No. 58336-1-I

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

CITY OF SEATTLE,

Appellant,

v.

JESUS QUEZADA,

Respondent.

BRIEF *AMICUS CURIAE*

OF

WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

Amici Curiae Washington Association of Criminal Defense Lawyers ("WACDL") submit this Brief of Amici Curiae in support of Defendant-Respondent Jesus Quezada for the Court's consideration in this matter, pursuant to RAP 10.6.

WACDL is a nonprofit organization dedicated to improving the quality and administration of justice, and protecting and insuring by rule of law those individual rights guaranteed by the Washington and Federal Constitutions in order to promote justice and the common good of the citizens of Washington and the United States. In particular, WACDL is committed to the proper and fair administration of criminal sentencing statutes which is directly affected by this case.

II. STATEMENT OF THE CASE

In 2001, Jesus Quezada was arrested for, and pled guilty to, a DUI. In 2002, Mr. Quezada was arrested for a second DUI. He entered into a deferred prosecution on this charge. In 2005 Mr. Quezada was again arrested for DUI, and subsequently found guilty of reckless driving. Mr. Quezada's subsequent conviction for reckless driving resulted in the revocation of his deferred prosecution and a finding of guilt for DUI.

The Municipal Court found that only the 2001 offense constituted a prior offense for purposes of the mandatory minimum sentencing

enhancements under RCW 46.62.5055. The City appealed, arguing that both the prior 2001 DUI and subsequent 2005 reckless driving convictions should be counted as prior offenses under the Statute. The Superior Court also rejected the City's argument.

To qualify as a "prior offense" under RCW 46.61.5055, the arrest for a particular offense must have occurred before the arrest for the offense being sentenced. In particular, to qualify as a "prior offense" for purposes of sentencing a revoked deferred prosecution, the arrest for a particular disposition must have occurred before the arrest resulting in the deferred prosecution. Accordingly, the only "prior offense" for purposes of sentencing Mr. Quezada's revoked deferred prosecution was the DUI resulting from the 2001 arrest. The decisions of the Municipal and Superior Courts to this effect should be upheld.

III. ARGUMENT

A. TO QUALIFY AS A "PRIOR OFFENSE" UNDER RCW 46.61.5055, THE ARREST FOR A PARTICULAR OFFENSE MUST PREDATE THE ARREST FOR THE OFFENSE BEING SENTENCED.

RCW 46.61.5055 sets forth the penalties for a conviction under RCW 46.61.502. RCW 46.61.5055. Prior to entering a sentence for violation of RCW 46.61.502, the Court must "verify the defendant's criminal history…current to within…[o]ne working day." RCW

46.61.513. "[T]he criminal history shall include all previous convictions and orders of deferred prosecution." *Id.* (*emphasis added*). "A person who is convicted of a violation of RCW 46.61.502…and who has [one] or more prior offenses within seven years" is subject to an enhanced mandatory minimum sentence. RCW 46.61.5055(2)-(3)(*emphasis added*); *City of Walla Walla v. Greene*, 154 Wn.2d 722, 724 (2005).

RCW 46.61.5055 specifically sets forth those dispositions that may be treated as a "prior offense" for sentencing purposes.[1] RCW 46.61.5055(12)(a). In doing so, "the statute specifies the prior [dispositions] being applied to impose an enhanced punishment for a later offense." *Greene* at 727 (*emphasis added*). Where one of these "prior offenses" has been committed, a "sentence enhancement for a subsequent offense [becomes] a possibility." *City of Richland v. Michel*, 89 Wn.App.

[1] A "prior offense" includes 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."

764, 770 (1998)(*emphasis added*). Thus, *looking forward*, one of the designated dispositions may count as "a prior offense in subsequent DUI offenses." *City of Kent v. Jenkins*, 99 Wn.App. 287, 291 (2000). (*emphasis added*).

Looking backwards, "RCW 46.61.5055…limits prior offenses to those within the last seven years for purposes of punishing a DUI offense." *State v. Holgren*, 106 Wn.App. 477, 482 (2001)(*emphasis added*). That is, for the enhanced mandatory minimums of RCW 46.61.5055 to apply, an individual must have "had a prior offense within the previous seven years." *City of Yakima v. Skov*, 129 Wn.App. 91, 93 (2005)(*emphasis added*).

Combining these perspectives we see that where a "prior offense" occurred "within the previous seven years, [of] a new DUI…[the] penalty for the new DUI [will] be more severe than it would have been had the new DUI been [the] first offense." *City of Bremerton v. Tucker*, 126 Wn.App. 26, 30-3 (2005)(*emphasis added*). In other words, RCW 46.61.5055 increases "the penalty for a second DUI where a defendant has previously [committed one of the designated prior offenses]." *Id*. at 30 (*emphasis added*). Thus, given its' "plain" and "ordinary meaning",[2] a

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[2] "Undefined statutory terms are given their usual and ordinary meaning." *State v. Hahn*, 83 Wn.App. 825, 832 (1996). "Plain words do not require construction." *Jenkins* at 290.

"prior offense" under RCW 46.61.5055 consists of one of the statutorily designated dispositions when it "precedes in time or order"[3] the offense being sentenced.[4]

This is crucial for the question under consideration. By itself, however, it is not enough to dispose of the issue. One more piece of information is required. We need to know what events are being referred to in the command that one "precede in time or order" the other.

Under the sentencing statute, "'[w]ithin seven years' means that the <u>arrest</u> for a prior offense occurred within seven years of the <u>arrest</u> for the current offense." RCW 46.61.5055(12)(b)(*emphasis added*). This specifically defines the relevant "seven year" period as being based upon dates of arrest and not dates of sentencing or conviction. *State v. Bays*, 90 Wn.App. 731, 737 (1998). Accordingly, the plain language of the statute mandates that dates of arrest be utilized as the metric by which a "seven year" period will be determined.[5] *Id.*

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[3] "Prior" is defined as "preceding in time or order." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 1395 (4th ed. 2000). "When a term is not defined in the statute, courts may look to the ordinary dictionary meaning." *Hahn* at 832.

[4] Logically speaking, the conclusion just arrived at is obviously true as a semantic tautology. It simply says that to be considered a "prior offense" an offense must "precede in time or order" a "later" offense it is "prior" to.

[5] The Court is "duty-bound to give meaning to every word that the Legislature chose to include in a statute and to avoid rendering any language superfluous." *State v. Chester*, 82 Wn.App. 422, 426 (1996). Accordingly, "language of a statute which is explicit and unequivocal" must be given effect. *In re Phillips' Estate*, 193 Wn. 194, 200 (1938). "If a statute is unambiguous, then its meaning must be derived from the statutory language

From this it follows that a disposition is a "prior offense within seven years" if, and only if, it is one of the statutorily designated dispositions and has an arrest date that falls within the seven years preceding the arrest date of the crime being sentenced. That is, to qualify as a "prior offense" under RCW 46.61.5055, the arrest for a particular offense must have occurred before the arrest for the offense being sentenced.

With this in mind, and putting everything discussed so far together, the following is required in sentencing an individual for violation of RCW 46.61.502:

1) The Court must verify "all [a defendant's] previous convictions and orders of deferred prosecution." RCW 46.61.513.

2) The Court must identify which "previous convictions and orders of deferred prosecution" fall into the category of dispositions that may be considered as "prior offenses." RCW 46.61.5055(12)(a).

3) The Court must establish the date of arrest for each potential "prior offense" as well as for the offense being sentenced. RCW 46.61.5055(12)(b).

4) The Court must determine if the arrest dates of any of those potential "prior offenses" is within the seven years preceding the date of arrest for the offense being sentenced. RCW 46.61.5055(12)(a)-(b); *Holgren* at 482; *Tucker* at 30; *Skov* at 93.

5) Those offenses with arrest dates within the seven years preceding the arrest for the offense being sentenced are "prior offenses."

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alone." *State v. Kuhn*, 74 Wn.App. 787, 790-1 (1994). "[C]ourts may not read into a statute a meaning that is not there." *Hahn* at 832.

RCW 46.61.5055(12)(a)-(b); *Greene* at 727; *Holgren* at 482; *Tucker* at 30; *Skov* at 93.

6) "Prior offenses" are limited to those offenses with arrest dates within the last seven years preceding the arrest for the offense being sentenced. *Holgren* at 482; *Tucker* at 30; *Skov* at 93.

7) Those offenses with arrest dates after the date of arrest for the offense being sentenced are "later offenses" for which the offense being sentenced will count as a "prior offense." RCW 46.61.5055(12)(a)-(b); *Greene* at 727; *Holgren* at 482; *Tucker* at 30; *Skov* at 93.

These principles and procedures govern the determination of the mandatory minimum penalties that may be imposed under RCW 46.61.5055. Moreover, their application is fairly straight forward. Once the sentencing court has identified the statutorily designated dispositions and their arrest dates, it can easily determine which qualify as "prior offenses."

B. TO QUALIFY AS A "PRIOR OFFENSE" FOR PURPOSES OF SENTENCING A REVOKED DEFERRED PROSECUTION UNDER RCW 46.61.5055, THE ARREST FOR A PARTICULAR DISPOSITION MUST PREDATE THE ARREST RESULTING IN THE DEFERRED PROSECUTION.

A citizen charged with DUI may petition a court for a Deferred Prosecution ("DP") under RCW 10.05 if that individual has never before received a DP. RCW 10.05.010; RCW 10.05.015. If the individual successfully complies with the requirements of the DP, "the court shall dismiss the charges pending against the petitioner." RCW 10.05.120. On

the other hand, if an individual "is subsequently convicted of a similar offense" while on a DP, the court shall revoke the DP and enter judgment." RCW 10.05.100; *State v. Kuhn*, 74 Wn.App. 787, 791 (1994). Such judgment may include a finding of guilt to the underlying charge of DUI. *State v. Shattuck*, 55 Wn.App. 131, 134 (1989).

"The definition of 'prior offense' under RCW 46.61.5055 includes…deferred prosecution(s) related to driving under the influence." *State v. Teitzel*, 109 Wn.App. 791, 793 (2002). In this context, the Statute "treats those who [enter a deferred prosecution] and <u>then</u> reoffend…the same as those who are convicted of a DUI and <u>later</u> reoffend." *Michel* at 772 (*emphasis added*). Accordingly, if after entering a DP an individual "drove again while under the influence, his penalty for the <u>new</u> DUI would be more severe." *Tucker* at 33 (*emphasis added*). RCW 46.61.5055 "increase[es] the penalty for a <u>second</u> DUI where a defendant has <u>previously</u> admitted to having committed a <u>prior</u> DUI under a deferred prosecution." *Tucker* at 33-4 (*emphasis added*).

Whether or not an individual successfully completes a DP does not change this conclusion. *Jenkins* at 290-1; *Tucker* at 34; Cf., *Hahn* at 832-4. The statute treats a DP identically, whether it has been "granted and dismissed" or "granted but not yet dismissed." *Jenkins* at 290-1; *Tucker* at 33-4. Accordingly, to qualify as a "prior offense" for purposes of

sentencing a revoked DP, the arrest for a particular disposition must have occurred before the arrest resulting in the DP.

C. THE CONSTITUTIONALITY OF RCW 46.61.5055 WAS DEPENDANT UPON THE FACT THAT UNDER ITS PROVISIONS NEW CHARGES DO NOT INCREASE PUNISHMENT FOR PAST ACTS.

In *Michel*, the Court sustained the constitutionality of RCW 46.61.5055 based on the fact that, under its provisions, offenses committed earlier in time were not enhanced by later offenses. There, the defendant:

> was first arrested in January 1992 for DUI…[an] order granting his petition for deferred prosecution was entered in April of that year. After successful completion of the treatment prescribed in the deferred prosecution, his charge was dismissed in April 1994…On September 13, 1995, two weeks after RCW 46.61.5055 went into effect, Mr. Michel was arrested for a new DUI offense. His alcohol concentration was determined to be 0.18 at the time of arrest. He pleaded guilty in district court in November. Taking into consideration the deferred prosecution for the offense committed less than five years before, the court sentenced him to 45 days in jail, the minimum under RCW 46.61.5055 [at that time].

Michel at 767-8.

The defendant "challenge[d] RCW 46.61.5055 as a violation of the ex post facto laws [contending that] the statute permit[ed] a more severe punishment than was permissible when he was first arrested for DUI in 1992." *Michel* at 773. Just as now, the statute determined "prior offenses" based on dates of arrest. Former RCW 46.61.5055(7)(b). As a

result, the Court was able to rely on dates of arrest in its analysis to determine whether the statute had retroactive effect. *Michel* at 767-8; 773.

The Court rejected the defendant's *ex post facto* argument concluding that "RCW 46.61.5055 does not increase or enhance punishment for a crime committed before the effective date of the statute. It applies prospectively only to crimes committed after September 1, 1995." *Michel* at 773 (*emphasis added*).

For this conclusion to be true, however, the effects of RCW 46.61.5055 in a particular case must not accrue to past actions. If they did, the Statute would have the effect of "increasing or enhancing punishment for crimes committed before its effective date" and would have done so for at least five years.[6] This would have rendered it retroactive and in violation of *ex post facto* prohibitions.[7]

Conversely, to be strictly prospective, the statutory enhancements can only apply to each new offense, as it is committed. While the

[6] At the time of the *Michel* decision, RCW 46.61.5055 applied to "prior offenses within 5 years." Accordingly, if the statute were able to "increase or enhance punishment for crimes committed before its effective date," it would have continued to do so for 5 years. Only after 5 years had passed would "crimes committed before its effective date" be beyond its reach.

[7] An ex post facto law refers to certain retroactively applied criminal laws including "[e]very law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed." *Carmell v. Texas*, 529 U.S. 513, 522, 120 S.Ct. 1620 (2000)(*quoting*, *Calder v. Bull*, 3 U.S. 386, 390 (1798)); see also, *State v. Edwards*, 104 Wn.2d 63, 70-1 (1985).

sentences levied may be graduated based upon past actions, the Statute must place no enhanced sanctions on those past actions as the result of later offenses. Thus, to have complied with *ex post facto* constraints, the Statute must ensure that "new charges [do] not increase punishment for past acts." *State v. Sell*, 110 Wn.App. 741, 748 (2002).

This is the same conclusion arrived at based upon the plain language of the statute. Accordingly, a disposition is a "prior offense" under RCW 46.61.5055 if, and only if, its arrest date "precedes in time or order" the arrest date of the offense being sentenced.

D. THE ONLY "PRIOR OFFENSE" UNDER RCW 46.61.5055 FOR PURPOSES OF SENTENCING MR. QUEZADA'S REVOKED DEFERRED PROSECUTION WAS THE DUI CONVICTION RESULTING FROM HIS 2001 ARREST.

We can now apply these principles to the facts of this case. In 2001, Jesus Quezada was arrested for, and pled guilty to, a DUI. Under RCW 46.61.5055, that was his first offense. In 2002, Mr. Quezada was arrested for a second DUI. Instead of fighting or pleaing to the charge, however, he chose to enter a DP in Seattle Municipal Court. Upon entering into the DP, that disposition became a "prior offense" measured from the point of arrest for the underlying charge. RCW 46.61.5055(12)(a)(vii). This was his second offense. In 2005, Mr. Quezada was again arrested for DUI, this being his third arrest for DUI.

The charge was amended down to reckless driving and Mr. Quezada pled guilty. For purposes of a subsequent DUI, this constituted a third offense under RCW 46.61.5055. RCW 46.61.5055(12)(a)(vii).

Mr. Quezada's subsequent conviction for reckless driving resulted in the revocation of his DP and a finding of guilt for DUI. As discussed above, at his sentencing on the revocation, the Court was first required to verify all of his previous convictions and orders of deferred prosecution. This included the incidents described above. The Court was then required to identify all "convictions and orders of deferred prosecution" which fell into the category of dispositions that could be considered as "prior offenses." This consisted solely of the incidents listed above. At that point, the correct procedure was for the judge to determine the arrest dates for each of these offenses. We have a 2001 arrest date for the first DUI conviction, a 2003 arrest date for the revoked DP, and a 2005 arrest date for the reckless driving conviction.

The only potential "prior offense" with an arrest date preceding that of the 2003 DP is the 2001 DUI. According to the principles enunciated above, then, the 2001 DUI is a "prior offense" under RCW 46.61.5055. By those same principles, however, it is the only "prior offense." Because the 2005 arrest occurred after the arrest resulting in the DP, the conviction based thereon is a "later offense" which does not count

towards any enhanced mandatory minimum penalties on the revoked DP.

While the record is not clear as to whether this was the thought process the sentencing judge actually engaged in, it is clear that he arrived at the same conclusion: the only "prior offense" for purposes of sentencing the revoked DP was the DUI resulting from the 2001 arrest. As should be clear by now, this was the correct conclusion.[8]

E. THE STATE'S ARGUMENT THAT TWO DISPOSITIONS CAN EACH BE CONSIDERED PRIOR TO THE OTHER UNDER RCW 46.61.5055 IS NOT SUPPORTED BY LAW, POLICY OR FACT.

1. Neither Consideration Of The SRA Nor Washouts Under Its Provisions Is Appropriate. – The City attempts to overcome the above conclusions by analogy to the SRA claiming that a DP "washes out" after 7 years. Both the analogy and the claim have decisively been rejected by Washington Courts.

The SRA does not apply to a DUI sentenced under RCW 46.61.5055. *City of Bremerton v. Bradshaw*, 121 Wn.App. 410, 413 (2004). Moreover, any comparison between the SRA and RCW

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[8] Under the City's scheme, the 2003 DP would have correctly been counted as a "prior offense" for purposes of sentencing had the 2005 arrest resulted in a conviction for DUI. According to the City, however, the 2005 reckless driving conviction should also count as a "prior offense" for purposes of sentencing on the revoked DP. "To hold [as the City suggests] would be illogical [however] because...each offense would be treated as a prior [offense] to the other." *State v. Whitaker*, 112 Wn.2d 341, 346 (1989). "The statute was not meant to be interpreted to bring about this 'absurd' result." Cf., *State v. Booze*, 712 P.2d 1253, 1257 (Kan. 1986)(addressing a similar question under Kansas' DUI diversion statute).

46.61.5055 for sentencing purposes "is of very limited utility." *Wahleithner v. Thompson*, 134 Wn.App. 931, 941 (2006). This is especially so where the sentence for a revoked DP is being considered as the SRA does not permit such a disposition. *Id*. at 941. "[B]oth the purposes and effects of deferred prosecutions differ from convictions" under the SRA, making any consideration of the SRA "inapposite." *Jenkins* at 290; *Bays* at 737.

Moreover, "a deferred prosecution does not wash out." *Sell* at 746-7. Thus, "a record of a DUI charge and deferred prosecution is not analogous to a prior conviction [under the SRA], washed out or otherwise." *Jenkins* at 289; *State v. Preuett*, 116 Wn.App. 746, 751 (2003).

2. The City's Tragedy Of Horrors Is Neither. – The City next marches out a tragedy of horrors so as to distract the Court from the plain and ordinary meaning of RCW 46.61.5055. First, it claims that the plain meaning of the statute would permit offenders to escape the punishment intended by the legislature because "state-wide statistics for DUI dispositions demonstrate that less than half of all DUI charges result in a conviction for DUI."

Examining those statistics, one sees that there were approximately

34,100 DUI charges in 2005.[9] Of those, approximately 4,100 were completely "dismissed…or the defendant was found not guilty of the charge."[10] This constitutes just over 12% of the total. It will be presumed that the City understands the presumption of innocence requiring that each of these individuals be presumed not to have committed the charge of DUI with which they were charged.[11] Accordingly, it is unlikely that the City is decrying the fact that any of these individuals will escape consequences for an accusation they are presumed to be innocent of.

Continuing examination reveals that 10,131 of charged DUIs resulted in deferred prosecutions.[12] This constitutes just over 30% of the total. Like a conviction, a DP is eligible for consideration as a "prior offense" the moment it is granted. *Jenkins* at 290-1. Accordingly, none of these individuals are escaping harsher penalties for a subsequent offense simply because they were not convicted of a DUI. Moreover, as we have

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[9] Official Washington Courts Website, *The Courts of Limited Jurisdiction Sentencing Report for DUI Charges Disposed, 2005* (visited 3/18/07) <http://www.courts.wa.gov/caseload/?fa=caseload.display_years&folderID=clj&subFolderID=dui&year=2005&fileID=duisent>.

[10] See, supra, n.7.

[11] The "presumption of innocence" is the "bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *In re Winship,* 397 U.S. 358, 363, 90 S.Ct. 1068 (1970) (quoting, *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394 (1895). Accordingly, "[e]very person charged with the commission of a crime shall be presumed innocent until the contrary is proved…beyond a reasonable doubt." RCW 10.58.020.

[12] See, supra, n.7.

seen, if the DP is revoked, the individual will have any appropriate "prior offenses" counted against him at sentencing.

It is true that if the individual successfully completes the DP he will not suffer any enhanced punitive measures in the context of that incident. The reason, though, is because the Legislature intended that no sentence be imposed if an individual successfully completes the DP. The Legislature meant for a DP to be an "alternative to punishment." *Abad v. Cozza*, 128 Wn.2d 575, 583 (1996). It "is *designed to encourage treatment* of *culpable* people whose conduct is caused by a treatable condition, like alcoholism. Such people are given an opportunity to avoid conviction if they successfully complete treatment." *Tucker* at 32. Thus, any consequences escaped by these individuals were purposefully meant to be avoided by the Legislature.

Taken together, these first two categories of non-conviction for those charged with DUI account for 42% of the total DUIs charged. And the consequences, or lack thereof, for those in each category are exactly as required and intended under the law.

Going back to the Court data, we find that another 11,647 of the charged DUIs were amended to either reckless or negligent driving

resulting in a conviction.[13] This is just over 34% of the total. Each of these constitutes a "prior offense" for purposes of a subsequent DUI. RCW 46.61.5055(12)(a)(v). Accordingly, none of these individuals are escaping harsher penalties for a subsequent offense simply because they were not convicted of a DUI. Moreover, as a result of the presumption of innocence, none should be viewed as escaping the proper consequences of their actions on the amended charge. If the government was unable or unwilling to prove each individual was guilty of DUI beyond a reasonable doubt, then each is presumed innocent of DUI and rightfully exempt from the sentencing scheme of RCW 46.61.5055.

Taken together, these three categories of non-conviction for those charged with DUI account for over 75% of the total DUIs charged. And the consequences, or lack thereof, for those in each category are exactly as required and intended under the law. The rest of the charged DUIs in this period resulted, in nearly equal numbers, either in convictions for DUI or "charges placed in, completed, or revoked from a prosecutor's deferral or diversion program."[14]

Given these numbers, it is difficult to understand the point of the City's argument. In all likelihood, it is nothing more than a lack of

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[13] See, supra, n.7.

[14] See, supra, n.7.

understanding of either the data presented or the meaning of the statistic the City put forward. In light of the analysis just engaged in, however, the Court need not labor under the same misconception.

The next reel cued up by the City has an individual pleading guilty, in reverse order, to three separate DUIs committed by the same individual in three consecutive months. Of course it's possible for such a situation to arise. It's also possible that Counsel for the City will win the lottery. But it's unlikely that Counsel is basing any significant decisions he has on such a possibility. Nor should the Court.

"If 'hard cases make bad law,' unusual cases surely have the potential to make even worse law." *Department of the Air Force v. Rose,* 425 U.S. 352, 382, 96 S.Ct. 1592 (1976)(Burger, C.J., dissenting). The situation described by the City is sufficiently unlikely that the mere possibility that it might occur does not justify the departure from the plain meaning of the statute that the City advances. Cf., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 n.29, 101 S.Ct. 2748 (1981); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514, 110 S.Ct. 2972 (1990).

Even if such circumstances were to arise, however, the City's position hides within it a false assumption. Just because the enhanced penalties for prior offenses are mandatory in the appropriate

circumstances, doesn't mean similar penalties are prohibited when not mandated by RCW 46.61.5055.

To the contrary, the Statute explicitly acknowledges the court's "discretion in setting penalties." RCW 46.61.5055(5). In fact, it gives judges "broad authority" and "flexibility" in determining what sentence to impose. *Wahleithner* at 939, 941. Under it, the court may impose jail in addition to the mandatory minimums up to a maximum of 1 year or, in the alternative, suspend any remaining "period of confinement for a period not exceeding five years." RCW 46.61.5055(9)(a). In the later context, "The court may impose conditions of probation…that may be appropriate [and t]he sentence may be imposed in whole or in part upon violation of a condition of probation during the suspension period." *Id.*

Thus, even if the situation anticipated by the City were to arise, the court is fully equipped to address it in the appropriate manner. Put simply, the plain and ordinary meaning of the Statute will not lead to the gaming of the system the City anticipates.

IV. CONCLUSION

To qualify as a "prior offense" under RCW 46.61.5055, the arrest for a particular offense must have occurred before the arrest for the offense being sentenced. In particular, to qualify as a "prior offense" for purposes of sentencing a revoked DP, the arrest for a particular disposition

must have occurred before the arrest resulting in the DP. Accordingly, the only "prior offense" for purposes of sentencing Mr. Quezada's revoked DP was the DUI resulting from the 2001 arrest. The decisions of the Municipal and Superior Courts to this effect should be upheld.

DATED this 18th day of March 2007.

Respectfully Submitted,

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