

No. 65396-2-I  
(consolidated with 65398-9-I & 65497-1-I)

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

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STATE OF WASHINGTON,

Respondent,

v.

GERMAN DURAN MADRIGAL,

Appellant.

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REPLY BRIEF OF APPELLANT

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On Appeal From King County Superior Court  
The Hon. Michael Heavey, Presiding  
The Hon. Johanna Bender, Judge *Pro Tempore*, Presiding  
The Hon. Barbara Harris, Judge *Pro Tempore*, Presiding

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**A. ISSUES IN REPLY**

1. Can a constitutional and jurisdictional challenge to the authority of pro tem judges be raised for the first time on appeal?
2. Has the State provided any authority that pro tem judges historically, at the time of Statehood, accepted guilty pleas?
3. Is accepting a guilty plea the same as “trying” a case?
4. If Mr. Duran Madrigal cannot raise a challenge to the factual basis and voluntariness of the pleas on direct appeal, should the State be barred from arguing that he cannot raise these challenges on collateral review?
5. Was there a sufficient factual basis for the pleas?
6. Was there prejudice to Mr. Duran Madrigal by the lack of a factual basis?
7. Was the charging document for the felon in possession of a firearm charge sufficient?
8. What is the legal maximum for attempted possession of cocaine?

**B. ARGUMENT IN REPLY**

**1. *Pro Tem Judges Do Not Have the Authority to Accept Pleas in Superior Court in Washington State***

The State's argues that the plain language of the Wash. Const. art. 4, § 7,<sup>1</sup> and RCW 2.08.180 should not be followed for the following reasons:

1. Mr. Duran Madrigal did not raise the issue below, and therefore waived the issue.
2. To rule that the pro tem judges in this case did not have the authority to accept pleas would call into question many other actions purportedly taken by such officials, causing chaos.
3. The Constitution must be interpreted in light of the law at the time it was adopted.
4. To "try" a case means something other than to preside over a trial.

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<sup>1</sup> Wash. Const. art. 4, § 7 provides in part:

The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his or her duty to do so. A case in the superior court may be tried by a judge pro tempore either with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the judge pro tempore is a sitting elected judge and is acting as a judge pro tempore pursuant to supreme court rule. . . .

*Brief of Respondent* at 5-10. Each of the State’s arguments should be rejected.

With regard to the issue of waiver, RAP 2.5(a)(3) specifically allows for the raising of constitutional errors for the first time on appeal. If the pro tem judges did not have the authority to accept guilty pleas, then not only were Wash. Const. art.4, §§ 5 & 7 violated, but due process of law under U.S. Const. amend. 14 and Wash. Const. art.1, § 3 was also violated. *See Opening Brief of Appellant* at 16-18.

More importantly, if the pro tem judges lacked either the constitutional or statutory authority to take the pleas, there is a jurisdictional defect. RAP 2.5(a)(1) specifically allows jurisdictional issues to be raised for the first time on appeal. The fact that Mr. Duran Madrigal did not object when the pro tem judges went beyond the scope of their written authority<sup>2</sup> is of little import. “Any party to an appeal . . . may raise the issue of lack of subject matter jurisdiction at any time.” *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998). Subject matter jurisdiction cannot be conferred

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<sup>2</sup> The written stipulations gave the pro tem judges the authority to “try and determine the above entitled cause and that his/her action *in the trial* and subsequent proceedings have the same effect as if he/she were a judge of said court.” CP 7, 35, 63 (emphasis added).

by the consent of the parties. *Wampler v. Wampler*, 25 Wn.2d 258, 267, 170 P.2d 316 (1946).

Here, while the King County Superior Court generally had subject matter jurisdiction over these cases, the attorneys who presided over the guilty plea hearings were not superior court judges and did not have the authority, constitutional or statutory, to accept the guilty pleas. Mr. Duran Madrigal's "consent" to jurisdiction does not bar him from challenging jurisdiction later.

The State fears the broad invalidation of many court proceedings, including other guilty pleas, that have taken place since 1889. *Brief of Respondent* at 7. This argument ties in to the State's argument that the Constitution must be construed as it was at the time of statehood. *Brief of Respondent* at 7-11.

Yet, the State cites no authority that, in 1889 or over most of the next century, guilty pleas to felonies were taken by unelected attorneys who were acting as superior court judges. To be sure, the undersigned counsel has a personal memory that, in the early 1990s, retired Judge Frank Eberharter was assigned, as a pro tem judge, to handle a plea calendar in King County Superior Court. However, this memory does not

qualify as historic research to show that pro tem judges always handled pleas, and that the practice was so well entrenched at the time of statehood that one must conclude that the Founders contemplated that art. 4, § 7, would include the taking of guilty pleas in the concept of “trying” cases.

A party’s anecdotal memory that “this is the way we have always done it” is not sufficient. Simply because “it is done that way” does not make it constitutional, and there are many cases where “the way it is done” turned out to be unconstitutional. *See State v. Canady*, 116 Wn.2d 853, 809 P.2d 203 (1991) (warrant issued by pro tem judge in department of municipal court that had not been properly created was invalid); *State v. Brennan*, 76 Wn. App. 347, 884 P.2d 1343 (1994) (district court did not have constitutional authority to issue anti-harassment orders).<sup>3</sup>

Similarly, generalized fears about opening floodgates to collateral attack is hardly a reasoned basis to decide cases. As the United States Supreme Court recently held:

Pleas account for nearly 95% of all criminal convictions.  
[Footnote omitted] But they account for only  
approximately 30% of the habeas petitions filed. [Footnote

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<sup>3</sup> *Brennan* is notable because the jurisdictional defect was argued for the first time in a motion to modify a commissioner’s ruling denying a motion for discretionary review of a RALJ decision upholding a conviction for violating the anti-harassment order, an order that had been granted in a collateral civil proceeding and one that was “mutual.” 76 Wn. App. at 348-49.

omitted] The nature of relief secured by a successful collateral challenge to a guilty plea – an opportunity to withdraw the plea and proceed to trial – imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. Thus, a different calculus informs whether it is wise to challenge a guilty plea in a habeas proceeding because, ultimately, the challenge may result in a *less favorable* outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.

*Padilla v. Kentucky*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 1473, 1485-86, 176 L. Ed.2d 284 (2010) (emphasis in original).

The Washington Constitution established a system, for better or for worse, of elected superior court judges – judges who ultimately are selected by the voters in regularly held elections, and judges who can have no other employment other than being judges. Wash. Const. art. 4, §§ 5, 15, 19, & 29. It may be expedient to pay a practicing attorney to handle a calendar of guilty pleas<sup>4</sup> so that the elected judges can save themselves from the apparent repetition inherent in handling this type of calendar in a busy court. However, such expediency conflicts with the political division of power set out in the Constitution and the Framers’ preference that

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<sup>4</sup> King County LCR 0.11 provides for the appointment of pro tem judges who can work for *up to 910 hours a year*, without leave, overtime, and medical benefits and who can be terminated without cause or prior notice.

superior court judges not be practicing attorneys, that they are to be elected for a set term and that they would be accountable to the voters, rather than being attorneys who are appointed and are merely accountable to a presiding judge. If workloads are too great, the Constitution provides for the appointment of court commissioners to assist the elected judges, whose decisions are subject to revision. Wash. Const. art. 4, § 23.<sup>5</sup> RCW 2.24.040(15) specifically gives superior court commissioners the power “to accept pleas” in adult criminal cases.<sup>6</sup>

While the Constitution allows for an unelected pro tem judge to “try” a case, it does not allow for such a person to perform perhaps the constitutionally more challenging task of accepting a guilty plea which

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<sup>5</sup> Wash. Const. art. 4, § 23 provides:

There may be appointed in each county, by the judge of the superior court having jurisdiction therein, one or more court commissioners, not exceeding three in number, who shall have authority to perform like duties as a judge of the superior court at chambers, subject to revision by such judge, to take depositions and to perform such other business connected with the administration of justice as may be prescribed by law.

<sup>6</sup> One early case held that a court commissioner could not accept a guilty plea because commissioners only had the same power that judges had while acting in chambers, and accepting a guilty plea had to take place in open court. *State v. Philip*, 44 Wash. 615, 87 P. 955 (1906). However, because the Legislature has now authorized commissioners to accept pleas, RCW 2.24.040, such practices are constitutional under a separate clause of Wash. Const. art. 4, § 23 giving court commissioners the power to power “to perform such other business connected with the administration of justice as may be prescribed by law.”

requires insuring that a person facing a felony conviction understands several complicated constitutional rights before being stigmatized and branded for life.<sup>7</sup>

The State’s argument that “trying” a case includes taking a guilty plea is not supported by authority. The argument ignores the plain language of the constitutional provision.<sup>8</sup> “Words in the constitution must be given their common and ordinary meaning. [Citation omitted] If the constitutional language is clear and unambiguous, interpretation by the courts is improper.” *State ex rel. O’Connell v. Slavin*, 75 Wn.2d 554, 557, 452 P.2d 943 (1969). Here, the State has no argument to counter the clear line of cases in this State that differentiate between “trial” proceedings and guilty plea proceedings. *See Opening Brief of Appellant* at 15.<sup>9</sup>

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<sup>7</sup> If *Padilla v. Kentucky*, *supra*, means anything, it is that one must cast a critical eye on some accepted practices in our justice system, which include assembly line guilty pleas, without careful and individualized attention.

<sup>8</sup> The six criteria set out in *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986), are not particularly useful here. They really only bear on whether a provision of the Washington Constitution should be construed differently than a correlate provision in the United States Constitution. Many of these provisions (i.e. structural differences with the federal constitution, differences in text, issues of state or local concern) simply do not make sense in construing a provision like Wash. Const. art. 4, § 7. Still, some of the factors – the textual language and constitutional history – are important to examine.

<sup>9</sup> It should be noted that there is very little constitutional history connected to Wash. Const. art. 4, § 7. *See generally* R. Utter & H. Spitzer, *The Washington State Constitution, A Reference Guide* (2002), at 103-04.

The constitutional distinction between “trial” and non-trial proceedings is clear by examining the distinction within Wash. Const. art. 4, § 7, between visiting judges and judges *pro tempore*. Art. 4, § 7, provides in part: “The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his or her duty to do so.” Thus, visiting judges have all of the powers conferred upon a regularly elected judge in a particular county. *Demaris v. Barker*, 33 Wash. 200, 203-04, 74 P. 362 (1903). In contrast, the same constitutional provision sets out a restriction on the powers of judges *pro tempore*, giving them the power only to “try” cases. This language would make no sense if the Constitution intended to give unelected judges *pro tempore* the same powers as elected superior court judges.

Similarly, one should compare the textual language of Wash. Const. art. 4, § 7, dealing with visiting and pro tem judges, with that of Wash. Const. art. 4, § 23, dealing with court commissioners. The latter constitutional provision give commissioners the “authority to perform like duties as a judge of the superior court *at chambers*.” Wash. Const. art. 4, § 23 (emphasis added). This power – of a judge of the superior court *at*

*chambers* – has a particular meaning, traceable to Territorial days, and only includes matters that do not require resolution through jury trials:

When the Washington Constitution was adopted in 1889, the judges of courts of general jurisdiction, "at chambers", could "entertain, try, hear and determine, all actions, causes, motions, demurrers and other matters not requiring a trial by jury". Code of 1881, § 2138, p. 368; [*State ex rel.*] *Lockhart* [*v. Claypool*], 132 Wash. [374,] at 375[, 232 P. 351 (1925)]; *Peterson v. Dillon*, 27 Wash. 78, 84, 67 P. 397 (1901); [*State ex rel. Henderson v.*] *Woods*, 72 Wn. App. [544,] at 548-49[, 865 P.2d 33 (1994)]. The framers of the Washington Constitution intended that superior court commissioners have like powers. *Lockhart*, 132 Wash. at 376, quoting *Peterson*, 27 Wash. at 83-84. It follows that a court commissioner appointed under article IV, section 23, has authority to act in any matter not requiring a trial by jury, subject to revision by a superior court judge.

*State v. Goss*, 78 Wn. App. 58, 60, 895 P.2d 861 (1995). Thus, the Constitution differentiates between court commissioners who can handle any number of non-jury trial related matters<sup>10</sup> and judges *pro tempore* who can handle only trials. See *Slavin*, 75 Wn.2d at 559 ("For purposes of constitutional interpretation, the express mention of one thing implies the exclusion of another which might logically have been considered at the same time.").

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<sup>10</sup> In keeping with this division, RCW 2.24.040 (set out in the statutory appendix) lists very specifically the non-jury trial related tasks now assigned to commissioners.

Finally, the State ignores language in various statutes which provide that pro tem judges in courts of limited jurisdiction have co-extensive powers with their elected or appointed counterparts. RCW 3.50.090 & RCW 35.20.200. The absence of such language both in Wash. Const. art. 4, § 7, and RCW 2.08.180 is significant – the language about “trying” cases in Wash. Const. art. 4, § 7, should therefore be seen as a limitation on the power of pro tem judges, rather than a general grant of power, a limitation that should be viewed narrowly given the constitutional preference for elected judges.

The State cites to *Nelson v. Seattle Traction Comp.*, 25 Wash. 602, 66 P. 61 (1901), but this case is not as far-reaching as the State would like it to be. *Nelson* involved a civil case that was tried to a jury before an elected judge. After the jury returned a verdict for the defendant, the plaintiff filed a motion for a new trial. Before the judge could decide the motion, his term expired. He was then appointed as a judge *pro tempore* and denied the motion. On appeal, the plaintiff attacked the judge’s statutory authority (not raising a constitutional issue). The Supreme Court affirmed, and held:

We construe the statute to mean that a judge *pro tempore* acquires jurisdiction of a cause from the time of his

appointment and qualification, and he thereafter *tries* what remains to be done in the case, whether it be the trial of questions of fact or of law, or both. In this case the trial upon the facts had been heard, and there remained certain questions of law to be determined, viz., those raised by the motion for a new trial and the entry of judgment.

66 Wash. at 603-04. Thus, the judge *pro tempore* had the authority to finish the trial that had already taken place (and which he had properly overseen). There were lingering issues connected to that trial that the judge had the authority to decide (even though he became a pro tem judge). But, this case does not mean that a judge *pro tempore* had the initial authority to oversee a proceeding that was not a trial.<sup>11</sup> *Accord Fisher v. Puget Sound Brick, Tile & Terra Cotta Co.*, 34 Wash. 578, 581, 76 P. 107 (1904) (pro tem judge who tried case had the authority to hear post-trial motions – “judge *pro tempore* of the superior court, appointed to try, hear, and determine the action, retained jurisdiction to the end.”).<sup>12</sup>

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<sup>11</sup> Another other case relied upon by the State – *Mitchell v. Kitsap County*, 59 Wn. App. 177, 797 P.2d 56 (1990) – has already been discussed and distinguished by Mr. Duran Madrigal in the opening brief. *Opening Brief of Appellant* at 15-16 n.7.

<sup>12</sup> The State cites *Fisher* for the broad proposition that a pro tem has the power to hear motions and enter orders. *Brief of Respondent* at 10. But, *Fisher* merely stands for the proposition that once a pro tem judge tried a case, he or she can entertain motions that relate to the trial that he or she properly tried.

Similarly, the State misconstrues the holding of *State v. Belgarde*, 62 Wn. App. 684, 815 P.2d 812 (1991), *aff'd on different grounds* 119 Wn.2d 711, 837 P.2d 599 (1992). In that case, a judge who oversaw the first trial, retired and heard the case as a  
(continued...)

Here, there was no authority for two attorneys – Barbara Harris and Johanna Bender – to take the guilty pleas in this case. Their actions violated Wash. Const. art. 4, §§ 5 & 7 and RCW 2.08.180 and therefore violated Mr. Duran Madrigal’s right to due process of law under Wash. Const. art. 1, § 3, and U.S. Const. amend. 14. The convictions should be reversed.

**2. *If the State Does Not Believe that a Direct Appeal is the Proper Forum for Many of Mr. Duran Madrigal’s Challenges, the State Should Not Be Allowed to Argue Procedural Bar When Mr. Duran Madrigal Re-Raises These Issues in Another Forum***

The State argues that Mr. Duran Madrigal should not be allowed to argue issues on a direct appeal involving the factual basis of the pleas because of the lack of objection below. *Brief of Respondent* at 10-14. Mr. Duran Madrigal raises issues about the factual basis for the guilty pleas

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<sup>12</sup>(...continued)

pro tem judge when the case was remanded for a new trial. The Supreme Court held that the judge properly oversaw the new trial because of the intervening adoption of a constitutional amendment before the judge retired that allowed retired judges to continue in cases where they had made discretionary rulings as elected judges. Wash. Const. Amend. 80. 119 Wn.2d at 722-24. While *Belgarde* does state that unelected judges have constitutional authority to perform judicial duties, 119 Wn.2d at 720-21, such judges still require some specific constitutional authority to perform those duties, authority that is missing in this case.

(and how that tied into the voluntariness of the pleas<sup>13</sup>) in this appeal solely because the Supreme Court has held that a defendant may not be able to raise such a claim on collateral attack if it was not raised on direct appeal:

The petitioner argues that CrR 4.2(d) was violated. This claimed error is subject to the rule that a conviction may not be collaterally attacked upon a nonconstitutional ground which could have been raised on appeal, but was not. [Citation omitted]. A guilty plea does not preclude an appeal as to the circumstances under which the plea was made. [Citation omitted] Therefore, this contention is precluded, no appeal having been taken.

*In re Keene*, 95 Wn.2d 203, 205, 622 P.2d 360 (1980).

Mr. Duran Madrigal raises these issues in this proceeding because he fears that if he does not, the State will take advantage of his failure to do so in a later proceeding and argue some sort of waiver and procedural bar. If there is a ruling by this Court (based upon the State's arguments) that Mr. Duran Madrigal can, and should, raise issues about the factual basis, the circumstances under which the pleas were taken, and voluntariness in a collateral review proceeding, then Mr. Duran Madrigal

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<sup>13</sup> The issue of whether there is a factual basis to a plea is directly tied to whether the plea is knowingly, freely and voluntarily made, as required by the Due Process Clauses of U.S. Const. amend. 14 and Wash. Const. art. 1, § 3, (and other constitutional provisions such as the right to remain silent, the right to a jury trial and the right to confront witnesses, protected under U.S. Const. amends. 5, 6, & 14 and Wash. Const. art. 1, § 22. See *State v. Zhao*, 157 Wn.2d 188, 197-201, 137 P.3d 835 (2006).

will file such a petition and combine these claims with the other claims he may have that are not record based. However, the State should be precluded from arguing that Mr. Duran Madrigal is procedurally barred from raising such claims in a collateral attack petition because he could have raised these claims on direct appeal and in fact has already done so.

**3. *Other Issues Related to Factual Basis and Charging Document***

**a. Certifications of Probable Cause**

The State argues that the certifications of probable cause can be considered because they were in the record at the time of the pleas and that the colloquy did not have to contain the “magic words” “I have reviewed these documents.” *Brief of Respondent* at 17. Yet, the “magic words” are important in these cases because of the parties’ agreement that the facts set forth in the certification were “real and material facts for purposes of this sentencing.” CP 20, 46, 94. Thus, the record reveals that the facts included in the certification were not to be considered for any purpose *other than sentencing* – not as a factual basis for the plea. The State’s suggestion that the parties intended to stipulate to the consideration of the certification as a factual basis for the pleas conflicts with the documentary evidence.

**b. Felon in Possession Conviction**

As for the felon in possession of a firearm conviction, the State argues that the defendant's statement, the certification of probable cause, and the information do not have to contain reference to facts that the defendant in fact was statutorily ineligible to possess a firearm, and only need to contain the allegation that he had a felony conviction at some point in the past and possessed a firearm at the time of the offense. *Brief of Respondent* at 17-21, 27-31. The State misconstrues the statute at issue.

The State focuses solely on the first two paragraphs of RCW 9.41.040, and seems to think that the rest of the statute is surplusage or somehow sets up affirmative defenses. Yet, nothing in the wording of RCW 9.41.040(3) & (4) would lead to the conclusion that those paragraphs establish defenses, rather than operating as exclusions from the coverage of the first two sections of the statute.

In *Rivard v. State*, 168 Wn.2d 775, 231 P.3d 186 (2010), the Supreme Court analyzed RCW 9.41.040 in a case where a defendant convicted of vehicular homicide was trying to obtain his firearm rights back. The Supreme Court stated that RCW 9.41.040(1) "would, as an initial matter, prohibit him from owning or possessing a firearm. However,

subsection (4) creates certain exceptions to the general prohibitions under subsection (1).” 168 Wn.2d at 782. This construction of the statute is that the exclusions in subsection (4) operate to exclude categories of people from the coverage of subsections (1) and (2). Subsection (4) does not set up a defense, but rather helps to define who is and who is not eligible to possess a firearm.

Similarly, subsection (3) also creates exclusions from the coverage of the general prohibitions in subsections (1) and (2), rather than affirmative defenses:

A person *shall not be precluded* from possession of a firearm if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted or the conviction or disposition has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

RCW 9.41.040(3) (emphasis added). *See also State v. Radan*, 143 Wn.2d 323, 334-35, 21 P.3d 255 (2001) (defendant who received equivalent of a certificate of rehabilitation from Montana was not covered by RCW 9.41.040(2)’s prohibitions on firearm possession); RCW 9.41.040(3) (“Where no record of the court’s disposition of the charges can be found,

there shall be a rebuttable presumption that the person was not convicted of the charge.”).

Thus, in order to convict Mr. Duran Madrigal of a violation of RCW 9.41.040, the State must allege in the charging document, and there must be a factual basis of, something more than the fact that the defendant simply had a prior felony conviction in the distant past and that he lost the right to possess firearms at that time. Rather, the State must allege in the information and there must be a factual basis that at the time of the offense in 2007, Mr. Duran Madrigal was ineligible to possess a firearm under all subsections of RCW 9.41.040 – including the exceptions to the general prohibitions contained in subsections (3) and (4). It is the State’s burden of proof to show that, at the time of the alleged possession, Mr. Duran Madrigal was barred from possessing a firearm under the statute, not simply that he once was barred from possessing firearms.

As noted in the opening brief (at p. 26), Mr. Duran Madrigal’s only prior felony conviction was in 1997 and thus he would have been eligible, under RCW 9.41.040(4), to restore his firearm rights. It was the State’s burden of proof to show that he had not done so (and this burden of proof

should be reflected in the elements of the offense listed in the information and in the factual basis for a plea of guilty).

Accordingly, for these reasons and the reasons set out in the opening brief, this Court should hold that there was no factual basis for the plea to a violation of RCW 9.41.040 and that the charging document was defective under U.S. Const. amends. 6 & 14; Wash. Const. art. 1, §§ 3 & 22.

**c. No Contact Order Violations**

The State argues that the Supreme Court overruled several decisions of the Court of Appeals in *State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005), and has now held that the validity of a no contact order is not an “element” of the crime that should be determined by the jury. Thus, the State argues, the factual basis did not have to include the authority under which the no contact orders issued, whether the orders had expired, and whether the defendant was the petitioner or the respondent. *Brief of Respondent* at 25-26.

*Miller*, however, did not overrule *City of Seattle v. Termain*, 124 Wn. App. 798, 805, 103 P.3d 209 (2004), where this Court held that the essential elements of violating a no contact order include reference to the

identity of the victim, to the underlying domestic violence order, and the facts of the crime.<sup>14</sup> Here, the bare-boned statement “I had contact with Mary Duran in violation of a court order,” CP 41, is simply not sufficient to set a factual basis for the charged crime.<sup>15</sup>

**d. VUCSA Violation**

The State suggests that Mr. Duran Madrigal pled guilty to a non-existent crime under *In re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984). Yet, there is no indication that Mr. Duran Madrigal entered into a *In re Barr* type of plea, there being no evidence that he entered into this agreement to accept the benefit of a plea bargain. *See State v. Zhao, supra* (record showed that defendant pled guilty to lesser offense for which there was no factual basis to avoid conviction for greater offense).

**e. Prejudice**

The State relies on language from *State v. Ridgley*, 28 Wn. App. 351, 623 P.2d 717 (1981), to argue that a mere violation of CrR 4.2,

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<sup>14</sup> *Miller* does not survive an analysis under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2431, 159 L.Ed.2d 403 (2004), and the U.S. Supreme Court’s holding that the Sixth Amendment requires jury determinations on contested facts rather than a judge’s “legal ruling” outside the presence of the jury about key issues in the case.

<sup>15</sup> CP 10’s recitation that includes the fact the order was issued pursuant to RCW 10.99 is only marginally better, although even this statement does not indicate that the order prohibited contact with Ms. Duran (just that she was the “named individual” in the order).

without more, does not constitute a “manifest injustice.” *Brief of Respondent* at 26-27. However, in a later case, *State v. Perez*, 33 Wn. App. 258, 654 P.2d 708 (1983), the Court of Appeals held that, in contrast to *Ridgley*, criminal rules were not made to be broken or ignored, and that the failure to comply with CrR 4.2’s dictates “standing alone, will be grounds for withdrawal of a plea.” 33 Wn. App. at 263. The fact that Mr. Duran Madrigal was represented by counsel and pled guilty pursuant to a plea agreement is not significant – the same could be said for almost all cases.

In any case, Mr. Duran Madrigal has been prejudiced – he was convicted of multiple offenses and his life can be ruined as a result. It is callous for the State to claim “lack of prejudice” when it does not have to suffer the practical effects of the convictions.

**4. *The Maximum for Attempted Possession of Cocaine was Five Years in Prison***

The State mischaracterizes the issue in this case as one of equal protection – whether the State must charge under the specific (RCW 69.50.407), rather than the general (RCW 9A.28.020), statute. *Brief of Respondent* at 32-33. This is not the issue.

Rather, the issue is where a defendant was originally charged with VUCSA under RCW 69.50.4013, CP 1-2, and pled guilty simply to “attempt to possess” cocaine under the same statutory section, CP 12-13, what is the legal maximum? The cases cited in the opening brief make it clear that attempted possession of cocaine in this state is only chargeable under RCW 69.50.407 (with its five year maximum) and cannot be charged under the general attempt statute in RCW 9A. See *Opening Brief of Appellant* at 37-38.

*State v. Moten*, 95 Wn. App. 927, 976 P.2d 1286 (1999), has no bearing on this case. There, the defendant pled guilty to one count of criminal solicitation of VUCSA and was sentenced for a violation of RCW 9A.28.030, rather than for a violation of RCW 69.50.401. He argued that he should have been sentenced as if the offense was an unranked crime as were attempted VUCSA or conspiracy to commit VUCSA under RCW 69.50.407. 95 Wn. App. at 929-30. The Court of Appeals rejected this argument because Mr. Moten agreed to plead guilty to criminal solicitation under RCW 9A.28.030, he did not commit the crimes of attempted VUCSA or conspiracy to commit VUCSA, and waived his right to appeal the imposition of a standard range sentence. *Id.*

In contrast, Mr. Duran Madrigal did not plead guilty to solicitation and waived his right to appeal. He was charged under RCW 69.50 and pled guilty to attempted possession under RCW 69.50, a crime that has a five year maximum under RCW 69.50.407. Because this is a direct appeal (and not a collateral attack), misinforming Mr. Duran Madrigal of the maximum sentence not only violates due process under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3, but is presumed prejudicial. *In re Stockwell*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (No. 37230-4-II, April 19, 2011) (misadvice about maximum sentence would be grounds for reversal on direct appeal, but not in PRP).

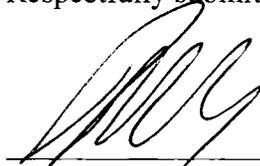
The conviction for “attempted” VUCSA should be reversed and the guilty plea withdrawn.

C. **CONCLUSION**

For the foregoing reasons, and the reasons set out in the opening brief, this Court should reverse the convictions.

DATED this 3 day of May 2011.

Respectfully submitted,



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NEIL M. FOX  
WSBA NO. 15277  
Attorney for Appellant

## STATUTORY APPENDIX

Local King County Rule 0.11 provides:

The Presiding Judge, with the advice of the relevant standing committees, shall be responsible for the selection of pro tem judges and pro tem commissioners and shall ensure that such pro tem judges and pro tem commissioners are properly trained.

Pro tem judges and pro tem commissioners:

(1) Serve at the pleasure of the Presiding Judge and Executive Committee. A pro tem judge or pro tem commissioner shall work fewer than nine hundred ten (910) hours in a calendar year, except for Term Limited appointments. The pro tem judge, or pro tem commissioner, or the Court may terminate an appointment as pro tem judge or pro tem commissioner at any time without cause or prior notice.

(2) Are not subject to the Court personnel rules or any other employee handbook except for policies that *explicitly apply* to pro tem judges and pro tem commissioners.

(3) Are not eligible for leave, overtime pay, medical or retirement benefits or any other employment-related benefits.

(4) May be required to attend training pertaining to the particular services being provided. Attendance at a Court-required training is mandatory and a condition of continued placement as a pro tem judge or pro tem commissioner.

(b) *Assignments*. The Court has the discretion to make calendar assignments and to change assignments.

CrR 4.2.(d) provides:

**(d)Voluntariness.** The court shall not accept a plea of guilty without first determining that it is made voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

RAP 2.5 provides in part:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. . .

RCW 2.08.180 provides in part:

A case in the superior court of any county may be tried by a judge pro tempore, who must be either: (1) A member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the case; or (2) pursuant to supreme court rule, any sitting elected judge. Any action in the trial of such cause shall have the same effect as if it was made by a judge of such court. However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement.

A judge pro tempore shall, before entering upon his or her duties in any cause, take and subscribe the following oath or affirmation:

"I do solemnly swear (or affirm, as the case may be,) that I will support the Constitution of the United States and the Constitution of the State of Washington, and that I will faithfully discharge the duties of the office of judge pro tempore in the cause wherein . . . . . is plaintiff and . . . . . defendant, according to the best of my ability." . . . .

RCW 2.24.040 provides:

Such court commissioner shall have power, authority, and jurisdiction, concurrent with the superior court and the judge thereof, in the following particulars:

(1) To hear and determine all matters in probate, to make and issue all proper orders therein, and to issue citations in all cases where same are authorized by the probate statutes of this state.

(2) To grant and enter defaults and enter judgment thereon.

(3) To issue temporary restraining orders and temporary injunctions, and to fix and approve bonds thereon.

(4) To act as referee in all matters and actions referred to him or her by the superior court as such, with all the powers now conferred upon referees by law.

(5) To hear and determine all proceedings supplemental to execution, with all the powers conferred upon the judge of the superior court in such matters.

(6) To hear and determine all petitions for the adoption of children and for the dissolution of incorporations.

(7) To hear and determine all applications for the commitment of any person to the hospital for the insane,

with all the powers of the superior court in such matters:  
PROVIDED, That in cases where a jury is demanded, same shall be referred to the superior court for trial.

(8) To hear and determine all complaints for the commitments of minors with all powers conferred upon the superior court in such matters.

(9) To hear and determine ex parte and uncontested civil matters of any nature.

(10) To grant adjournments, administer oaths, preserve order, compel attendance of witnesses, and to punish for contempts in the refusal to obey or the neglect of the court commissioner's lawful orders made in any matter before the court commissioner as fully as the judge of the superior court.

(11) To take acknowledgments and proofs of deeds, mortgages and all other instruments requiring acknowledgment under the laws of this state, and to take affidavits and depositions in all cases.

(12) To provide an official seal, upon which shall be engraved the words "Court Commissioner," and the name of the county for which he or she may be appointed, and to authenticate his official acts therewith in all cases where same is necessary.

(13) To charge and collect, for his or her own use, the same fees for the official performance of official acts mentioned in subsections (4) and (11) of this section as are provided by law for referees and notaries public.

(14) To hear and determine small claims appeals as provided in chapter 12.36 RCW.

(15) In adult criminal cases, to preside over

arraignments, preliminary appearances, initial extradition hearings, and noncompliance proceedings pursuant to RCW 9.94A.6333 or 9.94B.040; accept pleas if authorized by local court rules; appoint counsel; make determinations of probable cause; set, amend, and review conditions of pretrial release; set bail; set trial and hearing dates; authorize continuances; and accept waivers of the right to speedy trial.

RCW 9.41.040 provides:

(1) (a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

(b) Unlawful possession of a firearm in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

(2) (a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm:

(i) After having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section, or any of the following crimes when committed by one family or household member against another, committed on or after July 1, 1993: Assault in the fourth degree, coercion,

stalking, reckless endangerment, criminal trespass in the first degree, or violation of the provisions of a protection order or no-contact order restraining the person or excluding the person from a residence (RCW 26.50.060, 26.50.070, 26.50.130, or 10.99.040);

(ii) After having previously been involuntarily committed for mental health treatment under RCW 71.05.320, 71.34.090, chapter 10.77 RCW, or equivalent statutes of another jurisdiction, unless his or her right to possess a firearm has been restored as provided in RCW 9.41.047;

(iii) If the person is under eighteen years of age, except as provided in RCW 9.41.042; and/or

(iv) If the person is free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offense as defined in RCW 9.41.010.

(b) Unlawful possession of a firearm in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

(3) Notwithstanding RCW 9.41.047 or any other provisions of law, as used in this chapter, a person has been "convicted", whether in an adult court or adjudicated in a juvenile court, at such time as a plea of guilty has been accepted, or a verdict of guilty has been filed, notwithstanding the pendency of any future proceedings including but not limited to sentencing or disposition, post-trial or post-factfinding motions, and appeals. Conviction includes a dismissal entered after a period of probation, suspension or deferral of sentence, and also includes equivalent dispositions by courts in jurisdictions other than Washington state. A person shall not be precluded from possession of a firearm if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation,

or other equivalent procedure based on a finding of the rehabilitation of the person convicted or the conviction or disposition has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence. Where no record of the court's disposition of the charges can be found, there shall be a rebuttable presumption that the person was not convicted of the charge.

(4) Notwithstanding subsection (1) or (2) of this section, a person convicted or found not guilty by reason of insanity of an offense prohibiting the possession of a firearm under this section other than murder, manslaughter, robbery, rape, indecent liberties, arson, assault, kidnapping, extortion, burglary, or violations with respect to controlled substances under RCW 69.50.401 and 69.50.410, who received a probationary sentence under RCW 9.95.200, and who received a dismissal of the charge under RCW 9.95.240, shall not be precluded from possession of a firearm as a result of the conviction or finding of not guilty by reason of insanity. Notwithstanding any other provisions of this section, if a person is prohibited from possession of a firearm under subsection (1) or (2) of this section and has not previously been convicted or found not guilty by reason of insanity of a sex offense prohibiting firearm ownership under subsection (1) or (2) of this section and/or any felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, the individual may petition a court of record to have his or her right to possess a firearm restored:

(a) Under RCW 9.41.047; and/or

(b) (i) If the conviction or finding of not guilty by reason of insanity was for a felony offense, after five or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony

convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525; or

(ii) If the conviction or finding of not guilty by reason of insanity was for a nonfelony offense, after three or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525 and the individual has completed all conditions of the sentence.

(5) In addition to any other penalty provided for by law, if a person under the age of eighteen years is found by a court to have possessed a firearm in a vehicle in violation of subsection (1) or (2) of this section or to have committed an offense while armed with a firearm during which offense a motor vehicle served an integral function, the court shall notify the department of licensing within twenty-four hours and the person's privilege to drive shall be revoked under RCW 46.20.265.

(6) Nothing in chapter 129, Laws of 1995 shall ever be construed or interpreted as preventing an offender from being charged and subsequently convicted for the separate felony crimes of theft of a firearm or possession of a stolen firearm, or both, in addition to being charged and subsequently convicted under this section for unlawful possession of a firearm in the first or second degree. Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.

(7) Each firearm unlawfully possessed under this section shall be a separate offense.

RCW 69.50.407 provides:

Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Wash. Const. art. 4, § 5, provides:

**Superior Court – Election of Judges, Terms Of, etc.** There shall be in each of the organized counties of this state a superior court for which at least one judge shall be elected by the qualified electors of the county at the general state election: Provided, That until otherwise directed by the legislature one judge only shall be elected for the counties of Spokane and Stevens; one judge for the county of Whitman; one judge for the counties of Lincoln, Okanogan, Douglas and Adams; one judge for the counties of Walla Walla and Franklin; one judge for the counties of Columbia, Garfield and Asotin; one judge for the counties of Kittitas, Yakima and Klickitat; one judge for the counties of Clarke, Skamania, Pacific, Cowlitz and Wahkiakum; one judge for the counties of Thurston, Chehalis, Mason and Lewis; one judge for the county of Pierce; one judge for the county of King; one judge for the counties of Jefferson, Island, Kitsap, San Juan and Clallam; and one judge for the counties of Whatcom, Skagit and Snohomish. In any county where there shall be more than one superior judge, there may be as many sessions of the superior court at the same time as there are judges thereof, and whenever the governor shall direct a superior judge to hold court in any county other than that for which he has

been elected, there may be as many sessions of the superior court in said county at the same time as there are judges therein or assigned to duty therein by the governor, and the business of the court shall be so distributed and assigned by law or in the absence of legislation therefor, by such rules and orders of court as shall best promote and secure the convenient and expeditious transaction thereof. The judgments, decrees, orders and proceedings of any session of the superior court held by any one or more of the judges of such court shall be equally effectual as if all the judges of said court presided at such session. The first superior judges elected under this Constitution shall hold their offices for the period of three years, and until their successors shall be elected and qualified, and thereafter the term of office of all superior judges in this state shall be for four years from the second Monday in January next succeeding their election and until their successors are elected and qualified. The first election of judges of the superior court shall be at the election held for the adoption of this Constitution. If a vacancy occurs in the office of judge of the superior court, the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall be at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term.

Wash. Const. art. 4, § 7 provides:

**Exchange of Judges – Judges Pro Tempore.** The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his or her duty to do so. A case in the superior court may be tried by a judge pro tempore either with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the

judge pro tempore is a sitting elected judge and is acting as a judge pro tempore pursuant to supreme court rule. The supreme court rule must require assignments of judges pro tempore based on the judges' experience and must provide for the right, exercisable once during a case, to a change of judge pro tempore. Such right shall be in addition to any other right provided by law. However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement.

Wash. Const. art. 4, § 15 provides:

**Ineligibility of Judges.** The judges of the supreme court and the judges of the superior court shall be ineligible to any other office or public employment than a judicial office, or employment, during the term for which they shall have been elected.

Wash. Const. art. 4, § 19 provides:

**Judges May Not Practice Law.** No judge of a court of record shall practice law in any court of this state during his continuance in office.

Wash. Const. art. 4, § 23 provides:

There may be appointed in each county, by the judge of the superior court having jurisdiction therein, one or more court commissioners, not exceeding three in number, who shall have authority to perform like duties as a judge of the superior court at chambers, subject to revision by such judge, to take depositions and to perform such other business connected with the administration of justice as may be prescribed by law

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

STATE OF WASHINGTON,

Respondent,

v.

GERMAN DURAN MADRIGAL,

aka German Madrigal Duran

Appellant.

NO. 65396-2-I

CERTIFICATION OF SERVICE

I certify that on the 3<sup>rd</sup> day of May 2011, I served a copy of the REPLY BRIEF OF APPELLANT by depositing a copy in United States Mail, with proper first class postage attached addressed to:

Dennis McCurdy  
King County Prosecutors  
516 3<sup>rd</sup> Ave. # W554  
Seattle WA 98104-2390

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

5-3-2011 - SEATTLE, WA  
DATE AND PLACE

Alex Fast  
ALEXANDRA FAST