted; quoting United States v. Ibarra, 737 F.2d 825, 827 (9th Cir.1984); citing Cadwallader, 155 Wn.2d at 876; Ford, 137 Wn.2d at 480). Because the defendants in Mendoza did not affirmatively acknowledge asserted criminal histories and their sentencing courts had no information with which to find those assertions valid, the sentences were reversed. Id. at 929.

Again, it is impossible that a defendant has greater due process protections at sentencing than at trial. Under Mendoza, it is clear that State retained its burden to prove each element of the crime beyond a reasonable doubt, as Mr. Cochrane did nothing to relieve that burden. Because this appeal is in the context of conviction, not sentencing, due process must protect Mr. Cochrane's challenge at least that much, if not more.

e. Findings of Fact 25 and 26 are incomplete and assert facts unsubstantiated or contradicted by the evidence in the record. The trial court made two critically incomplete findings with relevance to this element. Specifically, the court found:

On the date of this crime, the defendant had been convicted of four prior DUI or Physical Control crimes within 10 years.

CP 35 (FF 25) (quoted in relevant part). As discussed above, the State did not prove that two of the prior offenses were “DUI or Physical Control crimes” as defined by RCW 46.61.5055(14)(a). To the extent it implies they were qualifying convictions, Finding of Fact 25 is therefore unsubstantiated by the record.

The court then found:

Exhibit #16 documents that, on April 24, 2008, the defendant stipulated that the above four convictions are part of his complete criminal history, are correct, and that he is the person named in those convictions.

CP 35 (FF 26). The record is clear that the court admitted Exhibit 16 for the fact of conviction only. 8/26/09RP 39-40. Mr. Cochrane renewed his objection to the stipulation when the Findings of Fact and Conclusions of Law were entered. 9/2/09RP 3. Finding of Fact 26 is incomplete in failing to acknowledge the limited purpose of the stipulation. To the extent that it implies the stipulation established the convictions are qualifying offenses under RCW 46.61.5055(14)(a), it is contradicted by the record.

“[A] judge abuses his or her discretion when findings of fact supporting the discretionary [evidentiary] decision are not supported by the evidence.” State v. Williamson, 100 Wn.App. 248, 257, 996 P.2d 1097 (2000); see also State v. Ramires, 109

Wn.App. 749, 757, 37 P.3d 343 (2002) (“An evidentiary decision may be an abuse of discretion if it is based upon facts that are not supported by the evidence”). The trial court abused its discretion by failing to find facts based on the evidence at trial and by basing its ruling on these fatally incomplete findings.

f. Reversal and dismissal is required. The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Green, 94 Wn.2d at 221. The Fifth Amendment’s Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

Because the State failed to prove the element that Mr. Cochrane had four prior qualifying offenses the Court should reverse his DUI conviction and dismiss with prejudice. In the alternative, because Mr. Cochrane argued the State had charged and proved only the gross misdemeanor, not the felony, the Court may reform the verdict to a conviction on the lesser offense under

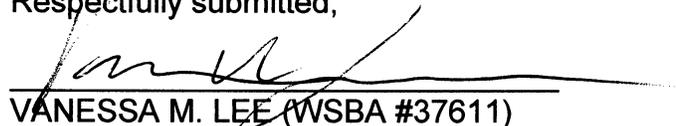
RCW 46.61.502(5). Green. 94 Wn.2d at 234-35; State v. Argueta,  
107 Wn.App. 532, 539, 27 P.3d 242 (2001).

E. CONCLUSION

Because the State failed to prove each element of the DUI charge beyond a reasonable doubt, Mr. Cochrane respectfully requests this Court reverse the conviction and dismiss with prejudice. In the alternative, because the charging document was constitutionally deficient, he respectfully requests this Court remand for entry of judgment and sentence for the lesser offense.

DATED this 30<sup>th</sup> day of March, 2010.

Respectfully submitted,



VANESSA M. LEE (WSBA #37611)  
Washington Appellate Project  
Attorneys for Appellant

# **APPENDIX A**

070205X DLV  
01/20/2009 3:41 PM

KCOC-WEST DIV (SDC)  
D O C K E T

CASE: C00295853 WSP  
Criminal Traffic  
Agency No. 0268400

DEFENDANT  
COCHRANE, DONALD HARER  
3708 S.W. 105TH ST  
SEATTLE WA 98146-1157

Home Phone: 2066797373

AKA CUCHRANE, DONALD H

OFFICER  
00331 WSP DALY, DONOVAN

CHARGES

Violation Date:	DV Plea	Finding
05/30/1999		
1 46.61.502 DUI	N	Guilty
2 46.20.342.1 DWLS 1ST DEGREE	N	Guilty

TEXT

S 01/29/2001 Case Filed on 01/29/2001 EAM

U DEFENDANT BOOKED INTO KCOF ON RENTON DIV WARR(ORIG BOOKING 2-1-01) IN CUSTODY HEARING HELD BEFORE JUDGE GOODMAN PA SCOTT MILZER - PD CATHY GORMLEY DEFENSE DENIES ALLEGATIONS COURT ORDERS CHANGE OF DIVISION TO SEATTLE DISTRICT COURT BAIL REMAINS THE SAME - SET FOR REVIEW / REVOCATION HEARING OPD TO APPOINT

S Finding/Judgment of Guilty for Charge 1 GJF  
Finding/Judgment of Guilty for Charge 2

01/30/2001 OFF 1 DALY, DONOVAN Added as Participant EAM

01/31/2001 REV JAIL Set for 02/21/2001 09:00 AM in Room 301 with Judge DCG

U OPD REFERRAL SENT VIA EMAIL

02/01/2001 RECEIVED FILE FROM RENTON

02/06/2001 ACA APPOINTED AS COUNSEL OPD REFERRAL RECEIVED---ACA APPOINTED SDF

02/07/2001 NOTICE OF APPEARANCE, REQUEST FOR DISCOVERY, PETITION FOR DEFERRED PROSECUTION, DEMAND FOR SPEEDY TRIAL, DEMAND FOR JURY TRIAL, MOTION TO MAKE MORE DEFINITE AND CERTAIN, MOTION FOR JOINDER OF OFFENSES FILED BY ACA

S 02/08/2001 ATY 1 BAKER, KAREN REBECCA Added as Participant GJF

02/21/2001 REV JAIL: Held Proceedings Recorded on Tape No. 01-2-052

U JUDGE DARCY GOODMAN PRESIDING DPA: ALISON BOGAR DEFENDANT IN CUSTODY DEF APPEARED WITH COUNSEL, K BAKER DEF ADDRESSES COURT - DEFT SERVING SEVERAL SENTENCES FILE REVIEWED DEFT BELIEVED BALANCE WAS SUSPENDED ON THIS CASE BY SENTENCING JUDGE PHILLIPSON COURT SENTENCES DEFT TO 730 DAYS JAIL, CONSECUTIVE WITH ALL OTHER SENTENCES, AS ORIGINALLY SENTENCED BY JUDGE PHILLIPSON

S Judge GOODMAN, DARCY C Imposed Sentence Court Imposes Jail Time of 365 Days on Charge 1 with 0 Days Suspended, and 0 Days Credit for time served

DEFENDANT  
COCHRANE, DONALD HARE R

CASE: C00295853 WSP  
Criminal Traffic  
Agency No. 0268400

TEXT - Continued

S 02/21/2001 Judge GOODMAN, DARCY C Imposed Sentence GJF  
 Court Imposes Jail Time of 365 Days on Charge 2  
 with 0 Days Suspended, and  
 0 Days Credit for time served  
 U DEFT GIVEN CREDIT FOR TIME SERVED ON THIS SENTENCE  
 FINE EXCUSED - CREDITED FOR JAIL TIME SERVED  
 CASE CLOSED  
 ORDER OF RELEASE/COMMITMENT GIVEN TO KC JAIL OFFICER  
 S Case Disposition of CL Entered  
 U 11/05/2007 PIERCE COUNTY PROSECUTOR PHONED, INQUIRED IF FILE HAS BEEN ALT  
 DESTROYED; CALL TRANSFERRED TO SEATTLE COURTHOUSE.  
 PIERCE COUNTY PROSECUTOR'S OFFICE CALLED ASKING IF THIS FILE KMC  
 HAD BEEN DESTROYED; PER MANAGER INFORMED HER TO SEND A  
 REQUEST TO THE GENERIC EMAIL BOX AND SOMEONE WILL GO TO THE  
 BASEMENT TO LOOK FOR THE FILE AND SEND APPROPRIATE COPIES

ADDITIONAL CASE DATA

Case Disposition  
Disposition: Closed Date: 02/21/2001

Parties  
Attorney BAKER, KAREN REBECCA

Personal Description  
Sex: M Race: W DOB: 08/18/1958  
Dr.Lic.No.: COCHRDH426NQ State: WA Expires: 1998  
Employer:  
Height: 6 2 Weight: 220 Eyes: BLU Hair: BRO

Hearing Summary  
Held IN-CUSTODY HEARING ON 02/21/2001 AT 09:00 AM IN ROOM 303 WITH DCG

End of docket report for this case

The undersigned, being a duly authorized clerk of King County District Court, Seattle Division, does hereby certify that the foregoing and annexed transcript is a full, true and correct transcript of all entries made in the docket of said court relating to that certain case heretofore pending before said court.

DATED AT SEATTLE, KING COUNTY, WASHINGTON

THE 20 DAY OF January, 20 09

*Den Raulo Jr*  
DISTRICT COURT CLERK

CERTIFIED  
COPY

MUNICIPAL COURT OF SEATTLE  
DOCKET

r295002

Case Status: OPEN Jurisdiction EndDate: 02/18/2006

CITY OF SEATTLE, Plaintiff

\*\* DRIVING WHILE INTOXICATED \*\*  
\*\* OPEN \*\*

Vs.

\*\* Clctn: COLL

COCHRANE, DONALD HARER , Defendant

Address: 3211 SW AVALON #401  
SEATTLE, WA 98126  
/ (Home) - / (Work)

Case No: 371777  
File Loc: REC  
Def No: 12167  
Incident No: 99496485  
Custody: IN  
Rltd Grp No: 134776  
Co-Def's:

DOB: 08/18/1958 Age: 50 Sex: M Race: W Lang:  
DOL: WA/CUHRDH426N0  
Sentencing Judge: DOYLE, THERESA  
Prosecutor:  
Defense Attorney: TAKAHASHI, STEVE  
Interpreter:

-----  
\*\* Charges \*\*

Chrg Doc No: Type: BK Viol Date: 11/24/1999 Filing Date: 11/24/1999

Chrg 1: PHYSICAL CONTROL WHILE INTOXICATED  
11.56.020(B) Plea: G Find: G Status: SS  
Disposition: SUSPENDED SENTENCE

BAIL BAIL NOT FORFEITABLE YDH  
Start:11/24/1999 Due:11/24/1999 End:02/21/2001 APPEARED IN COURT  
Amt:500 Susp: Curr:

BRTH BREATH TEST ASSESSMENT JMH  
Start:02/21/2001 Due:02/21/2001 End:  
Amt:125 Susp: Curr:125

FINE PAY FINE JMH  
Start:02/21/2001 Due:02/21/2001 End:  
Amt:5,000 Susp:2,600 Curr:2,400

JAIL COMPLY WITH JAIL SENTENCE SMS  
Start:02/20/2001 Due:02/18/2006 End:05/29/2006 JURISDICTION EXPIRED  
Jail:365 Susp: Unit:Days Cfts:Y  
Rmks:02/20/01: COURT MAINTAINS JURISDICTION FOR 5 YRS, CFTS,  
COMMITTED  
JURISDICTION EXPIRED

Chrg 2: LICENSE, DRIVER, SUSP./RVOKED/FIRST DEGREE  
11.56.320(B) Plea: Find: Status: DM  
Disposition: DISMISSED WITH PREJUDICE  
Dismissal: OCM

BAIL	BAIL NOT FORFEITABLE							YDH
	Start:11/24/1999	Due:11/24/1999	End:02/21/2001	APPEARED IN COURT				
	Amt:500	Susp:	Curr:					
Other Case Obligations:								
BALW	BAIL ON A WARRANT							BJA
	Start:11/27/1999	Due:	End:02/22/2001	OBL CORRECTION				
	Amt:50,000	Susp:	Curr:					
	Rmks:1/3/01...CASH ONLY.							
ABST	ABSTAIN FROM ALCOHOL/DRUG USE							SMS
	Start:02/20/2001	Due:02/18/2006	End:05/29/2006	JURISDICTION EXPIRED				
	Rmks:JURISDICTION EXPIRED							
CADD	REPORT ADDR CHANGE TO COURT IN WRITING W/IN 24HR							SMS
	Start:02/20/2001	Due:02/18/2006	End:05/29/2006	JURISDICTION EXPIRED				
	Rmks:JURISDICTION EXPIRED							
CDAT	CHEMICAL DEPENDENCY ASSESSMENT AND TREATMENT							JMH
	Start:02/20/2001	Due:02/18/2006	End:12/06/2002	STRICKEN				
DONT	DO NOT REFUSE BLOOD OR BREATH ALCOHOL TEST							SMS
	Start:02/20/2001	Due:02/18/2006	End:05/29/2006	JURISDICTION EXPIRED				
	Rmks:JURISDICTION EXPIRED							
DWIV	DWI VICTIM'S PANEL							JMH
	Start:02/20/2001	Due:02/18/2006	End:12/06/2002	STRICKEN				
IID	DRIVE ONLY VEHICLE W/IGNITION INTERLOCK .025							SMS
	Start:02/20/2001	Due:02/18/2006	End:05/29/2006	JURISDICTION EXPIRED				
	Rmks:02/20/01: 5 YRS JURISDICTION EXPIRED							
NCLV	NO CRIMINAL LAW VIOLATIONS							SMS
	Start:02/20/2001	Due:02/18/2006	End:05/29/2006	JURISDICTION EXPIRED				
	Rmks:JURISDICTION EXPIRED							
NVOI	COMPLY NOT DRIVE W/OUT VALID LIC OR INSURANCE							SMS
	Start:02/20/2001	Due:02/18/2006	End:05/29/2006	JURISDICTION EXPIRED				
	Rmks:JURISDICTION EXPIRED							
PROB	PROBATION							JMH
	Start:02/20/2001	Due:02/18/2006	End:12/06/2002	STRICKEN				
	Rmks:02/20/01: REPORT W/N 36 HOURS OF RELEASE							

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 \*\* Scheduled Hearings \*\*  
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S	Date	Time	Crtrm	Type	Tape	Judge	Prosecutor	Date	Clk
C	11/26/1999	10:30	7	ICA				11/24/1999	NJR
W	11/27/1999	13:00	11	DUIOCA	68924	HURTADO, M	RILEY, L	11/24/1999	NJR
C	01/03/2001	10:05	7	ICA				01/02/2001	STK
H	01/03/2001	17:00	11	ICA	75916	HURTADO, M	CHIN, A	01/03/2001	PJB
H	01/16/2001	13:30	1	PTH	76062	DOYLE, T	VILES, K	01/03/2001	PJB
C	02/12/2001	13:30	1	PTH				01/16/2001	LBS

H	02/12/2001	13:30	1	IPTH	DOYLE, T	VILES, K	02/07/2001	JMH
H	02/20/2001	13:30	1	IPTH	DOYLE, T	STODDARD, M	02/12/2001	JMH
C	02/25/2002	13:30	3	RV_PB			01/31/2002	PJJ
H	11/22/2002	9:00	1101	RV_PB	DOYLE, T	KINNEY, J	10/25/2002	BXA
H	12/06/2002	9:00	1101	OTĀ	DOYLE, T	LYNCH, M	11/22/2002	SXL

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 \*\* Events \*\*  
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Date	Description	
11/24/1999	CHARGE(S) FILED	NJR
11/24/1999	DEFENDANT BOOKED. BA# 199054418	NJR
11/24/1999	IN-CUSTODY ARRAIGNMENT SCHEDULED FOR 11/26/99 AT 1030 IN DEPT 7	NJR
11/24/1999	DUI OUT OF CUSTODY ARRAIGNMENT SCHEDULED FOR 11/27/99 AT 1300 IN DEPT 11	NJR
11/24/1999	IN-CUSTODY ARRAIGNMENT HRNG SCHDLD FOR 11/26/99 AT 1030 IN DEPT 7, CANCELLED!	NJR
11/27/1999	DF: COCHRANE, DONALD HARER (12167) DEFENDANT NOT PRESENT. TP 68924 (2282) CLK SA. DEFT FTA.	JAG
11/27/1999	BENCH WARRANT # 990250547 ISSUED 11/27/99	JAG
11/27/1999	BOND FORFEITED	JAG
11/27/1999	PROBABLE CAUSE FOUND BY COURT	JAG
01/02/2001	BENCH WARRANT # 990250547 CLEARED 01/02/2001 (BOOKED INTO JAIL)	PJW
01/02/2001	IN-CUSTODY ARRAIGNMENT SCHEDULED FOR 01/03/2001 AT 1005 IN DEPT 7	STK
01/02/2001	DEFENDANT BOOKED. BA# 201100226	STK
01/02/2001	BOOKED AT RJC	STK
01/03/2001	IN-CUSTODY ARRAIGNMENT HRNG SCHDLD FOR 01/03/2001 AT 1005 IN DEPT 7, CANCELLED!	PJB
01/03/2001	IN-CUSTODY ARRAIGNMENT SCHEDULED FOR 01/03/2001 AT 1700 IN DEPT 11	PJB
01/03/2001	DF: COCHRANE, DONALD HARER (12167) PRESENT CL: PJB - TP: 75916 - AOD D. KINARD PRESENT - ACA/OPD. DEFENSE OBJECTS TO THE DATE OF ARRAIGNMENT - DEFENSE RESERVES RELEASE MOTIONS - 3.2 FINDING FOUND BY THE CT. PC FOUND - BAIL REMAINS AS SET \$50,000 CASH ONLY.	PJB
01/03/2001	CHARGE # 1 115602000 (D.U.I.) NOT GUILTY PLEA ENTERED	PJB
01/03/2001	CHARGE # 2 115632000 (SUSP.OL.) NOT GUILTY PLEA ENTERED	PJB

01/03/2001 PRE-TRIAL HEARING SCHEDULED FOR 01/16/2001 AT 1330 IN DEPT 1 PJB

01/16/2001 DF: COCHRANE, DONALD HARER (12167) DEFENDANT NOT PRESENT. TAPE 76062 LOC 5821 CLERK KLD LBS

01/16/2001 SPEEDY TRIAL RULE WAIVER FILED 30 DAYS LBS

01/16/2001 PRE-TRIAL HEARING SCHEDULED FOR 02/12/2001 AT 1330 IN DEPT 1 LBS

01/16/2001 CONTINUANCE REQUESTED BY DEFENSE - FOR DEFERRED PROSECUTION - GRANTED. LAST CONTINUANCE. LBS

01/16/2001 DA: TAKAHASHI, STEVE (1000000786) PRESENT VLP

02/07/2001 PRE-TRIAL HEARING HRNG SCHDLD FOR 02/12/2001 AT 1330 IN DEPT 1, CANCELLED! JMH

02/07/2001 IN CUSTODY PRE-TRIAL HEARING SCHEDULED FOR 02/12/2001 AT 1330 IN DEPT 1 JMH

02/08/2001 RECEIVED 02/08/2001 PETITION FOR DEFERRED PROSECUTION, ORDER OF DEFERRED PROSECUTION, DIAGNOSTIC EVALUATION & TREATMENT RECOMMENDATIONSS FILED ATTY STEVE TAKAHASHI, WSBA 19084 FORWARDED TO DEPT. 1 02/08/2001 AF (CS EVENT) AMF

02/12/2001 DF: COCHRANE, DONALD HARER (12167) PRESENT JMH

02/12/2001 DA: TAKAHASHI, STEVE (1000000786) PRESENT CLK:JMH. TP:76556(2813) JMH

02/12/2001 CONTINUANCE REQUESTED BY BOTH CITY AND DEFENSE (DEFERRED PROSECUTION PETITION) -GRANTED. JMH

02/12/2001 IN CUSTODY PRE-TRIAL HEARING SCHEDULED FOR 02/20/2001 AT 1330 IN DEPT 1 JMH

02/20/2001 DF: COCHRANE, DONALD HARER (12167) PRESENT TP 76728/1400 & 76730/1850 CLK JH - DFNS MOTION FOR DP, CITY OBJECTS-DENIED. CITY AGREES TO TAKE NO ACTION ON CASE 344383 PER PLEA AGREEMENT YDH

02/20/2001 DA: TAKAHASHI, STEVE (1000000786) PRESENT YDH

02/20/2001 GUILTY PLEA ENTERED. STMT OF DEF ON PLEA OF GUILTY ATTACHED HERETO (CS EVENT) YDH

02/20/2001 PLEA CHANGED TO GUILTY CHARGE# 1 11560200B (PHY.CONTROL) YDH

02/20/2001 CHARGE # 1 11560200B (PHY.CONTROL) GUILTY FINDING ENTERED YDH

02/20/2001 CHARGE # 1 11560200B (PHY.CONTROL) SUSPENDED SENTENCE YDH

02/20/2001	PLEA CHANGED TO CHARGE# 2 11563200B (SUSP.OL 1ST)	YDH
02/20/2001	CHARGE # 2 11563200B (SUSP.OL 1ST) DISMISSED WITH PREJUDICE DISMISSED ON CITY'S MOTION	YDH
02/20/2001	JURISDICTION END DATE SET TO '02/18/2006	YDH
02/20/2001	TO BE GIVEN CREDIT FOR TIME SERVED	YDH
02/20/2001	CASE REFERRED TO PROBATION	YDH
02/20/2001	REPORT OF DISPOSITION MAILED TO DOL	YDH
02/20/2001	SENTENCE IMPOSED	YDH
01/31/2002	REVIEW PROBATION HEARING SCHEDULED FOR 02/25/2002 AT 1330 IN DEPT 3	PJJ
01/31/2002	REVIEW HEARING SCHEDULED FOR FTC W/SUBSTANCE ABUSE EVAL/TX, FTR TO MPS, PER PC AMY ISELER.	PJJ
02/05/2002	REVIEW PROBATION HEARING HRNG SCHDLD FOR 02/25/2002 AT 1330 IN DEPT 3, CANCELLED!	PJJ
02/05/2002	CANCEL REVIEW BECAUSE DEFENDANT IS NOW IN COMPLIANCE, PER PC AMY ISELER. (CS EVENT)	PJJ
10/25/2002	REVIEW PROBATION HEARING SCHEDULED FOR 11/22/2002 AT 900 IN COURTROOM 1101	BXA
10/25/2002	REVIEW HEARING SCHEDULED FOR FTC WITH NCLV, AND FTC WITH ABSTENTION, PER PC RON VEACH.	BXA
11/22/2002	DF: COCHRANE, DONALD HARER (12167) DEFENDANT NOT PRESENT. C;L JMH. MPS RPT IN CT.	SXL
11/22/2002	ORDER TO APPEAR HEARING BY COURT SCHEDULED FOR 12/06/2002 AT 900 IN COURTROOM 1101	SXL
11/23/2002	OTA HEARING NOTICE MAILED TO 3201 SW AVALON WY 21 SEATTLE, WA 98126	B
12/06/2002	DF: COCHRANE, DONALD HARER (12167) DEFENDANT NOT PRESENT. CLK:JMH. MPS RPT IN COURT. NO JAIL TIME TO IMPOSE, MPS STRICKEN. FINE REFERRED TO COLLECTIONS SPD CONTACTED 2NS TIME REGARDING OUTSTANDING \$50000 BW ON NEW CASE.	JMH
10/09/2003	FORFEITURE SET ASIDE	RMS
10/09/2003	BOND EXONERATED	RMS
10/09/2003	EXON PER PRES JUDGE F BONNER (BOND PROJECT) RMS (CS EVENT)	RMS

-----  
\*\* Warrants \*\*

Wrnt Nr	Issued	Served	Wrnt/. Clrn Type	Description
990250547	11/27/1999	01/02/2001	BW JL	BENCH WARRANT BOOKED INTO JAIL

Reasons: FAIL TO APPEAR FOR OUT OF CUSTODY ARRAIGNMENT  
Rstrcs: CASH ONLY NO PR \*\*\*FIELD SERVICE\*\*  
Warrant issued by: JUDGE MICHAEL HURTADO

-----  
\*\* Accounting Summary \*\*

Post Date	Bail Amount	Type	Paid	Method	Status	DC	Posted By
11/24/1999	500.00	BAIL	500.00	BO	E		SIGNATURE BAIL BON
11/24/1999	500.00	BAIL	500.00	BO	E		SIGNATURE BAIL BON

Chg Sq#	Obl Type	Orig Amount	Obl Bal Due	TP Status
1	BRTH	125.00	125.00	
1	FINE	5000.00	2400.00	

\*\* Total due on this case: 2525.00 \*\*

DD7020SX DPL  
01/16/2009 9:24 AM

EVERETT MUNICIPAL COURT  
D O C K E T

PAGE: 1

DEFENDANT  
COCHRANE, DONALD HARER  
3706 S.W. 105TH ST  
SEATTLE WA 98146-1157

CASE: CR0043051 EPD  
Criminal Traffic  
Agency No. 00-11073

Home Phone: 2066797373

AKA CUCHRANE, DONALD H

\*\*\* FTA ISSUED \*\*\*

**CERTIFIED COPY**

OFFICER  
01142 EPD MEADE, T

CHARGES

Violation Date: 06/15/2000	DV Plea	Finding
1 46.61.502 DUI	N Not Guilty	Guilty
2 46.20.342.1A DWLS 1ST DEGREE	N Not Guilty	Guilty

TEXT

S 06/15/2000 Case Filed on 06/15/2000 TLR  
 OFF 1 MEADE, T Added as Participant  
 ARR Set for 06/15/2000 11:45 AM  
 in Room 1 with Judge TBO  
 Vehicle Linked to COCHRANE, DONALD HARER

U TBO/DLF DEFENDANT PRESENT WITHOUT COUNSEL. CASE IS SET DLF  
 FOR PRE TRIAL. DEFENDANT REFERRED TO AAA. AMENDED  
 COMPLAINT FILED. ORDER SETTING BAIL ISSUED, \$5000.00 CASH.

S Defendant Arraigned on Charge 1  
 Plea/Response of Not Guilty Entered on Charge 1  
 Defendant Arraigned on Charge 2  
 Plea/Response of Not Guilty Entered on Charge 2  
 ARR: Held JMS  
 Proceedings Recorded on Tape No. YO66

06/16/2000 OTH PTH Set for 06/27/2000 02:30 PM DLF  
 in Room 1 with Judge TBO

U 06/27/2000 DOUG FAIR, PRO TEM - DEFENDANT NOT PRESENT. IS IN CUSTODY. NLA  
 CONTINUED TO IN-CUSTODY CALENDAR.

S OTH PTH Rescheduled to 06/28/2000 11:45 AM  
 in Room 1 with Judge DCM

U 06/28/2000 DCM/DLF DEFENDANT PRESENT WITH COUNSEL. CASE IS SET FOR DLF  
 CONFIRMATION ON JULY 20, 2000 AND JURY TRIAL ON JULY 24.

S OTH CONF Set for 07/20/2000 09:00 AM  
 in Room 1 with Judge TBO  
 OTH PTH: Held JMS  
 Proceedings Recorded on Tape No. YO71

U 06/29/2000 CASE SET AT THE REQUEST OF AAA. DLF  
 S MOT Set for 06/29/2000 11:45 AM  
 in Room 1 with Judge DCM

U DCM/DLF DEFENDANT PRESENT WITH ATTORNEY CANDLER. CASE  
 IS RE SET AT DEFENSE REQUEST.  
 S OTH CONF Rescheduled to 07/13/2000 09:00 AM  
 in Room 1 with Judge TBO  
 MOT: Held JMS  
 Proceedings Recorded on Tape No. YO71

Docket continued on next page

STATE OF WASHINGTON }  
COUNTY OF SNOHOMISH } SS

The undersigned Clerk of the Court does hereby  
certify that the foregoing instrument is a true and  
correct copy of the original now on file in this court.  
In witness whereof, I have hereunto set my hand

this 16<sup>th</sup> day of January, 2009  
Jeri Cusinjarfo, Court Administrator

By DLanier Clerk  
Municipal Court of Everett

DEFENDANT  
COCHRANE, DONALD HARER

CASE: CR0043051 EPD  
Criminal Traffic  
Agency No. 00-11073

TEXT - Continued

U 07/12/2000 AT THE REQUEST OF AAA, CASE IS SET FOR DISPOSITION DLF  
S OTH DISP Set for 07/12/2000 11:45 AM  
in Room 1 with Judge DCM  
U DCM/DLF DEFENDANT PRESENT WITH ATTORNEY SMITH. STIPULATES  
S TO THE REPORT.  
Finding/Judgment of Guilty for Charge 1  
Case Heard Before Judge MITCHELL, DAVID C  
Judge MITCHELL, DAVID C Imposed Sentence  
Court Imposes Jail Time of 365 Days on Charge 1  
with 0 Days Suspended, and  
0 Days Credit for time served  
Total Imposed on Charge 1: 5,000.00  
with 2,500.00 Suspended  
And 200.00 Other Amount Ordered  
Other : 2 Y  
OT2 Review Set for 06/01/2002  
DUI Ignition Interlock : 5 Y  
DUI: No refusing a BAC test : 2 Y  
Not refuse to submit to a test of breath/blood to det the  
alcohol concentration upon req of law enf who has reasonable  
grounds to believe the person was driving or was in actual  
phys cntrl of a veh within this st while under the influence.  
Finding/Judgment of Guilty for Charge 2  
Case Heard Before Judge MITCHELL, DAVID C  
Judge MITCHELL, DAVID C Imposed Sentence  
Court Imposes Jail Time of 365 Days on Charge 2  
with 100 Days Suspended, and  
0 Days Credit for time served  
U COMMITMENT ISSUED, CREDIT SINCE BOOKING CONSECUTIVE  
S Judge MITCHELL, DAVID C Imposed Sentence  
Blood Alcohol Test Refused  
OTH DISP: Not Held, Hearing Canceled JMS  
STI: Held  
Proceedings Recorded on Tape No. YO80  
07/13/2000 OTH CONF: Not Held, Hearing Canceled  
Proceedings Recorded on Tape No. YO-1223  
07/14/2000 Accounts Receivable Created 3,300.00 CAW  
Case Scheduled on Time Pay Agreement 1 for: 3,300.00  
U 10/06/2000 LETTER FROM DEFENDANT AND FILE TO JUDGE FOR REVIEW. MLW  
10/10/2000 JUDGE MITCHELL DENIED DEFENDANT'S REQUEST TO CHANGE  
THE SENTENCE BUT WILL REVIEW DEFENDANT'S REQUEST AGAIN IN  
NOVEMBER. LETTER MAILED TO DEFENDANT.  
11/03/2000 AMENDED COMMITMENT RUNNING SENTENCE CONCURRENT WITH KING CO.  
ISSUED BY JUDGE MITCHELL. COPY MAILED TO DEFENDANT.  
12/04/2000 LETTER FILED BY DEFENDANT REGARDING HIS JAIL TO RUN DLF  
CONCURRENT WITH KING COUNTY. COPY OF LETTER AND THE  
COMMITMENT IS FAXED TO AAA.  
12/07/2000 MR SMITH PHONED; HE WILL BE FILING A REQUEST FOR REVIEW  
12/08/2000 LETTER FILED BY DEFENDANT REQUESTING SENTENCE REVIEW.

Docket continued on next page

DEFENDANT  
COCHRANE, DONALD HARER

CASE: CR0043051 EPD  
Criminal Traffic  
Agency No. 00-11073

TEXT - Continued

U 12/08/2000 COPY OF LETTER PLACED IN AAA FILE FOR MR SMITH. DLF  
 12/11/2000 DEFENSE MOTION FOR SENTENCE REVIEW FILED WITH CALENDAR NOTE. KMT  
 S 12/18/2000 MOT Set for 12/20/2000 03:00 PM  
 in Room 1 with Judge DCM  
 U 12/20/2000 DCM/KMT DEF NOT PRESENT, ATTY SMITH PRESENT. COURT DENIED  
 MOTION AT THIS TIME, WILL RECONSIDER IN A FEW WEEKS.  
 S MOT: Held JMS  
 Proceedings Recorded on Tape No. YO-1384  
 U 12/29/2000 ORDER OF RELEASE SIGNED AND ISSUED BY JUDGE MITCHELL FOR MLW  
 DEFENDANT TO RECEIVE CONCURRENT TIME AND CREDIT FOR TIME  
 SERVED WITH CHARGES AT KING COUNTY.  
 01/18/2001 DEFENDANT'S COPY OF RELEASE RETURNED.  
 02/05/2001 LETTER FROM DEFENDANT RECEIVED.  
 02/13/2001 COPY OF RELEASE ORDER RESENT TO DEFENDANT'S UPDATED CUSTODY  
 ADDRESS AT NORTH REHABILITATION FACILITY.  
 02/20/2001 LETTER FROM DEFENDANT RECEIVED.  
 02/21/2001 LETTER FROM DEFENDANT RECEIVED DLF  
 03/09/2001 CALLED KING CO JAIL AND VERIFIED THAT DEFENDANT IS SERVING MLW  
 MULTIPLE KING CO CHARGES AND WILL BE IN-CUSTODY ON THOSE  
 UNTIL THE FALL. DEFENDANT NOT HELD ON THIS CHARGE- RELEASE  
 ORDER SIGNED 12-29-00. LETTER AND COPY OF RELEASE ORDER  
 MAILED TO DEFENDANT.  
 S 03/19/2002 Case Removed from Time Pay Agreement 66D 38646 1 RJP  
 FTA Ordered  
 Case Obligation Selected for Collections  
 Collections: 1st Notice Prepared  
 03/20/2002 FTA Issued, Amount Due 3,300.00 SYS  
 05/22/2002 Case Obligation Assigned to NATIONWIDE RECOVERY SERVICE INC f RJP  
 or Collections  
 U 10/09/2007 PIERCE CO PROS OFFICE REQUESTING RECORDS. CAW  
 REQUEST FOR RECORDS MAILED.

ACCOUNTING SUMMARY

	Total Due	Paid	Credit	Balance
Timepay: N	3,300.00			3,300.00

COLLECTION STATUS

Status Date	Status Description	Cln Amt
05/22/2002	Agent Assigned by System	3300.00

Collection Agent: NATIONWIDE RECOVERY SERVICE INC

ADDITIONAL CASE DATA

Case Disposition  
Disposition: OPEN

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DD7020SX DPL  
01/16/2009 9:24 AM

EVERETT MUNICIPAL COURT  
D O C K E T

PAGE: 4

DEFENDANT  
COCHRANE, DONALD HARER

CASE: CR0043051 EPD  
Criminal Traffic  
Agency No. 00-11073

ADDITIONAL CASE DATA - Continued

Personal Description

Sex: M Race: W DOB: 08/18/1958  
Dr.Lic.No.: COCHRDH426NQ State: WA Expires: 1998  
Employer:  
Height: 6 2 Weight: 220 Eyes: BLU Hair: BRO

Vehicle Lic. No.: A64477P State: WA Expires:

Hearing Summary

Held	ARRAIGNMENT	ON 06/15/2000 AT 11:45 AM IN ROOM 1	WITH TBO
Held	PRE-TRIAL HEARING	ON 06/28/2000 AT 11:45 AM IN ROOM 1	WITH DCM
Held	MOTION	ON 06/29/2000 AT 11:45 AM IN ROOM 1	WITH DCM
Held		ON 07/12/2000 AT 11:45 AM IN ROOM 1	WITH DCM
Held	MOTION	ON 12/20/2000 AT 03:00 PM IN ROOM 1	WITH DCM

End of docket report for this case

**CERTIFIED  
COPY**

MUNICIPAL COURT OF SEATTLE  
DOCKET

r295002

Case Status: OPEN Jurisdiction EndDate: 07/23/2011

CITY OF SEATTLE, Plaintiff

\*\* DRIVING WHILE INTOXICATED \*\*  
\*\* OPEN \*\*

Vs.

COCHRANE, DONALD HERER , Defendant

Case No: 424116  
File Loc: REC  
Def No: 12167  
Incident No: 2201857  
Custody: IN  
Rltd Grp No:  
Co-Def's:

Address: 3211 SW AVALON #401  
SEATTLE, WA 98126  
/ (Home) - / (Work)

DOB: 08/18/1958 Age: 50 Sex: M Race: W Lang:  
DOL: WA/CUHRDH426NQ  
Sentencing Judge: CHARLES, EDSONYA  
Prosecutor:  
Defense Attorney:  
Interpreter:

-----  
\*\* Charges \*\*

Chrg Doc No: 6058296 Type: CS Viol Date: 05/11/2002 Filing Date: 08/19/2002

Chrg 1: PRSNS UNDR THE INFLNCE OF INTXCNTS/DRUGS  
11.56.020 Plea: G Find: G Status: SS  
Disposition: SUSPENDED SENTENCE

BAIL BAIL NOT FORFEITABLE TSD  
Start:03/25/2006 Due:03/25/2006 End:04/13/2006 APPEARED IN COURT  
Amt:100,000 Susp: Curr:

BAIL BAIL NOT FORFEITABLE CXT  
Start:08/19/2002 Due:08/19/2002 End:08/26/2002 FTA WARRANT ISSUED  
Amt:500 Susp: Curr:

BRTN BREATH TEST ASSESSMENT TSD  
Start:04/13/2006 Due:04/13/2006 End:  
Amt:125 Susp: Curr:125

DIAS DUI ASSESSMENT FEE TSD  
Start:04/13/2006 Due:04/13/2006 End:  
Amt:80 Susp: Curr:80

FINE PAY FINE TSD  
Start:04/13/2006 Due:04/13/2006 End:  
Amt:5,000 Susp:2,600 Curr:2,400

JAIL COMPLY WITH JAIL SENTENCE JXH  
 Start:07/27/2007 Due:04/11/2011 End:  
 Jail:365 Susp: Unit:Days Cfts:Y  
 Rmks:COMMITTED, CFTS, JUDGE AUTHORIZES WORK RELEASE  
 01/05/07: 10 DAYS OF PREV SUSP REVOKED  
 PREV BAL: 365/90, NEW BAL: 365/80  
 80 DAYS OF SUSP SENT REVOKE COMMITTED CFTS. NEW BAL 365  
 0

Chrg 2: LICENSE, DRIVER, SUSP./RVOKED/FIRST DEGREE  
 11.56.320(B) Plea: Find: Status: DM  
 Disposition: DISMISSED WITH PREJUDICE  
 Dismissal: NGP

BAIL BAIL NOT FORFEITABLE CXT  
 Start:08/19/2002 Due:08/19/2002 End:08/26/2002 FTA WARRANT ISSUED  
 Amt:500 Susp: Curr:

Chrg 3: NEGLIGENT DRIVING FIRST DEGREE  
 11.58.005(A) Plea: Find: Status: DM  
 Disposition: DISMISSED WITH PREJUDICE  
 Dismissal: NGP

BAIL BAIL NOT FORFEITABLE CXT  
 Start:08/19/2002 Due:08/19/2002 End:08/26/2002 FTA WARRANT ISSUED  
 Amt:250 Susp: Curr:

Other Case Obligations:

BALW BAIL ON A WARRANT MAK  
 Start:05/11/2007 Due: End:09/06/2007 OBL CORRECTION  
 Amt:75,000 Susp: Curr:

BALW BAIL ON A WARRANT MAK  
 Start:11/29/2006 Due: End:01/05/2007 APPEARED IN COURT  
 Amt:75,000 Susp: Curr:

BALW BAIL ON A WARRANT SJG  
 Start:08/26/2002 Due: End:03/25/2006 APPEARED IN COURT  
 Amt:50,000 Susp: Curr:

REST RESTITUTION B  
 Start:04/13/2006 Due:04/13/2006 End:06/19/2006 NO VICTIM RESPONSE  
 Amt:0 Susp: Curr:  
 Vctm:CITY, OF SEATTLE  
 Rmks:AMOUNT TO BE DETERMINED. RESTITUTION NOTICE MUST BE  
 SENT TO BOTH DEFENDANT AND DEF'S ATTORNEY(KAREN BAKER,  
 ACA) IF RESTITUTION IS ORDERED.

ABST ABSTAIN FROM ALCOHOL/DRUG USE TSD  
 Start:04/13/2006 Due:04/11/2011 End:

CADD REPORT ADDR CHANGE TO COURT IN WRITING W/IN 24HR TSD  
 Start:04/13/2006 Due:04/11/2011 End:

CDAT CHEMICAL DEPENDENCY ASSESSMENT AND TREATMENT JXH  
 Start:04/13/2006 Due:04/11/2011 End:07/27/2007 STRICKEN  
 Rmks:AND FOLLOW UP

DONT DO NOT REFUSE BLOOD OR BREATH ALCOHOL TEST TSD  
 Start:04/13/2006 Due:04/11/2011 End:

DWIV DWI VICTIM'S PANEL JXH  
 Start:04/13/2006 Due:04/11/2011 End:07/27/2007 STRICKEN  
 Rmks:WITHIN 90 DAYS OF RELEASE FROM JAIL

IID DRIVE ONLY VEHICLE W/IGNITION INTERLOCK .025 TSD  
 Start:04/13/2006 Due:04/11/2011 End:  
 Rmks:FOR FIVE YEARS UPON REINSTATEMENT OF DRIVER'S LICNESE

NARO NO ALCOHOL-RELATED OFFENSES TSD  
 Start:04/13/2006 Due:04/11/2011 End:

NCLV NO CRIMINAL LAW VIOLATIONS TSD  
 Start:04/13/2006 Due:04/11/2011 End:

NDRO NO DRUG RELATED OFFENSES JXH  
 Start:04/13/2006 Due:04/11/2011 End:07/27/2007 STRICKEN

NVOI COMPLY NOT DRIVE W/OUT VALID LIC OR INSURANCE TSD  
 Start:04/13/2006 Due:04/11/2011 End:

OTHR OTHER OBLIGATION TSD  
 Start:03/25/2006 Due:09/21/2006 End:04/13/2006 OBLIGATION COMPLETED  
 Rmks:03/25/06 CONDITIONS IF RELEASED: NCLV,NARO,NDRO,NVOI,  
 ABST,DONT,EHMP W/BAC PLUS BAIL.

PROB PROBATION JXH  
 Start:04/13/2006 Due:04/11/2011 End:07/27/2007 STRICKEN  
 Rmks:DEF ORDERED TO REPORT TO MPS WITHIN 36 HOURS OF  
 RELEASE FROM JAIL.  
 01/05/07: DEF ORDERED TO MPS WITHIN 36 HOURS OF  
 RELEASE FROM JAIL.

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 \*\* Scheduled Hearings \*\*

S	Date	Time	Crtrm	Type	Tape	Judge	Prosecutor	Date	Clk
W	08/26/2002	13:30	7	DUIOCA		DOYLE, T	AMAN, H	08/19/2002	AXJ
H	03/25/2006	10:05	KCJ2	ICA		EISENBERG, A	MCGOODWIN, J	03/25/2006	DKA
H	04/06/2006	9:00	1101	IPTH		EISENBERG, A	LOR, S	03/25/2006	SJG
H	04/13/2006	10:00	1101	IPTH		CHARLES, E	CHAE, H	04/06/2006	TSD
W	11/29/2006	9:00	KCJ2	RV_PB		HURTADO, M	GAPPERT, B	10/31/2006	BXA
H	12/27/2006	10:05	KCJ2	ICA		ALICEA-GA, V	MURASHIGE, R	12/26/2006	AXW
H	01/05/2007	9:00	1101	RV_PB		CHARLES, E	GRANT, J	12/27/2006	CBE
W	05/11/2007	9:00	1101	RV_PB		EISENBERG, A	GRANT, J	03/27/2007	BXA
H	07/27/2007	10:05	KCJ2	ICA		BONNER, F	KIRKPATRI, K	07/26/2007	TMO

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\*\* Events \*\*

Date	Description	
08/19/2002	CHARGE(S) FILED	AXJ
08/19/2002	DUI OUT OF CUSTODY ARRAIGNMENT SCHEDULED FOR 08/26/2002 AT 1330 IN DEPT 7	AXJ
08/20/2002	DUIOCA HEARING NOTICE MAILED TO 3201 SW AVALON WY 21 SEATTLE, WA 98126	B
08/26/2002	DF: COCHRANE, DONALD (12167) DEFENDANT NOT PRESENT TP: 84777 LOC 5625 CLK LXZ. AOD D KINARD.	CXT
08/26/2002	PROBABLE CAUSE FOUND BY COURT	CXT
08/26/2002	BENCH WARRANT # 990279390 ISSUED 08/26/2002	CXT
03/25/2006	DEFENDANT BOOKED. BA# 206012051	DKA
03/25/2006	IN-CUSTODY ARRAIGNMENT SCHEDULED FOR 03/25/2006 AT 1005 IN COURTROOM KCJ2	DKA
03/25/2006	BENCH WARRANT # 990279390 CLEARED 03/25/2006 (BOOKED INTO JAIL)	HTG
03/25/2006	DF: COCHRANE, DONALD (12167) PRESENT DL: 12:36 CLK SJG AOD H ROGERS DEFENSE RESERVES RELEASE MOTION. CITY MOVES TO MAINTAIN BAIL - GRANTED. CITY MOVES TO INCREASE BAIL - GRANTED.	SJG
03/25/2006	CHARGE # 1 115602000 (D.U.I.) NOT GUILTY PLEA ENTERED	SJG
03/25/2006	CHARGE # 2 11563200B (SUSP.OL 1ST) NOT GUILTY PLEA ENTERED	SJG
03/25/2006	CHARGE # 3 11580050A (NEG. DR) NOT GUILTY PLEA ENTERED	SJG
03/25/2006	DEF SCREENED-CASE REFERRED TO ACA FOR ASSIGNMENT	SJG
03/25/2006	IN CUSTODY PRE-TRIAL HEARING SCHEDULED FOR 04/06/2006 AT 900 IN COURTROOM 1101	SJG
03/25/2006	NOTICE TO CLEAR HOLD SENT TO DOL	B
03/29/2006	NOTICE OF APPEARANCE FILED BY ACA ATTY BAKER WSBA #26271	SXP
04/06/2006	DF: COCHRANE, DONALD HERER (12167) DEFENDANT NOT PRESENT. DL:10:37 CLK:TD ATTY:K.BAKER. DEF IS AT RJC- SET OVER ONE WEEK.	TSD
04/06/2006	IN CUSTODY PRE-TRIAL HEARING SCHEDULED FOR 04/13/2006 AT 1000 IN COURTROOM 1101	TSD
04/13/2006	DF: COCHRANE, DONALD HERER (12167) PRESENT	TSD

DL:11:15 CLK:TD ATTY:K.BAKER. GUILTY PLEA ENTERED,  
STATEMENT OF DEF ON PLEA OF GUILTY ATTACHED HERETO.

04/13/2006 JURY WAIVER FILED TSD  
04/13/2006 BENCH TRIAL WAIVED TSD  
04/13/2006 JURISDICTION END DATE SET TO 04/11/2011 TSD  
04/13/2006 PLEA CHANGED TO GUILTY CHARGE# 1 115602000 (D.U.I.) TSD  
04/13/2006 CHARGE # 1 115602000 (D.U.I.) GUILTY FINDING ENTERED TSD  
04/13/2006 CHARGE # 1 115602000 (D.U.I.) SUSPENDED SENTENCE TSD  
04/13/2006 PLEA CHANGED TO CHARGE# 2 11563200B (SUSP.OL 1ST) TSD  
04/13/2006 CHARGE # 2 11563200B (SUSP.OL 1ST) DISMISSED WITH TSD  
PREJUDICE NEGOTIATED PLEA  
04/13/2006 PLEA CHANGED TO CHARGE# 3 11580050A (NEG. DR) TSD  
04/13/2006 CHARGE # 3 11580050A (NEG. DR) DISMISSED WITH PREJUDICE TSD  
NEGOTIATED PLEA  
04/13/2006 DEFENDANT REFERRED/RELEASED TO TIME PAY OFFICE TSD  
04/13/2006 TO BE GIVEN CREDIT FOR TIME SERVED TSD  
04/13/2006 CASE REFERRED TO PROBATION TSD  
04/13/2006 SENTENCE IMPOSED TSD  
04/13/2006 ELECTRONIC DHIP FORM FORWARDED TO DOL TSD  
04/16/2006 DATA SENT ELECTRONICALLY TO DOL ON CHARGE # 1 B  
05/17/2006 NOTICE OF WITHDRAWAL FILED BY ACA ON 050106 (CS EVENT) NCH  
06/19/2006 RESTITUTION () OBLIGATION CLOSED/NO AMOUNT SET B  
10/31/2006 REVIEW PROBATION HEARING SCHEDULED FOR 11/29/2006 AT BXA  
900 IN COURTROOM KCJ2  
10/31/2006 REVIEW HEARING SCHEDULED FOR FTR TO MPS, FTC WITH VP, BXA  
AND FTC WITH CD EVAL AND TX, PER PC SOKPUL CHEA.  
11/29/2006 STATUS/REVIEW REPORT RECEIVED PROBATION RLD  
11/29/2006 DF: COCHRANE, DONALD HERER (12167) DEFENDANT NOT NXB  
PRESENT CLK; RD DL; 9:48 MPS REPORT IN COURT -  
(11/27/06) & RETAINED.  
DEFENDANT IS NOT CURTRENTLY HELD IN KCCS PER BAILIFF KH  
11/29/2006 BENCH WARRANT # 990317811 ISSUED 11/29/2006 NXB

12/14/2006 LICENSE HOLD NOTICE SENT TO DOL B

=====  
Def. Name: COCHRANE, DONALD HERER  
11:17:59 As of 01/13/2009

12/26/2006	JRSJCT END DATE EXTENDED 27 DAYS FROM 04/11/11 TO 05/08/11	AXW
12/26/2006	BENCH WARRANT # 990317811 CLEARED 12/26/2006 (BOOKED INTO JAIL)	AXW
12/26/2006	DEFENDANT BOOKED. BA# 206053094	AXW
12/26/2006	IN-CUSTODY ARRAIGNMENT SCHEDULED FOR 12/27/2006 AT 1005 IN COURTROOM KCJ2	AXW
12/26/2006	NOTICE TO CLEAR HOLD SENT TO DOL	B
12/27/2006	DF: COCHRANE, DONALD HERER (12167) PRESENT FTR 2:34/2:40; CLERK MJB; AOD KINARD. ALLEGS - DENIED. DFNS MTN FOR RLS-RESERVED. PA MTN TO MAINTAIN BAIL-GRNT	CBE
12/27/2006	DEF SCREENED-CASE REFERRED TO ACA FOR ASSIGNMENT	CBE
12/27/2006	REVIEW PROBATION HEARING SCHEDULED FOR 01/05/2007 AT 900 IN COURTROOM 1101	CBE
12/29/2006	NOTICE OF APPEARANCE FROM ATTY ABBEY L. PERKINS #36998 SUBMITTED TO THE COURT ON 12/29/06. (CS EVENT)	KLM
01/05/2007	DF: COCHRANE, DONALD HERER (12167) PRESENT LOC 9:50. CLK MAK. DA: H ROGERS FOR AOR. ALLEGATION FTR MPS, FTC CDAT, ABST, DWIV, NCLV - ADMITTED. 10 DAYS PREVIOUSLY SUSP SENT REVOKED AND REFER BACK TO MPS. MPS REPORT IN COURT AND RETAINED.	MAK
01/05/2007	CASE REFERRED TO PROBATION	MAK
01/05/2007	CHARGE# 1 115602000 (D.U.I.) 10 Days OF SUSP COMPLY WITH JAIL SENTENCE REVOKED	MAK
01/19/2007	NOTICE OF WITHDRAWAL FILED 011807 BY ABBEY PERKINS. (CS EVENT)	JRT
03/27/2007	REVIEW PROBATION HEARING SCHEDULED FOR 05/11/2007 AT 900 IN COURTROOM 1101	BXA
03/27/2007	REVIEW HEARING SCHEDULED FOR FTR TO MPS, FTC WITH NCLV, VP, CD EVAL AND CDTX, PER PC SOKPUL CHEA.	BXA
05/11/2007	DF: COCHRANE, DONALD HERER (12167) DEFENDANT NOT PRESENT. DL:12:06 CLK:TD DEF IS NOT CURRENTLY HELD IN KING COUNTY CORR SYS PER BAILIFF SAM 5/11/07.	TSD
05/11/2007	BENCH WARRANT # 990322661 ISSUED 05/11/2007	TSD
05/26/2007	LICENSE HOLD NOTICE SENT TO DOL	B
06/05/2007	BNCH WRRNT #990322661 NOTICE RTND UNDEL FROM 3211 SW AVALON 401, SEATTLE, WA 98126 (CS EVENT)	MLT

07/26/2007 JRSDCT END DATE EXTENDED 76 DAYS FROM 05/08/11 TO 07/23/11 TMO

07/26/2007 BENCH WARRANT # 990322661 CLEARED 07/26/2007 (BOOKED INTO JAIL) TMO

07/26/2007 DEFENDANT BOOKED. BA# 207032187 TMO

07/26/2007 IN-CUSTODY ARRAIGNMENT SCHEDULED FOR 07/27/2007 AT 1005 IN COURTROOM KCJ2 TMO

07/26/2007 NOTICE TO CLEAR HOLD SENT TO DOL B

07/27/2007 DF: COCHRANE, DONALD HERER (12167) PRESENT JXH  
DL 10:11AM ALLEGATION ADMITTED STRIKE ALL CONDS.  
BAL SUSP JAIL TIME REVOKED. CASE CLOSED. MPS FILE IN CT  
AND RETAINED.

08/09/2007 NOTICE OF APPEARANCE FILED BY ACA ATTY PERKINS WSBA 36998; FILED 7/31/07 SXP

09/05/2007 NOTICE OF WITHDRAWAL FILED 08/09/07 ACA ABBEY PERKINS (CS EVENT) CDF

09/06/2007 CHARGE# 1 115602000 (D.U.I.) 80 Days OF SUSP COMPLY WITH JAIL SENTENCE REVOKED JXH

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\*\* Warrants \*\*

Wrnt Nr	Issued	Served	Wrnt/ Clrn Type	Description
990279390	08/26/2002	03/25/2006	BW JL	BENCH WARRANT BOOKED INTO JAIL Reasons: FAILURE TO APPEAR FOR DUI OUT OF CUSTODY ARR Rstrcs: FTA DUIOCA NO PR Warrant issued by: JUDGE THERESA DOYLE
990317811	11/29/2006	12/26/2006	BW JL	BENCH WARRANT BOOKED INTO JAIL Reasons: FAIL TO APPEAR AT PROBATION/PRE SENTENCING Rstrcs: NO PR FTA RVPB Warrant issued by: JUDGE MICHAEL HURTADO
990322661	05/11/2007	07/26/2007	BW JL	BENCH WARRANT BOOKED INTO JAIL Reasons: FAIL TO APPEAR AT PROBATION/PRE SENTENCING Rstrcs: NO PR FTA RVPB/FTC NCLV/DWIV/CDEVAL TX Warrant issued by: JUDGE ADAM EISENBERG

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\*\* Accounting Summary \*\*

Chg :	Obl :	Orig Obl :	Obl :	TP :
Sq# :	Type :	Amount :	Bal Due :	Status :
1	BRTH	125.00	125.00	
1	DIAS	80.00	80.00	
1	FINE	5000.00	2400.00	

\*\* Total due on this case: 2605.00 \*\*



Case Number: 07-1-03922-0 Date: August 25, 2008  
 SerialID: 5321CC46-F20F-6452-D52715EB25514C82  
 Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

07-1-03922-0

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	Seattle Muni	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	Seattle DIV, KCDC	03/30/99	A	[REDACTED]	[REDACTED]	[REDACTED]	Misdemeanor
[REDACTED]	[REDACTED]	Seattle Muni	11/24/99	A	[REDACTED]	[REDACTED]	[REDACTED]	Misdemeanor
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	Everett Muni	06/15/00	A	[REDACTED]	[REDACTED]	[REDACTED]	Misdemeanor
[REDACTED]	[REDACTED]	Seattle Muni	03/11/02	A	[REDACTED]	[REDACTED]	[REDACTED]	Misdemeanor
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Concurrent conviction scoring:

CONVICTIONS FROM OTHER JURISDICTIONS

The defendant also stipulates that the following convictions are equivalent to Washington State felony convictions of the class indicated, per RCW 9.94A.360(3)/9.94A.525 (Classifications of felony/misdemeanor, Class, and Type made under Washington Law):

Crime	Date of Sentence	Jurisdiction	Date of Crime	Adult/ Juvenile	Crime Type	Class	Score	Felony or Misdemeanor
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Office of Prosecuting Attorney  
 930 Tacoma Avenue S. Room 946  
 Tacoma, Washington 98402-2171  
 Telephone: (253) 798-7400

Case Number: 07-1-03922-0 Date: August 25, 2007  
SerialID: 5321CC46-F20F-6452-D527-EB25514C82  
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

07-1-03922-0

[REDACTED]							
[REDACTED]							

**Concurrent conviction scoring:**

The defendant stipulates that the above criminal history and scoring are correct, producing an offender score as follows, including current offenses, and stipulates that the offender score is correct:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancement)	MAXIMUM TERM
I	[REDACTED]	[REDACTED]	[REDACTED]		[REDACTED]	[REDACTED]
II	[REDACTED]	[REDACTED]	[REDACTED]		[REDACTED]	[REDACTED]
III	[REDACTED]	[REDACTED]	[REDACTED]		[REDACTED]	[REDACTED]

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

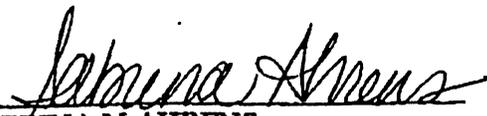
**The defendant further stipulates:**

- 1) Pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), defendant may have a right to have factors that affect the determination of criminal history and offender score be determined by a jury beyond a reasonable doubt. Defendant waives any such right to a jury determination of these factors and asks this court to sentence according to the stipulated offender score set forth above.
- 2) That if any additional criminal history is discovered, the State of Washington may resentence the defendant using the corrected offender score without affecting the validity of the plea of guilty;
- 3) That if the defendant pled guilty to an information which was amended as a result of plea negotiation, and if the plea of guilty is set aside due to the motion of the defendant, the State of Washington is permitted to refile and prosecute any charge(s) dismissed, reduced or withheld from filing by that negotiation, and speedy trial rules shall not be a bar to such later prosecution;
- 4) That none of the above criminal history convictions have "washed out" under RCW 9.94A.360(3)/9.94A.525 unless specifically so indicated.

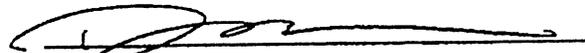
07-1-03922-0

If sentenced within the standard range, the defendant further waives any right to appeal or seek redress via any collateral attack based upon the above stated criminal history and/or offender score calculation.

Stipulated to this on the 24 day of April, 2008.

  
SABRINA M AHRENS  
Deputy Prosecuting Attorney  
WSB # 32184

  
DONALD HARER COCHRANE

  
David Katayama  
WSB # 33758

SSR

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the  
aforementioned court do hereby certify that the document  
SerialID: 5321CC46-F20F-6452-D52715EB25514C82 containing 4 pages plus  
this sheet, is a true and correct copy of the original that is of record in my office  
and that this image of the original has been transmitted pursuant to statutory  
authority under RCW 5.52.050. In Testimony whereof, I have electronically  
certified and attached the Seal of said Court on this date.



Kevin Stock, Pierce County Clerk

By /S/Melissa Engler, Deputy.

Dated: Aug 25, 2009 12:57 PM



**Instructions to recipient:** If you wish to verify the authenticity of the certified document that was transmitted electronically by the Court, sign on to:  
<https://www.co.pierce.wa.us/cfapps/secure/linx/courtfilling/certifieddocumentview.cfm>,  
enter SerialID: 5321CC46-F20F-6452-D52715EB25514C82.  
The copy associated with this number will be displayed by the Court.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 64126-3-I
v.	)	
	)	
DONALD COCHRANE,	)	
	)	
Appellant.	)	

---

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF MARCH, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> DONALD COCHRANE 824011 OLYMPIC CORRECTIONS CENTER 11235 HOH MAINLINE RD FORKS, WA 98331-9492	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF MARCH, 2010.

X \_\_\_\_\_  
*[Handwritten Signature]*

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 MAR 30 PM 4:51

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710