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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY Ysa  
DEPUTY

No. 379449-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,

vs.

JOSHUA M. SHADDAY,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF PACIFIC COUNTY

Before  
The Honorable Michael Sullivan, Judge

RESPONDENT'S RESPONSE TO  
APPELLANT'S RESPONSE BRIEF

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A.

**STATE'S RESPONSE TO APPELLANT'S  
RESPONSE TO STATE'S ASSIGNMENT OF ERROR**

Division II of the Court of Appeals should not follow the ruling of In Re Gutierrez, 146 Wn. App. 151, 188 P.3d 546 (2008) by treating school bus stop enhancements as part of the standard sentencing range.

B.

**STATEMENT OF THE CASE**

The State accepts the Statement of the Case in Response as delineated by Joshua Shadday with the caveat that this case involves three separate school bus stop enhancements.

C.

**ARGUMENT**

1. The trial court erred by including the school bus stop enhancements in the standard range sentence rather than by treating sentencing enhancements as an add-on sentence as required by RCW 9.9A.533(6); the holding of In Re Gutierrez, 146 Wash. App. 151 188 P.3d 546 (2008) should not be dispositive.

Joshua Shadday correctly points out that a school bus stop enhancement as defined by RCW 9.94A.533(6) adds an additional

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twenty-four months to the standard sentence range. Appellant's Response Brief to Respondent's Cross Appeal at 4. RCW 9.94A.533(6) reads as follows:

(6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.605. **All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.**

*Emphasis added.*

The last sentence of this statute went into effect in 2006. See Chapter 339, Section 301, Washington Laws, 2006. However, Shadday asserts that "[n]othing in the statutory language prohibits the court from including the enhancement in the DOSA sentence." Appellant's Response Brief to Respondent's Cross Appeal at 3. The problem with this assertion is that it is axiomatic that the Drug Offender Sentencing Alternative is a sentencing provision. Since RCW 9.94A.533(6) states explicitly that all drug enhancements run consecutively to all other sentencing provisions, a school bus stop enhancement has to run consecutively to a DOSA sentence. To

1 interpret RCW 9.94A.533(6) in the manner suggested by Shadday  
2  
3 would eviscerate the plain meaning of this statute.

4 The cases cited by Shadday on pages four and five of his  
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6 Response Brief are inapposite: viz., State v. Silva-Baltazar, 125  
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8 Wn.2d 472, 886 P.2d 138 (1994); State v. Lusby, 105 Wn. App.  
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10 257, 18 P.3d 625 (2001); State v. Johnson, 116 Wn. App. 851, 68  
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12 P.3d 290 (2003); State v. Nunez-Martinez, 90 Wn. App. 250, 951  
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14 P.2d 823 (1998); State v. Wimbs, 74 Wn. App. 511, 874 P.2d 193  
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16 (1994); and State v. Dobbins, 67 Wn. App. 15, 834 P.2d 646  
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18 (1992). These cases were decided before the stacking provision  
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20 pertaining to enhancements was adopted in 2006. On this point  
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22 Shadday merely refers to In Re Gutierrez, 146 Wn. App. 151, 188  
23  
24 P.3d 546 (2008) and asserts that the 2006 legislative amendment  
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26 did not change the manner in which sentences are calculated.  
27  
28 Appellant's Response Brief to Respondent's Cross Appeal at 6-7.

29 But it is precisely this point with which the State takes issue.  
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31 Gutierrez focuses primarily on the DOSA statute in stating that  
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33 "nothing in the DOSA statute itself suggests that a special rule  
applies to enhancements." 146 Wn. App. at 156. In discussing  
RCW 9.94A.533(6), the Gutierrez Court posits that the first

1 sentence of this subsection which adds 24 months to a standard  
2 sentence range overrides the second sentence of this subsection  
3 which states that enhancements shall run consecutively to all other  
4 sentencing provisions. Id. This assertion appears to be erroneous  
5 on its face because it ignores the explicit language of the second  
6 sentence of RCW 9.94A.533(6). Similarly, any reference to the  
7 DOSA statute as a basis for not running enhancements  
8 consecutively ignores the plain meaning of the second sentence of  
9 RCW 9.94A.533(6). Thus, the State believes that the logic of  
10 Gutierrez is flawed and that its holding should not be dispositive for  
11 the present case.  
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19 **2. Textual differences between the statute governing**  
20 **school bus stop enhancements and the statute**  
21 **pertaining to firearm/deadly weapon enhancements are**  
22 **not significant; hence, these statutes should not be**  
23 **interpreted differently.**

24 RCW 9.94A.533(6) provides that school bus stop  
25 enhancements shall run consecutively to all other sentencing  
26 provisions. Similar to the school bus stop enhancement, the  
27 firearm enhancement makes clear that the enhancement “shall  
28 run consecutively to all other sentencing provisions”:  
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(e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter . . . .

RCW 9.94.533(3)(e).

Likewise, the deadly weapon enhancement contains identical language. See RCW 9.94A.533(4)(e). Interestingly, all of these enhancements indicate that they shall run consecutively to all other sentencing provisions. When the same language appears in different portions of a statute, court gives it same construction in each. In re Personal restraint of Hopkins, 89 Wash. App. 198, 948 P.2d 394 (1997), reversed on other grounds 137 Wash.2d 897, 976 P.2d 616 (1999).

Shadday seizes on the fact that the firearm and deadly weapons enhancements require that the enhancement “shall be served in total confinement” and the school bus stop enhancement does not. From the State’s point of view, this is a distinction without a difference. RCW 9.94A.030(47) defines total confinement as “confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any

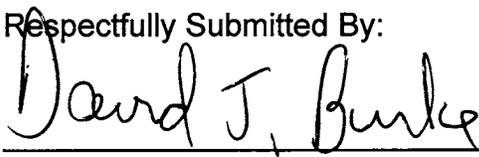
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other unit of government for twenty-four hours a day . . . .” Again,  
the State is at a loss to understand how this advances Shadday’s  
argument. The fact that school bus stop enhancements on drug  
cases can be served in something other than total confinement has  
nothing to do with whether the enhancements run consecutive to all  
other sentencing provision.

D.

**CONCLUSION**

For the reasons stated above, this case should be remanded  
to the Pacific County Superior Court with instructions to resentence  
the Appellant with the school bus stop enhancements running  
consecutively to the sentence imposed under DOSA.

Respectfully Submitted By:  
  
DAVID J. BURKE WSBA #16163  
Pacific County Prosecutor

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STATE OF WASHINGTON

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DEPUTY

1  
2 IN THE COURT OF APPEALS  
3 STATE OF WASHINGTON  
4 DIVISION II  
5

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7 STATE OF WASHINGTON, ) COURT OF APPEALS NO.

8 ) 37944-9-II

9 Respondent, )

10 VS. )

11 )  
12 )  
13 JOSHUA M. SHADDAY, )

14 ) CERTIFICATE OF MAILING

15 Appellant. )  
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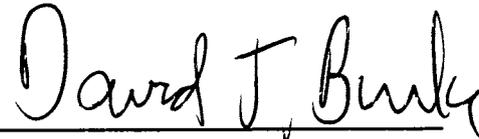
18 The undersigned attorney for the Respondent hereby certifies under penalty of  
19 perjury under the laws of the State of Washington that one original and one  
20 copy of the Respondent's Response to Appellant's Response Brief to  
21 Respondent's Cross Appeal were mailed to the Court of Appeals, Division 2,  
22 and two copies were mailed to The Tiller Law Firm, by first class mail,  
23 postage prepaid, on May 1, 2009 addressed as follows:  
24  
25

26  
27 The Tiller Law Firm  
28 ATTN: Peter Tiller  
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30 Centralia, WA 98531

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Dated: May 1, 2009 at South Bend, Washington.



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