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A. SUMMARY OF ARGUMENT

Shawn Moul sought forgiveness from Tracy Lundeen through letters and e-mails. He was heartsick, but he never threatened to harm Tracy.¹ In fact, he promised never to harm her or her family and he never approached them. Nonetheless, he was convicted of two counts felony stalking without sufficient evidence showing Tracy or her sister, Jennifer, reasonably feared injury. Those convictions accordingly should be reversed.

In the alternative, the exceptional sentence should be reversed and remanded because the evidence does not support the jury's finding of an "egregious lack of remorse." Furthermore, the aggravating factor is unconstitutionally vague because it does not define the term or provide adequate standards to assess culpability.

B. ASSIGNMENTS OF ERROR

1. In the absence of sufficient evidence to establish beyond a reasonable doubt Jennifer Lundeen reasonably feared injury, the conviction for count one violates Mr. Moul's constitutional right to due process.

¹ Because the charges and evidence related to sisters Tracy Lundeen and Jennifer Lundeen, this brief uses the sisters' first names for the sake of clarity. No disrespect is intended.

2. In the absence of sufficient evidence to establish beyond a reasonable doubt Tracy Lundeen subjectively feared injury, the conviction for count two violates Mr. Moul's constitutional right to due process.

3. In the absence of sufficient evidence to establish beyond a reasonable doubt Tracy Lundeen reasonably feared injury, the conviction for count two violates Mr. Moul's constitutional right to due process.

4. RCW 9A.46.110 is overbroad in violation of Mr. Moul's constitutional right to free speech.

5. RCW 9A.46.110 is overbroad in violation of Mr. Moul's constitutional right to substantive due process.

6. In the absence of sufficient evidence that Mr. Moul demonstrated or displayed an egregious lack of remorse, the imposition of an exceptional sentence violated his constitutional right to due process.

7. As applied to Mr. Moul, RCW 9.94A.535(3)(q) is unconstitutionally vague in violation of the Due Process Clause.

8. The trial court exceeded its statutory authority in imposing a sentence that includes community custody as to count two.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The United States and Washington Constitutions require the State prove all essential elements of a charged offense beyond a reasonable doubt. The offense of felony stalking requires the State prove the person threatened subjectively felt fear that the stalker would physically injure her and that fear of injury must be objectively reasonable. Where the evidence failed to show Tracy Lundeen subjectively feared physical injury or that any fear by either Tracy or Jennifer Lundeen was reasonable, should the felony stalking convictions be reversed because the State failed to prove all elements of the crime beyond a reasonable doubt?

2. A statute is overbroad if it sweeps protected speech into its reach. Such a statute is unconstitutional unless the State demonstrates it survives stringent strict scrutiny review—it must be narrowly tailored to serve a compelling governmental interest. Is RCW 9A.46.110 unconstitutionally overbroad where Mr. Moul was convicted based on protected speech and the State cannot show that the statute is necessary and narrowly drawn to serve a compelling government interest?

3. Due process requires that the State prove an aggravating sentencing factor beyond a reasonable doubt. To prove an accused

demonstrated or displayed an egregious lack of remorse, the State must prove conduct beyond that which was contemplated by the legislature in setting the standard range for an offense. Where the State alleged Mr. Moul demonstrated an egregious lack of remorse when stalking the Lundeens, was the evidence insufficient where it encompassed only the repeated harassment contemplated as an element of stalking?

4. A penal statute which fails to set forth objective guidelines to guard against arbitrary application is vague and violates the Fourteenth Amendment's Due Process Clause. RCW 9.94A.535(3)(q) provides for aggravating circumstances based on an egregious lack of remorse but does not further define the terms or the conduct required to satisfy the factor. Is this aggravating factor unconstitutionally vague as applied to Mr. Moul?

5. The Sentencing Reform Act (SRA) is the sole source of a trial court's sentencing authority. RCW 9.94A.701(9) requires that, where the combined term of community custody and confinement exceed the statutory maximum for an offense, the court must reduce the term of community custody. The court imposed the maximum term of confinement for count two and also imposed community custody

without limiting the term to count one. Should this court remand the sentence to limit the provision of community custody to count one?

D. STATEMENT OF THE CASE

Shawn Moul met Tracy Lundeen in middle school. 6/30/11RP 51-52. She was kind to him and he appreciated it; but a short time later her kindness ran out. 6/30/11RP 52-55. Mr. Moul wrote letters and called her to apologize. 6/30/11RP 56-58; 7/6/11RP 139. Years later and despite Ms. Lundeen having received a permanent anti-harassment order against Mr. Moul, he continued to write letters to her, sometimes through her sister, Jennifer Lundeen. 6/30/11RP 59-63; 7/6/11RP 8-9, 12-13, 19-23, 33, 50, 71, 145; 7/7/11RP 13, 16.

Mr. Moul's conduct was limited to sending letters and e-mails, and initially making telephone calls. 7/6/11RP 28-29, 167. He never approached the Lundeens. 7/6/11RP 26-27, 29-30, 39, 158; 7/7/11RP 80. The content of the correspondence focused on apologies, pleas for help and forgiveness, and suicidal thoughts. 7/6/11RP 19-23, 51-61; 7/7/11RP 85; Exhibits 2-31. Mr. Moul never threatened to harm the Lundeen sisters or their families. 7/6/11RP 29-30, 40, 64-65, 123; 7/7/11RP 84-85; Exhibits 15, 20.

Mr. Moul was charged with two counts of stalking (RCW 9A.46.110) and 19 counts violation of an anti-harassment order (RCW 10.14.120). CP 169-77. Two aggravators were charged for each felony count. CP 169-71.

The jury convicted him of all counts and found an egregious lack of remorse as to count two (stalking of Tracy Lundeen). CP 143-67. Based on the aggravating factor, the court sentenced Mr. Moul to an exceptional sentence. CP 188-89, 191, 195.²

E. ARGUMENT

1. The convictions for counts one and two should be reversed because the State failed to prove the fear of injury element through sufficient evidence.

- a. The State must prove every element of the charged offense beyond a reasonable doubt.

A criminal defendant has the right to a jury trial and may only be convicted if the State 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, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

² Copies of the felony judgment and sentence, including the findings as to the exceptional sentence, as well as the non-felony judgment and sentence pertaining to the 19 misdemeanor counts are attached as Appendix A.

On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

- b. Fear of physical injury is an element of felony stalking that the State must prove beyond a reasonable doubt.

The State charged Mr. Moul with two counts stalking, one as to Tracy Lundeen and one as to her sister, Jennifer. CP 169-70. The stalking statute provides:

(1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:

(a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and

(b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and

(c) The stalker either:

(i) Intends to frighten, intimidate, or harass the person; or

(ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

RCW 9A.46.110.³

As the statutory language makes clear, the State must show that the person being harassed is placed in fear that the stalker intends to injure that person, another person or property and that the harassed person's subjective fear of injury is reasonable ("one that a reasonable person in the same situation would experience under all the circumstances"). RCW 9A.46.110(1)(b); *accord State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). In other words, the person threatened must subjectively feel fear of injury and that fear must be reasonable. *State v. E.J.Y.*, 113 Wn. App. 940, 952, 55 P.3d 673 (2002).

It is also clear that the feared injury must be physical. In interpreting the stalking statute, this Court's primary goal is to give effect to the intent of the legislature. *State v. Kintz*, 169 Wn.2d 537,

³ A copy of the full statute is attached as Appendix B. This Court interprets a statute de novo. *State v. Kintz*, 169 Wn.2d 537, 545, 238 P.3d 470 (2010).

547, 238 P.3d 470 (2010). “[A] court must not interpret a statute in any way that renders any portion meaningless or superfluous.” *Jongeward v. BNSF R. Co.*, __ Wn.2d __, 278 P.3d 157, 164 (2012). Further, a single word in a statute is not to be read in isolation; its meaning “may be indicated or controlled by those with which they are associated.” *Id.* (quoting *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005)).

The separate intended and repeated harassment element of the stalking statute encompasses emotional harm. *See* RCW 9A.46.110(1)(a); RCW 10.14.020. The stalking statute defines harassment as a “course of conduct . . . such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the [victim], or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.” RCW 9A.46.110(1)(a), (6)(c); RCW 10.14.020;⁴ *Kintz*, 169 Wn.2d at 546.⁵

Thus, the legislature must have intended a distinct, non-emotional injury when providing the second element, fear of injury.

⁴ A copy of RCW 10.14.020 is attached as Appendix C.

⁵ The jury was so instructed as to that element. CP 110.

See RCW 9A.46.110(1)(b). The fear of injury element thus refers to a non-emotional injury: a physical injury.

Further, this Court narrowly defines terms to avoid constitutional infirmity. *E.g.*, *State v. Lee*, 82 Wn. App. 298, 309, 917 P.2d 159 (1996), *aff'd* 135 Wn.2d 369, 957 P.2d 741 (1998). Fighting words and true threats are unprotected speech not entitled to First Amendment protection. *State v. Knowles*, 91 Wn. App. 367, 373, 957 P.2d 797, *review denied* 136 Wn.2d 1029 (1998). These forms of speech are unprotected because they are linked to physical harm. *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001); *State v. Stephenson*, 89 Wn. App. 794, 800-01, 950 P.2d 38 (1998). Absent a similar connection to physical harm, the stalking statute would be unconstitutional as overbroad. *See Williams*, 144 Wn.2d at 208 (holding harassment statute overbroad to the extent it applies to threats to mental health, not just physical health); *see also id.* at 209-10 (distinguishing true threats and fighting words from protected speech). Thus for this additional reason, the fear of injury element must be interpreted as fear of physical injury.

In sum, the subjective fear of injury element requires evidence establishing the victim's subjective fear of physical injury. *State v.*

Alvarez, 74 Wn. App. 250, 260, 872 P.2d 1123 (1994), *aff'd* 128 Wn.2d 1, 904 P.2d 754 (1995).

Under the reasonable fear of physical injury component, “the trier of fact [must] consider the defendant’s conduct in context and . . . sift out idle threats from threats that warrant the mobilization of penal sanctions.” *Alvarez*, 74 Wn. App. at 261.

- c. The State failed to prove fear of physical injury beyond a reasonable doubt.
 - i. The State failed to prove Tracy Lundeen subjectively feared physical injury.

The State failed to prove Tracy Lundeen subjectively feared Mr. Moul would perpetrate physical injury upon her or her family (count two).

The record is devoid of evidence that Tracy Lundeen subjectively feared physical injury. Tracy testified to a “bothersome” set of contact by telephone and letters, initially, and later by letters only. *E.g.*, 7/6/11RP 31-32. She was tired of Mr. Moul’s repeated efforts to contact her with the same apologies for what occurred in high

school. She wanted it to stop. 7/6/11RP 24, 31. But she never testified Mr. Moul's conduct or words placed her in fear of physical injury.⁶

On the contrary, Tracy explicitly testified she was not in fear of physical harm. Tracy testified Mr. Moul had been following her by mail, located his sister's address and workplace, knew Tracy's former worksite, threatened his own suicide and did not stop following her by mail despite a permanent no-contact order. *E.g.*, 7/6/11RP 27-28, 35. But he did not threaten or attempt to harm her or her family. 7/6/11RP 27, 29-30, 40; Exhibit 15 (explicitly states he will never hurt Tracy). She elaborated that she has not "had to come to [the] point" of being concerned Mr. Moul would hurt her or her family. 7/6/11RP 18. "I don't know what he would be capable of besides letters." 7/6/11RP 18. She was not concerned that Mr. Moul stated he was suicidal. 7/6/11RP 23, 31.

Finally, she testified that if Mr. Moul knew where she worked (which he did not), she would be concerned for her safety, but could not say what she thought might happen. 7/6/11RP 14-15. As to what "might happen" Tracy testified,

⁶ While Jennifer Lundeen testified that she believed Mr. Moul was capable of hurting her sister and might do so, no such evidence was presented as to Tracy's own subjective fear. *See* 7/6/11RP 47.

To be honest with you, I don't know. I mean, all it's ever been was letters. I mean, I don't know. Physically, would it have been verbally? I honestly don't know.

7/6/11RP 15; *accord* 7/6/11RP 29-30.

Tellingly, the safety plan she described having in place was aimed not at protecting her physical security but solely at avoiding continued receipt of Mr. Moul's constant letters. 7/6/11RP 11 (keeps address and phone number confidential so as not to "continue to still get the letters that he continues to write"). This is fitting because "[n]othing has ever happened beyond calls and letters and the e-mails." 7/6/11RP 28.

The record does not establish Tracy's subjective fear of physical injury beyond a reasonable doubt.

- ii. The State failed to prove any actual fear of injury was reasonable.

If subjective fear is demonstrated beyond a reasonable doubt, that fear is reasonable if a reasonable trier of fact could have found beyond a reasonable doubt that the victim's fear was reasonable using an objective standard. *Alvarez*, 74 Wn. App. at 260-61. "This is an important limiting element in the statute, requiring the trier of fact to consider the defendant's conduct in context and to sift out idle threats from threats that warrant the mobilization of penal sanctions." *Id.* at

261 (emphasis added). A rational trier of fact regards objectively that which the victim knew at the time of the harassment to decide whether a reasonable person would have feared physical injury. *See State v. Ragin*, 94 Wn. App. 407, 412, 972 P.2d 519 (1999). Here, the evidence did not point to a reasonable fear of injury as to either count one or two.

In *E.J.Y.*, this Court found sufficient evidence to support the reasonable fear of injury element where the juvenile defendant told school officers “I think I should go get my gun and do like Columbine . . . You're going to have another Columbine around here, you guys better watch out.” 113 Wn. App. at 944, 953. The trial court’s finding was supported by sufficient evidence including “the words of E.J.Y., the victims’ personal knowledge of E.J.Y., [and] the victims’ awareness of other incidents of school violence.” *Id.* at 953-54.

In *E.J.Y.* the defendant threatened to bring a gun to school and commit a shooting spree, as in the Columbine shootings. Unlike in *E.J.Y.*, Mr. Moul’s words and conduct did not threaten physical injury to either of the Lundeen sisters. *E.g.*, Exhibit 15 (stating he would never harm Tracy); 7/6/11RP 64-65 (Moul commonly states in letters he has no intention of harming the Lundeens or anyone related to them). Moreover, Mr. Moul’s course of conduct since high school

demonstrated no intent to cause or even threaten physical injury. *E.g.*, 6/30/11RP 57-58 (conduct in high school limited to telephone calls and letters, which stated the “same thing over and over again[:] . . . I just want to be friends with you.”; conduct was “just bothersome”); 7/6/11RP 8-9 (describing same continuing conduct of letters with same content); 7/6/11RP 22-23 (same). Thus unlike *E.J.Y.*, the evidence was insufficient to show reasonable fear of physical injury.

In *Alvarez*, this Court relied on the defendant’s words, “Shut up, Bitch, or I’ll take you out [like I just killed this pigeon by twisting its neck],” and conduct, holding up the headless torso of a pigeon, as sufficient evidence that the victim’s fear was reasonable. 74 Wn. App. at 262 (remanding to trial court on harassment conviction for opportunity to supply missing finding regarding reasonable fear); *see also Ragin*, 94 Wn. App. at 411-12 (victim’s knowledge of defendant’s prior violent acts relevant to show fear of injury reasonable for harassment); *State v. Lee*, 82 Wn. App. 298, 304, 917 P.2d 159 (1996) (on review of stalking convictions, fear of injury reasonable because evidence showed defendant physically abused victim in past and defendant’s ongoing conduct of extensively following victim “terrified”

her). Here, neither Mr. Moul's words nor conduct indicated an intent or a threat to inflict physical injury on the Lundeen sisters.

- d. The convictions should be reversed and the charges dismissed because the State's evidence was insufficient.

The absence of proof of an element beyond a reasonable doubt requires dismissal of the conviction and charge. *E.g., Jackson*, 443 U.S. at 319; *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The Double Jeopardy Clause of the Fifth Amendment bars retrial of a case dismissed for insufficient evidence. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *reversed on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Because the State failed to prove the fear of injury element for felony stalking (counts one and two), the Court should reverse these convictions and dismiss the charges with prejudice.

- 2. Unless it is limited to the fear of physical injury, the statute criminalizing stalking is unconstitutionally overbroad to Mr. Moul.**

If the fear of injury element of stalking is not limited to physical injury, the statute is overbroad to Mr. Moul in violation of his constitutional right to free speech. *See* U.S. Const. amend. I; Const. art. 1, § 5. The constitutionality of a statute is a question of law, subject to

de novo review. *State v. Shultz*, 138 Wn.2d 638, 643, 980 P.2d 1265 (1999).

The ‘overbreadth’ doctrine involves questions of substantive due process. *State v. Carter*, 89 Wn.2d 236, 240, 570 P.2d 1218 (1977). Overbreadth analysis “goes to the question of whether a statute not only prohibits unprotected behavior, but also prohibits constitutionally protected activity as well.” *Id.* “A law is overbroad if it sweeps within its prohibitions constitutionally protected free speech activities.” *City of Bellevue v. Lorang*, 140 Wn.2d 19, 26, 992 P.2d 496 (2000) (quoting *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989)).

a. RCW 9A.46.110 reaches constitutionally-protected speech.

This case demonstrates that the stalking statute sweeps constitutionally-protected speech within its prohibitions. *See id.* The stalking allegations were premised entirely on Mr. Moul’s frequent written words, whether sent by letter or electronic communication. Unlike in other stalking prosecutions, Mr. Moul was not convicted based upon following or other physical conduct. *Compare* CP 106, 108 (“to convict” instruction limited to harassment) *with, e.g., State v. Lee*, 135 Wn.2d 369, 374-77, 957 P.2d 741 (1998) (describing defendant’s

conduct as largely comprised of following and approaching subject of protection order), 381-84 (prosecution based on defendant's repeated appearance at victim's place of employment and on her public transportation route).

Moreover, unlike the speech underlying some stalking convictions, Mr. Moul's speech was entitled to constitutional protection. *See* U.S. Const. amend. I; Const. art. 1, § 5. Only two categories of speech are unprotected—true threats and fighting words. “A true threat is ‘a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person.’” *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010) (quoting *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004)). Mr. Moul's communications with the Lundeens did not involve true threats because there was no serious expression of intent to inflict bodily harm. Fighting words are “language which, by its very utterance, inflicts injury or incites an immediate breach of the peace.” *Williams*, 144 Wn.2d at 209. Mr. Moul's communications were not fighting words.

Thus, the communications at issue here were entitled to constitutional protection.

Our Supreme Court's analysis in *Williams* illuminates the overbroad nature of the stalking statute as applied here. In *Williams*, the Court analyzed the criminal harassment statute, RCW 9A.46.020. 144 Wn.2d at 201. Mr. Williams argued the statute was overbroad in violation of the First Amendment because it criminalized a threat to harm another with respect to his mental health or safety. *Id.* at 206. The Court reasoned the statute was a content-based regulation of protected speech, threats. *Id.* at 207. However, the statute was not limited to true threats because it included threats to an individual's mental health. *Id.* at 208. The Court thus viewed the statute "with suspicion" because it regulated protected speech. *Id.* "Content-based restrictions on speech are presumptively unconstitutional and are thus subject to strict scrutiny." *Id.* (quoting *Collier v. City of Tacoma*, 121 Wn.2d 737, 748-49, 854 P.2d 1046 (1993)). Because the government could not sustain its burden to show a compelling governmental interest in criminalizing threats with respect to one's mental health, the Court invalidated that portion of the harassment statute. *Williams*, 121 Wn.2d at 211.

Oregon's Supreme Court has applied similar analysis to its stalking statute. Oregon's stalking statute criminalizes, in relevant part, "repeated and unwanted contacts" that cause the victim "reasonable apprehension regarding" his or her own or family's "personal safety." Or. Rev. Stat. § 163.732. On review, the court first found that the statute reached speech and was subject to overbreadth analysis. *State v. Rangel*, 328 Or. 294, 298-302, 977 P.2d 379 (1999). But rather than invalidate the statute because it reached unprotected speech, the court narrowed the construction of the stalking statute to apply only to "proscribable threats". *Id.* at 303. A proscribable threat is a true threat: "a communication that instills in the addressee a fear of imminent and serious personal violence from the speaker, is unequivocal, and is objectively likely to be followed by unlawful acts." *Id.* Like *Williams*, where the Washington Supreme Court struck threats to mental health from the harassment statute, the *Rangel* court found the only way to save Oregon's stalking statute, which reached speech aimed at non-physical harm and non-violent activity, was to limit it to true threats.

- b. RCW 9A.46.110 is not narrowly tailored to satisfy a compelling State interest.

Washington's stalking statute is overbroad like the harassment statute at issue in *Williams* and like Oregon's stalking statute in *Rangel*.

Accordingly, like *Williams*, the stalking statute is constitutional only if it survives strict scrutiny review. Under this highest level of scrutiny, “the burden is on the government to establish that an impairment of a constitutionally protected right is necessary to serve a compelling state interest.” *Lorang*, 140 Wn.2d at 29-30. The government cannot criminalize speech and conduct merely because “society at large views [it] as vile, politically incorrect, or borne of hate.” *Williams*, 114 Wn.2d at 209 (citing cases). “Speech is protected, even though it may advocate action which is highly alarming to the target of the communication, unless it fits under the narrow category of a ‘true threat.’” *Id.* (quoting Br. of Amicus Curiae).

The government’s interest is not sufficiently compelling to criminalize constitutionally-protected speech. In *Lee*, the court reasoned “the State has a legitimate interest in restraining harmful conduct.” 135 Wn.2d at 391. But a “legitimate” government interest does not satisfy the strict scrutiny “compelling interest” standard. *Id.*

The stalking statute, moreover, is not narrowly tailored. Mr. Moul’s letters and e-mails to the Lundeens subjected him to criminal punishment under Chapter 10.14 RCW, which criminalizes contact in violation of an anti-harassment order. In fact, Mr. Moul was sentenced

to 19 years confinement for the individual communications he sent to Tracy and Jennifer. CP 199. The State does not have a compelling interest in further criminalizing protected speech by creating an overbroad stalking statute, nor is such a statute narrowly-tailored where the crime of violating an anti-harassment order encompasses the same conduct without limiting free speech.

Finally, any compelling State interest can be satisfied by a stalking statute that proscribes only unprotected speech. Like in Oregon, the stalking statute should criminalize only words or conduct that constitute true threats.

The *Lee* decision is not controlling here. In *Lee*, the consolidated petitioners contended the former version of RCW 9A.46.110 was overbroad because it impacted constitutionally-protected conduct. 135 Wn.2d at 387. The court upheld the statute under the State's police powers and the privacy right to be left alone. *Id.* at 391-92; *see id.* at 395 (Madsen, J. dissenting) (criticizing majority's application of right to privacy as between private actors); *see also id.* at 394 (Alexander, J. concurring in result but joining dissent's reasoning regarding right to privacy).

Lee's application is limited for several reasons. First, the petitioners were charged under a prior version of the statute, which criminalized "following" but not harassment. *Id.* at 373 n.1. Compare RCW 9A.46.110 (1992) with RCW 9A.46.110. Thus the court did not consider the statute's criminalization of free speech. See generally *Lee*, 135 Wn.2d at 388-92. Though the petitioners apparently argued free speech was among the constitutionally-impacted conduct, the court analyzed the constitutionality of the law in light of freedom to travel and a general right to movement. *Id.* at 388-89. Therefore, unlike Mr. Moul, the petitioners' conduct primarily consisted of following, not simply harassment by words. *Lee*, 135 Wn.2d at 373-83. Additionally, the court did not apply strict scrutiny review. See generally *id.* at 388-92. For these reasons, *Lee* does not control Mr. Moul's case.

In sum, the stalking statute is overbroad to Mr. Moul because it criminalizes protected speech. The convictions for counts one and two should be reversed.

3. The finding that Mr. Moul demonstrated or displayed an egregious lack of remorse is not supported by sufficient evidence.

This Court applies the same standard of review for the sufficiency of the evidence of an aggravating factor as for another

element of the crime. *State v. Zigan*, 166 Wn. App. 597, 601, 270 P.3d 625 (2012). An aggravating factor is not based on sufficient evidence where, viewing the evidence in the light most favorable to the State, no rational trier of fact could find the aggravating circumstances beyond a reasonable doubt. *Id.* at 601-02.

Mr. Moul was charged with the aggravating circumstances of RCW 9.94A.535(3)(q), which provides for the imposition of an exceptional sentence where a jury finds “[t]he defendant demonstrated or displayed an egregious lack of remorse.” The terms are not defined. *See* RCW 9.94A.535; WPIC 300.26 (comments) (no court decision defines).

Aggravating factors necessarily may only be based on circumstances not considered in the presumptive sentence for the offense, including the underlying elements of the crime. *E.g.*, *State v. Stubbs*, 170 Wn.2d 117, 123, 240 P.3d 143 (2010); *State v. Cardenas*, 129 Wn.2d 1, 6, 914 P.2d 57 (1996); *State v. Nordby*, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986); *State v. Baker*, 40 Wn. App. 845, 848, 700 P.2d 1198 (1985). Similarly, “[t]he mundane lack of remorse found in run-of-the-mill criminals is not sufficient to aggravate an offense.” *State v. Garibay*, 67 Wn. App. 773, 781, 841 P.2d 49 (1992), *abrogated*

on other grounds by, *State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996).

The stalking statute criminalizes repeated harassment. RCW 9A.46.110(1)(a), (6)(e). Consequently, the evidence supporting a finding of egregious lack of remorse beyond a reasonable doubt must exceed the repetitious contacts contemplated by the legislature in imposing a standard range sentence for stalking. See *Kintz*, 169 Wn.2d at 545-49 (defining two or more separate occasions).

The only evidence of lack of remorse here was Mr. Moul's continued contacts with Tracy and Jennifer Lundeen. Indeed, in closing, the State argued the aggravator was satisfied because Mr. Moul contacted the sisters "over and over again." 7/11/11RP 35. But these letters and e-mails were the repeated acts of harassment that formed the basis of the felony stalking conviction. They cannot also form the basis for an exceptional sentence.

In cases where this Court has found sufficient evidence to support the egregious lack of remorse aggravator, the defendant's egregiously unremorseful conduct generally occurred after the underlying crime was completed. For example, in *State v. Russell* and *State v. Creekmore*, exceptional sentences were upheld where the

defendants acted to prevent their minor victims from receiving medical attention for injuries the defendants themselves inflicted. *State v. Russell*, 69 Wn. App. 237, 251-52, 848 P.2d 743 (1993); *State v. Creekmore*, 55 Wn. App. 852, 861-62, 783 P.2d 1068 (1989). In *Zigan*, evidence supporting the aggravator was sufficient where the defendant killed a woman while driving his motorcycle and quickly asked the victim's husband if he was "ready to bleed" too, laughed and joked with police at the crime scene, joked with police at the hospital later and then joked about the crime to inmates at the jail. 166 Wn. App. at 602-03. In *State v. Erickson*, the aggravator was supported by evidence the defendant bragged and laughed about the underlying murder, mimicked the victim's reaction to being shot, asked the victim whether it hurt to get shot, thought the killing was funny and joked about being on television for the murder. 108 Wn. App. 732, 739-40, 33 P.3d 85 (2001); *see also State v. Ross*, 71 Wn. App. 556, 563, 861 P.2d 329 (1994) (exceptional sentence based on court's finding upheld where defendant blamed system for his crimes and a subsequent apology was not credible); *State v. Wood*, 57 Wn. App. 792, 795, 800, 790 P.2d 220 (1990) (judicial finding of lack of remorse proper where

based on defendant's comments and actions after participating in murder of husband).

Such circumstances beyond the facts of the offense itself are not present here. Mr. Moul's exceptional sentence should be reversed for insufficient evidence and the matter remanded for imposition of a standard range sentence.

4. The aggravating factor set forth in RCW 9.94A.535(3)(q), which permits imposition of an exceptional sentence if 'the defendant demonstrated or displayed an egregious lack of remorse,' violates the vagueness prohibitions of constitutional due process.

- a. Statutes that authorize increased punishment based on factual findings by juries are subject to the void-for-vagueness doctrine.

Prior to *Blakely*,⁷ our Supreme Court held the void-for-vagueness doctrine applies only to laws that “proscribe or prescribe conduct” and called it “analytically unsound” to apply the doctrine to laws that simply “provide directives that judges should consider when imposing sentences.” *State v. Baldwin*, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003) (quoting *State v. Jacobsen*, 92 Wn. App. 958, 966, 965 P.2d 1140, review denied, 137 Wn.2d 1033 (1999)). At that time, the

⁷ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

court held the vagueness doctrine inapplicable to statutory aggravating factors. *Id.* at 460 (quoting *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 144, 866 P.2d 8 (1994)). The court concluded sentencing guidelines “do not define conduct . . . nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature.” *Id.* at 459. Thus, the void-for-vagueness doctrine “[has] no application in the context of sentencing guidelines.” *Id.*

In light of *Blakely*, the holding of *Baldwin* is no longer good law. The void-for-vagueness doctrine is applicable to sentencing aggravators because they increase the maximum punishment. *Blakely* holds that aggravating factors that warrant an exceptional sentence under the SRA alter the statutory maximum for the offense. 542 U.S. at 306-07. Under *Apprendi v. New Jersey* and *Blakely*, the Fourteenth Amendment’s Due Process Clause applies to such enhancements because they affect an accused’s liberty interests in being free from confinement. *Apprendi*, 530 U.S. at 478-85, 490; *Blakely*, 542 U.S. at 296 (Sixth and Fourteenth Amendments require sentencing factors be proved to a jury beyond a reasonable doubt).

If “laws that dictate particular decisions given particular facts can create liberty interests,” then an accused person has a liberty

interest in laws authorizing exceptional sentences based on factual findings by juries. *Baldwin*, 150 Wn.2d at 460. Post-*Blakely*, an aggravating sentencing factor such as “egregious lack of remorse” is precisely that—an authorization of an exceptional sentence based on the jury’s factual findings. See RCW 9.94A.535(3); *Stubbs*, 170 Wn.2d at 124. Because the aggravator increases the maximum penalty for the offense under *Blakely*, *Baldwin*’s reasoning dictates that due process protections are implicated.⁸

b. The ‘egregious lack of remorse’ aggravator is unconstitutionally vague.

The vagueness doctrine of the Due Process Clause rests on two principles. First, penal statutes must provide citizens with fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. *E.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers

⁸ The issue whether sentence aggravating factors are subject to constitutional vagueness review is pending before the Washington Supreme Court in *State v. Duncalf*, No. 86853-1 (oral argument scheduled for September 13, 2012).

of arbitrary and discriminatory application.” *Id.* at 108-09. A statute fails to adequately guard against arbitrary enforcement where it lacks ascertainable or legally fixed standards of application or invites “unfettered latitude” in its application. *Smith v. Goguen*, 415 U.S. 574, 578, 94 S. Ct. 1242, 15 L. Ed. 2d 447 (1973); *Giacco v. Pennsylvania*, 382 U.S. 399, 402-03, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966). Thus, “[t]o survive a vagueness challenge, a statute must be clear enough to give fair warning of what conduct is proscribed, and it must have ascertainable standards of guilt to prevent arbitrary enforcement.” *State v. Chanthabouly*, 164 Wn. App. 104, 141, 262 P.3d 144 (2011).

Under RCW 9.94A.535(3)(q), display or demonstration of an egregious lack of remorse constitutes an aggravating factor warranting an exceptional sentence. However, the statute does not define what constitutes an “egregious lack of remorse.” *See* RCW 9.94A.535 (providing no definition); RCW 9.94A.030 (defining terms applicable to SRA but not defining “egregious lack of remorse”).⁹

Lacking statutory standards, the term must be interpreted using standard dictionary definitions, or the common understanding of the jury and the public. *See Zigan*, 166 Wn. App. at 602. “Remorse” is “a

⁹ The courts have also not defined what constitutes an egregious lack of remorse. *See* WPIC 300.26 (comments).

gnawing distress arising from a sense of guilt for past wrongs; . . . self-reproach.” *Webster’s Third New Int’l Dictionary* 1921 (3d ed. 1993). “Egregious” means, in relevant part, “conspicuous for bad quality or taste” or “flagrant.” *Id.* at 727.

The egregious lack of remorse aggravator is vague here for two reasons. First, the jury has no reference point from which to determine the conduct that constitutes egregiousness, just as the public has no way of knowing which conduct is proscribed. The type of conduct contemplated by the legislature in setting the standard range for stalking cannot be the basis for any aggravator, including egregious lack of remorse. Thus, the jury’s finding must be premised upon an egregious lack of remorse beyond that contemplated by repeated harassment that placed the victims in fear of injury and through which the stalked intended to frighten, intimidate or harass the victims or reasonably should have known that would result. RCW 9A.46.110. But the jury’s reference point with regard to stalking and remorse was only Mr. Moul’s case. The aggravator is vague because it does not clearly delineate what level of conduct constitutes egregiousness.

Second, the stalking statute criminalizes repeated harassment. RCW 9A.46.110(1)(a). As previously stated, the aggravator applied

here permits an exceptional sentence where the accused's conduct shows egregious lack of remorse. RCW 9.94A.535(3)(q). But neither statute indicates when an accused crosses the line from "repeatedly" harassing his or her victim to demonstrating an egregious lack of remorse. For example, here the State argued Mr. Moul demonstrated egregious lack of remorse by continuing to send correspondence to the Lundeens. 7/11/11RP 35. The State argued Mr. Moul continued to contact them "[o]ver and over and over again." *Id.* These repeated contacts also formed the basis for the harassment charge. The statute provides no basis to distinguish among conduct supporting the offense of stalking and conduct supporting the aggravator of egregious lack of remorse. Therefore, the aggravator is vague.

Because Mr. Moul's sentence is predicated on an aggravating factor that is void for vagueness, the exceptional sentence should be reversed and the matter remanded for imposition of a standard range sentence.

5. The sentence should be remanded to exclude the provision of community custody from count two.

"A trial court only possesses the power to impose sentences provided by law." *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). The statutory maximum for an offense sets the

ceiling of punishment that may be imposed. RCW 9A.20.021; *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 668, 211 P.3d 1023 (2009).

A term of community custody may not exceed the statutory maximum when combined with the prison term imposed. RCW 9A.20.021; RCW 9.94A.701(9); *State v. Boyd*, 174 Wn.2d 470, 275 P.3d 321 (2012); *State v. Franklin*, 172 Wn.2d 831, 839-42, 263 P.3d 585 (2011).

This Court reviews de novo whether a sentence is legally erroneous. *Brooks*, 166 Wn.2d at 667. “Courts have the duty and power to correct an erroneous sentence upon its discovery.” *In re Pers. Restraint of Call*, 144 Wn.2d 315, 332, 28 P.3d 709 (2001).

The SRA limits the sentencing court’s authority as to count two to a total sentence of 60 months. CP 189; RCW 9A.20.021(1)(c); RCW 9A.46.110(5)(b). Because the trial court sentenced Mr. Moul to a 60-month term of confinement, no additional community custody term may be applied to that count. *See* CP 191; *Boyd*, 174 Wn.2d at 473. However, the trial court imposed a term of community custody without limiting its application to count one (another felony stalking charge as to which the jury did not find aggravating circumstances and the maximum term of confinement was not imposed). CP 192. In light

of *Boyd*, the court's *Brooks* notation is insufficient to render the sentence lawful. 174 Wn.2d at 473. Accordingly, the sentence should be remanded for imposition of a proper sentence.

F. CONCLUSION

The convictions for felony stalking should be reversed and the charges dismissed because the State failed to prove beyond a reasonable doubt Tracy Lundeen subjectively feared injury and that either sister's fear of injury was reasonable where Mr. Moul had never approached the sisters or threatened injury. In the alternative, the stalking statute is unconstitutionally overbroad to Mr. Moul.

If the convictions remain, the exceptional sentence should be reversed because the aggravating circumstances were not proved beyond a reasonable doubt or because the sentencing factor is unconstitutionally vague.

DATED this 30th day of July, 2012.

Respectfully submitted,



Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

APPENDIX A

FILED
KING COUNTY, WASHINGTON

JAN 24 2012

SUPERIOR COURT CLERK
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DEPUTY

JAN 24 2012

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

Vs.

SHAWN MICHAEL MOUL

Defendant,

No. 10-1-00909-1 SEA

JUDGMENT AND SENTENCE
FELONY (FJS)

SEE MISD JES

I. HEARING

1.1 The defendant, the defendant's lawyer, ROBERT JOURDAN, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: Tracy, Jennifer & Bill Lundeen.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court finds:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 07/12/2011 by jury verdict of:

Count No.: I Crime: STALKING - FELONY
RCW 9A.46.110 Crime Code: 02230
Date of Crime: 01/27/2010 - 05/31/2011 Incident No. _____

Count No.: II Crime: STALKING - FELONY
RCW 9A.46.110 Crime Code: 02230
Date of Crime: 01/27/2010 - 05/31/2011 Incident No. _____

Count No.: _____ Crime: _____
RCW _____ Crime Code: _____
Date of Crime: _____ Incident No. _____

Count No.: _____ Crime: _____
RCW _____ Crime Code: _____
Date of Crime: _____ Incident No. _____

[] Additional current offenses are attached in Appendix A

SPECIAL VERDICT or FINDING(S):

- (a) While armed with a **firearm** in count(s) _____ RCW 9.94A.533(3).
- (b) While armed with a **deadly weapon** other than a firearm in count(s) _____ RCW 9.94A.533(4).
- (c) With a **sexual motivation** in count(s) _____ RCW 9.94A.835.
- (d) A V.U.C.S.A offense committed in a **protected zone** in count(s) _____ RCW 69.50.435.
- (e) **Vehicle homicide** Violent traffic offense DUI Reckless Disregard.
- (f) **Vehicle homicide** by DUI with _____ prior conviction(s) for offense(s) defined in RCW 46.61.5055, RCW 9.94A.533(7).
- (g) **Non-parental kidnapping** or unlawful imprisonment with a minor victim. RCW 9A.44.128, .130.
- (h) **Domestic violence** offense as defined in RCW 10.99.020 for count(s) _____.
- (i) Current offenses **encompassing the same criminal conduct** in this cause are count(s) _____ RCW 9.94A.589(1)(a).
- (j) **Aggravating circumstances** as to count(s) II: Extreme Lack of Remorse
RCW 9.94A.535(3)(9) & upon the agreement of the parties RCW 9.94A.535

2.2 **OTHER CURRENT CONVICTION(S):** Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

2.3 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):
 Criminal history is attached in **Appendix B**.
 One point added for offense(s) committed while under community placement for count(s) _____

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	4	V	22 TO 29		22 TO 29 MONTHS	5 YRS AND/OR \$10,000
Count II	4	V	22 TO 29		22 TO 29 MONTHS	5 YRS AND/OR \$10,000
Count						
Count						

Additional current offense sentencing data is attached in **Appendix C**.

2.5 EXCEPTIONAL SENTENCE

Findings of Fact and Conclusions of Law as to sentence above the standard range:
Finding of Fact: The jury found or the defendant stipulated to aggravating circumstances as to Count(s) II.
Conclusion of Law: These aggravating circumstances constitute substantial and compelling reasons that justify a sentence above the standard range for Count(s) II. The court would impose the same sentence on the basis of any one of the aggravating circumstances.

An exceptional sentence above the standard range is imposed pursuant to RCW 9.94A.535(2) (including free crimes or the stipulation of the defendant). Findings of Fact and Conclusions of Law are attached in Appendix D.

An exceptional sentence below the standard range is imposed. Findings of Fact and Conclusions of Law are attached in Appendix D.

The State did did not recommend a similar sentence (RCW 9.94A.480(4)).

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and **Appendix A**.
 The Court **DISMISSES** Count(s) _____

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT:

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.
 - Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(5), sets forth those circumstances in attached Appendix E.
 - Restitution to be determined at future restitution hearing on (Date) _____ at _____ m.
 - Date to be set.
 - Defendant waives presence at future restitution hearing(s).
 - Restitution is not ordered. *Not Requested*
- Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of \$500.

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a) \$ _____, Court costs (RCW 9.94A.030, RCW 10.01.160); Court costs are waived;
- (b) \$100 DNA collection fee (RCW 43.43.7541)(mandatory for crimes committed after 7/1/02);
- (c) \$ _____, Recoupment for attorney's fees to King County Public Defense Programs (RCW 9.94A.030); Recoupment is waived;
- (d) \$ _____, Fine; \$1,000, Fine for VUCSA \$2,000, Fine for subsequent VUCSA (RCW 69.50.430); VUCSA fine waived;
- (e) \$ _____, King County Interlocal Drug Fund (RCW 9.94A.030); Drug Fund payment is waived;
- (f) \$ _____, \$100 State Crime Laboratory Fee (RCW 43.43.690); Laboratory fee waived;
- (g) \$ _____, Incarceration costs (RCW 9.94A.760(2)); Incarceration costs waived;
- (h) \$ _____, Other costs for: _____

4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is: \$ 600.00. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: Not less than \$ _____ per month; On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. **The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations: for crimes committed before 7/1/2000, for up to ten years from the date of sentence or release from total confinement, whichever is later; for crimes committed on or after 7/1/2000, until the obligation is completely satisfied.** Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.

- Court Clerk's trust fees are waived.
- Interest is waived except with respect to restitution.

4.4 CONFINEMENT OVER ONE YEAR: Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing: immediately; [] (Date): _____ by _____ m.

29 months/days on count I; _____ months/days on count _____; _____ months/day on count _____

60 months/days on count II; _____ months/days on count _____; _____ months/day on count _____

The above terms for counts I + II are consecutive / concurrent.

The above terms shall run CONSECUTIVE [] CONCURRENT to cause No.(s) misd
cts III - XXI

The above terms shall run [] CONSECUTIVE [] CONCURRENT to any previously imposed sentence not referred to in this order.

[] In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special WEAPON finding(s) in section 2.1: _____

which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (Use this section only for crimes committed after 6-10-98)

[] The enhancement term(s) for any special WEAPON findings in section 2.1 is/are included within the term(s) imposed above. (Use this section when appropriate, but for crimes before 6-11-98 only, per In Re Charles)

The TOTAL of all terms imposed in this cause is 89 months.

Credit is given for time served in King County Jail or EHD solely for confinement under this cause number pursuant to RCW 9.94A.505(6): 0 day(s) or ~~30~~ days determined by the King County Jail.

[] For nonviolent, nonsex offense, credit is given for days determined by the King County Jail to have been served in the King County Supervised Community Option (Enhanced CCAP) solely under this cause number.

[] For nonviolent, nonsex offense, the court authorizes earned early release credit consistent with the local correctional facility standards for days spent in the King County Supervised Community Option (Enhanced CCAP).

credit imposed against misdemeanor sentences

4.5 NO CONTACT: For the maximum term of 5 years, defendant shall have no contact with Tracy Jennifer Lundeen, Holly Watson Knowles & their families.

4.6 DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in APPENDIX G.

[] HIV TESTING: For sex offense, prostitution offense, drug offense associated with the use of hypodermic needles, the defendant shall submit to HIV testing as ordered in APPENDIX G.

4.7 (a) [] COMMUNITY CUSTODY for qualifying crimes committed before 7-1-2000, is ordered for [] one year (for a drug offense, assault 2, assault of a child 2, or any crime against a person where there is a finding that defendant or an accomplice was armed with a deadly weapon); [] 18 months (for any vehicular homicide or for a vehicular assault by being under the influence or by operation of a vehicle in a reckless manner); [] two years (for a serious violent offense).

(b) [] COMMUNITY CUSTODY for any SEX OFFENSE committed after 6-5-96 but before 7-1-2000, is ordered for a period of 36 months.

(c) **COMMUNITY CUSTODY** - for qualifying crimes committed after 6-30-2000 is ordered for the following established range or term:

Sex Offense, RCW 9.94A.030 - 36 months—when not sentenced under RCW 9.94A.507

Serious Violent Offense, RCW 9.94A.030 - 36 months

If crime committed prior to 8-1-09, a range of 24 to 36 months.

Violent Offense, RCW 9.94A.030 - 18 months

Crime Against Person, RCW 9.94A.411 or Felony Violation of RCW 69.50/52 - 12 months

If crime committed prior to 8-1-09, a range of 9 to 12 months.

* Community Custody not to exceed the statutory maximum for the crime

Sanctions and punishments for non-compliance will be imposed by the Department of Corrections or the court.

APPENDIX H for Community Custody conditions is attached and incorporated herein.

APPENDIX J for sex offender registration is attached and incorporated herein.

4.8 **WORK ETHIC CAMP**: The court finds that the defendant is eligible for work ethic camp, is likely to qualify under RCW 9.94A.690 and recommends that the defendant serve the sentence at a work ethic camp. Upon successful completion of this program, the defendant shall be released to community custody for any remaining time of total confinement, subject to the conditions set out in **Appendix H**.

4.9 **ARMED CRIME COMPLIANCE, RCW 9.94A.475, 480**. The State's plea/sentencing agreement is attached as follows:

The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: 1-24-12



JUDGE

Print Name: P. Dish

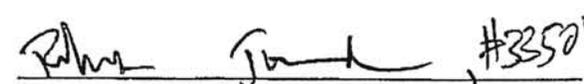
Presented by:



Deputy Prosecuting Attorney, WSBA# 31915

Print Name: Alex Voorhees

Approved as to form: .



Attorney for Defendant, WSBA#

Print Name: Robert Jordan

FINGERPRINTS

BEST IMAGE POSSIBLE



RIGHT HAND
FINGERPRINTS OF:

DEFENDANT'S SIGNATURE: X Shawn Moul
DEFENDANT'S ADDRESS: Homeless & DOC

SHAWN MICHAEL MOUL

DATED: 1/24/12

ATTESTED BY: BARBARA MINER,
SUPERIOR COURT CLERK

[Signature]
JUDGE, KING COUNTY SUPERIOR COURT

BY: [Signature]
DEPUTY CLERK

CERTIFICATE

OFFENDER IDENTIFICATION

I, _____,
CLERK OF THIS COURT, CERTIFY THAT
THE ABOVE IS A TRUE COPY OF THE
JUDGEMENT AND SENTENCE IN THIS
ACTION ON RECORD IN MY OFFICE.
DATED: _____

S.I.D. NO.
DOB: JULY 10, 1980
SEX: M
RACE: W

CLERK

BY: _____
DEPUTY CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

SHAWN MICHAEL MOUL

Defendant,

No. 10-1-00909-1 SEA

JUDGMENT AND SENTENCE,
(FELONY) - APPENDIX B,
CRIMINAL HISTORY

2.2 The defendant has the following criminal history used in calculating the offender score (RCW 9.94A.525):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
INTIMIDATING A JUDGE	09/20/2001	ADULT	011003271	KING CO
INTIMIDATING A JUDGE	09/20/2001	ADULT	011003271	KING CO
STALKING	05/04/2001	ADULT	001051952	KING CO

The following prior convictions were counted as one offense in determining the offender score (RCW 9.94A.525(5)):

Date: 1/24/12



JUDGE, KING COUNTY SUPERIOR COURT



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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

SHAWN MOUL,

Defendant.

No. 09-1-00909-1 SEA

APPENDIX D TO THE JUDGMENT
AND SENTENCE:
FINDINGS OF FACT AND
CONCLUSIONS OF LAW FOR
EXCEPTIONAL SENTENCE

Pursuant to RCW 9.94A.535 and having reviewed all the evidence, records and other information in this matter and having considered the arguments of counsel, the court hereby imposes an exceptional sentence of 29 mos Ct I (00 mos Ct II) ^{consecutive} for the aggravating factors of Egregious Lack of Remorse and based upon the agreement of the parties. This sentence is based on the following facts and law:

A. FINDINGS OF FACT

1. The jury found beyond a reasonable doubt that the defendant demonstrated or displayed an egregious lack of remorse on count II pursuant to RCW 9.94A.535(3)(q), giving this court the authority to impose an exceptional sentence.

2. The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of

APPENDIX E TO THE JUDGMENT AND SENTENCE:
FINDINGS OF FACT AND CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 1

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 the sentencing reform act, pursuant to RCW 9.94A.535(2),

2 B. CONCLUSIONS OF LAW -- SUBSTANTIAL AND COMPELLING REASONS
3 EXIST FOR IMPOSING AN EXCEPTIONAL SENTENCE

4 Substantial and compelling reasons justify an upward departure from the standard range

5 1. An exceptional sentence of 29 months on Count I and 100 months on Count
6 II, to run consecutively to each other is justified for the following reason: based on the jury's
7 finding that the defendant acted with an egregious lack of remorse and the defendant and the
8 state both stipulate that justice is best served by the imposition of an exceptional sentence outside
9 the standard range, and the court finds the exceptional sentence to be consistent with and in
10 furtherance of the interests of justice and the purposes of the sentencing reform act.

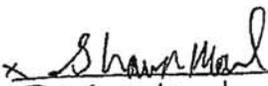
11 Dated this 24th day of January, 2012
12 ~~August~~

13 
14 The Honorable Judge [Judge's Name]
King County Superior Court

15 Presented by:

16 
17 Alex Voorhees, WSBA# 31915
18 Deputy Prosecuting Attorney

16  #33501
17 Robert Jourdan, WSBA# _____
18 Attorney for Defendant

19 
20 Defendant

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

SHAWN MICHAEL MOUL

Defendant,

)
)
) No. 10-1-00909-1 SEA
)
) APPENDIX G
) ORDER FOR BIOLOGICAL TESTING
) AND COUNSELING
)
)
)

(1) **DNA IDENTIFICATION (RCW 43.43.754):**

The Court orders the defendant to cooperate with the King County Department of Adult Detention, King County Sheriff's Office, and/or the State Department of Corrections in providing a biological sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangements for the test to be conducted within 15 days.

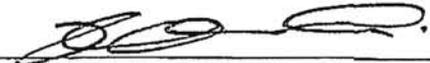
(2) **HIV TESTING AND COUNSELING (RCW 70.24.340):**

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense.)

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 205-7837 to make arrangements for the test to be conducted within 30 days.

If (2) is checked, two independent biological samples shall be taken.

Date: 1/24/12



JUDGE, King County Superior Court

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)
Plaintiff,) No. 10-1-00909-1 SEA
vs.) JUDGMENT AND SENTENCE
SHAWN MICHAEL MOUL) APPENDIX H
Defendant,) COMMUNITY CUSTODY

The Defendant shall comply with the following conditions of community custody, effective as of the date of sentencing unless otherwise ordered by the court.

- 1) Report to and be available for contact with the assigned community corrections officer as directed;
2) Work at Department of Corrections-approved education, employment, and/or community restitution;
3) Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
4) Pay supervision fees as determined by the Department of Corrections;
5) Receive prior approval for living arrangements and residence location; and
6) Not own, use, or possess a firearm or ammunition. (RCW 9.94A.706)
7) Notify community corrections officer of any change in address or employment;
8) Upon request of the Department of Corrections, notify the Department of court-ordered treatment;
9) Remain within geographic boundaries, as set forth in writing by the Department of Corrections Officer or as set forth with SODA order.

- [] The defendant shall not consume any alcohol.
[x] Defendant shall have no contact with: Tracy Lundeen / Jennifer Lundeen
[x] Defendant shall remain [x] within [] outside of a specified geographical boundary, to wit: per CCO
[x] The defendant shall participate in the following crime-related treatment or counseling services: per CCO
[x] The defendant shall comply with the following crime-related prohibitions: per CCO
[]
[]

Other conditions may be imposed by the court or Department during community custody.

Community Custody shall begin upon completion of the term(s) of confinement imposed herein, or at the time of sentencing if no term of confinement is ordered. The defendant shall remain under the supervision of the Department of Corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the conditions and may issue warrants and/or detain defendants who violate a condition.

Date: 1/27/12

JUDGE



FILED
KING COUNTY, WASHINGTON

JAN 24 2012

SUPERIOR COURT CLERK
BY: NANCY L. SLYE
DEPUTY

COPY TO COUNTY JAIL JAN 24 2012

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

Defendant.

No. 10-1-00909-1 SEA

JUDGMENT AND SENTENCE,
NON-FELONY - Count(s)
(Jail Commitment Only)

See also Felony
J+S

Shawn Mowl

The Prosecuting Attorney, the above-named defendant and counsel Robert Jourdan being present in Court, the defendant having been found guilty of the crime(s) charged in the 2nd Amended information on 7-12-11 by jury and there being no reason why judgment should not be pronounced;

IT IS ADJUDGED that the defendant is guilty of the crime(s) of:

Counts III-XXI
Violation of Anti-harassment order RCW
10.14.120

and that the Defendant be sentenced to a term of confinement of 364 days per
Count [] in the King County Jail, Department of Adult Detention, [] in King County Work/Education Release subject to conditions of conduct ordered this date, [] in King County Electronic Home Detention subject to conditions of conduct ordered this date, said terms to be served

[] concurrently [] consecutively with each other;

and to be served [] concurrently consecutively with CTS I & II

The term(s) imposed herein shall be served consecutively with any term not referenced herein.

CREDIT is given for [] days served days determined by the King County Jail solely on this cause.

Sentence will commence immediately [] Date: _____ no later than _____ a.m./p.m.;

Defendant shall pay to the clerk of this Court:

- (1) Restitution is not ordered;
- Order of Restitution is attached;
- Restitution to be determined at a restitution hearing on (Date) _____ at _____ .m.;
- Date to be set;
- The defendant waives presence at future restitution hearing(s);

(2) \$ _____, Court costs;

(3) \$ _____, Victim assessment, \$500 for gross misdemeanors and \$100 for misdemeanors;

(4) \$ _____, Recoupment for attorney's fees to King County Public Defense Programs;

(5) \$100 DNA collection fee;

(6) \$ _____, Fine;

(7) TOTAL financial obligation: see felony J+S _____;

The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: Not less than \$ _____ per month; to be paid in full by (Date) _____.

The defendant shall have a biological sample collected for purposed of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in Appendix G (for stalking, harassment, or communicating with a minor for immoral purposes).

Date: 1-24-12

[Signature]
Judge, King County Superior Court
Print Name: P. Dish

Presented by:
[Signature] 31915
Deputy Prosecuting Attorney, WSBA #
Print Name: Alex Voorhees

Form Approved for Entry:
[Signature] #33501
Attorney for Defendant, WSBA #
Print Name: Robert Janda

APPENDIX B

RCW 9A.46.110
Stalking.

(1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:

(a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and

(b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and

(c) The stalker either:

(i) Intends to frighten, intimidate, or harass the person; or

(ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

(2)(a) It is not a defense to the crime of stalking under subsection (1)(c)(i) of this section that the stalker was not given actual notice that the person did not want the stalker to contact or follow the person; and

(b) It is not a defense to the crime of stalking under subsection (1)(c)(ii) of this section that the stalker did not intend to frighten, intimidate, or harass the person.

(3) It shall be a defense to the crime of stalking that the defendant is a licensed private investigator acting within the capacity of his or her license as provided by chapter 18.165 RCW.

(4) Attempts to contact or follow the person after being given actual notice that the person does not want to be contacted or followed constitutes prima facie evidence that the stalker intends to intimidate or harass the person. "Contact" includes, in addition to any other form of contact or communication, the sending of an electronic communication to the person.

(5)(a) Except as provided in (b) of this subsection, a person who stalks another person is guilty of a gross misdemeanor.

(b) A person who stalks another is guilty of a class C felony if any of the following applies: (i) The stalker has previously been convicted in this state or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a protective order; (ii) the stalking violates any protective order protecting the person being stalked; (iii) the stalker has previously been convicted of a gross misdemeanor or felony stalking offense under this section for stalking another person; (iv) the stalker was armed with a deadly weapon, as defined in *RCW 9.94A.602, while stalking the person; (v)(A) the stalker's victim is or was a law enforcement officer; judge; juror; attorney; victim advocate; legislator; community corrections' officer; an employee, contract staff person, or volunteer of a correctional agency; or an employee of the child protective, child welfare, or adult protective services division within the department of social and health services; and (B) the stalker stalked the victim to retaliate against the victim for an act the victim performed during the course of official duties or to influence the victim's performance of official duties; or (vi) the stalker's victim is a current, former, or prospective witness in an adjudicative proceeding, and the stalker stalked the victim to retaliate against the victim as a result of the victim's testimony or potential testimony.

(6) As used in this section:

(a) "Correctional agency" means a person working for the department of natural resources in a correctional setting or any state, county, or municipally operated agency with the authority to direct the release of a person serving a sentence or term of confinement and includes but is not limited to the department of corrections, the indeterminate sentence review board, and the department of social and health services.

(b) "Follows" means deliberately maintaining visual or physical proximity to a specific person over a period of time. A finding that the alleged stalker repeatedly and deliberately appears at the person's home, school, place of employment, business, or any other location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person. It is not necessary to establish that the alleged stalker follows the person while in transit from one location to another.

(c) "Harasses" means unlawful harassment as defined in RCW 10.14.020.

(d) "Protective order" means any temporary or permanent court order prohibiting or limiting violence against, harassment of, contact or communication with, or physical proximity to another person.

(e) "Repeatedly" means on two or more separate occasions.

[2007 c 201 § 1; 2006 c 95 § 3; 2003 c 53 § 70. Prior: 1999 c 143 § 35; 1999 c 27 § 3; 1994 c 271 § 801; 1992 c 186 § 1.]

Notes:

***Reviser's note:** RCW 9.94A.602 was recodified as RCW 9.94A.825 pursuant to 2009 c 28 § 41.

Findings--Intent -- 2006 c 95: See note following RCW 74.04.790.

Intent -- Effective date -- 2003 c 53: See notes following RCW 2.48.180.

Intent -- 1999 c 27: See note following RCW 9A.46.020.

Purpose -- Severability -- 1994 c 271: See notes following RCW 9A.28.020.

Severability -- 1992 c 186: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1992 c 186 § 10.]

APPENDIX C

RCW 10.14.020
Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. "Course of conduct" includes, in addition to any other form of communication, contact, or conduct, the sending of an electronic communication, but does not include constitutionally protected free speech. Constitutionally protected activity is not included within the meaning of "course of conduct."

(2) "Unlawful harassment" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.

[2011 c 307 § 2; 2001 c 260 § 2; 1999 c 27 § 4; 1995 c 127 § 1; 1987 c 280 § 2.]

Notes:

Reviser's note: The definitions in this section have been alphabetized pursuant to RCW 1.08.015(2)(k).

Findings -- Intent -- 2001 c 260: "The legislature finds that unlawful harassment directed at a child by a person under the age of eighteen is not acceptable and can have serious consequences. The legislature further finds that some interactions between minors, such as "schoolyard scuffles," though not to be condoned, may not rise to the level of unlawful harassment. It is the intent of the legislature that a protection order sought by the parent or guardian of a child as provided for in this chapter be available only when the alleged behavior of the person under the age of eighteen to be restrained rises to the level set forth in chapter 10.14 RCW." [2001 c 260 § 1.]

Intent -- 1999 c 27: vSee note following RCW 9A.46.020.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68260-1-I
v.)	
)	
SHAWN MOUL,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JULY, 2012, 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:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] SHAWN MOUL 815651 MONROE CORRECTIONAL COMPLEX-WSR PO BOX 777 MONROE, WA 98272-0777	(X) () ()	U.S. MAIL HAND DELIVERY _____

2012 JUL 30 4:15:03
COURT OF APPEALS
DIVISION ONE

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JULY, 2012.

X _____ *gmb*

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