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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

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Respondent,

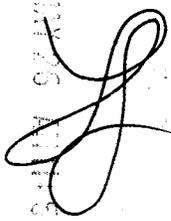
v.

EMORY LEE BERUBE

Appellant,

APPELLANTS
STATEMENT OF ADDITIONAL GROUNDS

EMORY LEE BERUBE,
SUI JURIS
1313 NORTH 13th Ave
Walla, Walla, Wa. 99362

OS-1114 9/12/2007


A. SUMMARY OF COUNSELS BRIEF

The rules of Appellate Procedure Authorizes an Appellant/Defendant, to file a pro se statement of additional grounds for review to identify and discuss those matters which the appellant/defendant believes have not been adequately addressed by appellant counsel . **RAP 10.10.** I have received and reviewed the opening brief prepared by my attorney and I find her decision not to address on this review the sufficiency of the evidence admitted to prove " intent " unreasonable. Therefore, summarized below, I have taken the liberty to demonstrate in additional grounds for review the insufficiency of the evidence to prove the material element of " Intent to Deliver"

B. GROUND ONE

EVIDENCE OF MR. ERUBES INTENT TO DELIVER
WAS INSUFFICIENT

Berube challenges the sufficiency of the evidence of intent to sustain his conviction for possession with intent to deliver a controlled substance. In determining the sufficiency of the evidence, the test is " whether,

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After viewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." see STATE V GROVER, 55 Wn. App. 923 930,780 P.2d 901 (1989)., review denied, 114 Wn.2d 1008 (1990) see also JACKSON V VIRGINIA, 443 U.S. 307, 61 L.ed 2d 560,99 S.ct.2781 (1979). " Circumstantial evidence is no less reliable than direct evidence; specific intent may be inferred from circumstances as a matter of logical probability. " see STATE V ZAMORA, 63 Wn.App.220,223,817 P.2d 880 (1991). Washington Case law forbids the inference of an intent to deliver based on " bare possession of a controlled substance, absent other facts and circumstances". see STATE V HARRIS, 14 Wn.App.414,418,542 P.2d 122 (1975) review denied, 86 Wn.2d 1010 (1976). In STATE V COBELLI, 56 Wn.App. 921, the court found possession of several baggies containing a total of 1.4 grams of marijuana was insufficient to establish even a prima facie case of intent to deliver. In STATE V KOVAC, 50 Wn.App. 117, 747, this court found mere possession of seven baggies containing a total of 8 grams of marijuana insufficient to establish possession with intent to deliver. In STATE V LILES, 11 Wn.App.166,521, the court reversed the conviction of

Possession of herion with intent to deliver where the evidence showed mere possession of a baggie containing 6.66 grams of 5 percent herion . In STATE V JOHNSON, 61 Wn. App. 539, 811, a conviction for possession of cocaine with intent to deliver was reversed and remanded for resentencing on a lesser charge of simple possession where untainted evidence showed at most constructive possession of seven bindles of cocaine. Washington cases where intent to deliver was inferred from the possession of a quantity of narcotics all involved at least one additional factor. for example, in STATE V LIAMASVILLA, 67 Wn.App.488,863, (1992), possession of cocaine, herion, and \$3,200, combined with an officer's observations of deals, supported the inference of intent. STATE V MEJIA, 111 Wn.2d 892, (1989) held that 1 1/2 pounds of cocaine combined with an informant's tip and a controlled buy supported an inference of intent to deliver. In STATE V LANE, 56 Wn.App.286,297, (1989), 1 ounce of cocaine, together with a large amount of cash and scales supported an intent to deliver, where the court specifically noted that cocaine is commonly sold by the one-eighth ounce. The following federal court cases are in accord with Washington state law.¹

This is a naked possession case, Berube had no weapon no substantial sum of money, no scales or other drug paraphernalia indicative of sales or delivery, the rocks of cocaine were not seperately packaged nor were seperate packages in his possession, the officers observation which suggest sales or delivery, is questionable, for one, the alleged person officer Jokela testified to that he witnessed the defendant sell cocaine to was not apprehended. (RP28-29). and for two officer Jokela testified that he witnessed the transaction through a camera located in Macy department store (RP29-39) however, on cross examination information revealed that in order for this officer to have seen what he claimed to have seen he would had have to see through cars, trucks, newspaper machines, traffic, and the starbucks coffee shop. (RP44-47). Berube was just sitting with a group of citizens of the state of washington on a bench. This case is on point with STATE V HUYNH, 107 Wn.App 68, 26 (2001)

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UNITED STATES V OCAMPO-GUARIN, 968 F.2d 1406(1st Cir.1992) United STATES V BELL, 954 F.2d 232 (4th Cir1992) UNITED STATES V MUNOZ, 957 F.2d 171 (5th Cir) UNITED STATES V GARDINER, 955 F.2d 1492 (11th Cir 1992) UNITED STATES V TANNER, 941 F.2d 574 (7 th Cir. 1991) UNITED STATES V POOLE, 878 F.2d 1389 (11th Cir. 1989) UNITED STATES V PRIETO-TEJAS, 779 F.2d 1260 (1986) UNITED STATES V GLEN, 667 F.2d 1269 (9th Cir.1982)

Drug paraphernalia, and the drugs were not seperately packaged). Here Berube had 4.2 grams of cocaine, no scales, the cocaine was not seperately packaged, no weapons, or other paraphernalia associated with selling narcotics. The state is primarily relying on officers Jokela questionable observation that Berube is subject to conviction for possession with intent to deliver and of course, the significant difference between the standard ranges for simple possession and for possession with intent to deliver is no question a determinative factor. In Berube's case, the difference is an offender score of C and a standard sentence of 12t to 24 months versus an offender score Bt and a standard sentencing range of 60t to 120, which exactly is what Mr. Berube was sentenced to 120 months. This approximately tenfold difference strongly indicates that the legislature views these crimes very differently.

C. CONCLUSION

The courts must be careful to preserve the distinction and not to turn every possession of a minimal amount of a controlled substance into a possession with intent to deliver without substantial evidence as to the possessor's intent above and beyond the possession itself.

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