

COURT OF APPEALS
DIVISION II

09 MAY 19 AM 11:34 NO. 38164-8-II

STATE OF WASHINGTON
BY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DEPUTY

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO SAO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Vicki Hogan

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Defense counsel was ineffective for failing to propose an instruction holding the State to its burden to disprove diminished capacity beyond a reasonable doubt.

2. The trial court erred in failing to instruct the jurors regarding the constitutional presumption to be applied in determining whether aggravating circumstances had been proven.

3. The trial court erred in failing to instruct the jurors that they could not consider facts they relied upon in reaching their verdict on the underlying offense in deciding the existence of aggravating circumstances.

4. The statutory provisions on the “particular vulnerability” aggravator is unconstitutionally vague, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

5. The exceptional sentence imposed by the trial court was “clearly excessive.”

6. Cumulative instructional error denied Mr. Sao a fair trial on the aggravating circumstances.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Under the due process clauses of the state and federal constitutions, an accused has the constitutional right to jury instructions that adequately allocate the State's burden of proof. Where a defense negates an element of the charged crime, the defense is an essential element of the offense. The jury must accordingly be instructed that the State bears the burden of proving the absence of the defense beyond a reasonable doubt unless the Legislature has signified its intent that the burden lie elsewhere. Diminished capacity is a mental condition not amounting to insanity which prevents the defendant from possessing the requisite mental state to commit the crime charged. Because diminished capacity evidence negated the essential element of intent, and particularly in a trial where the existence of diminished capacity was the only significant issue, did counsel's failure to propose such an instruction constitute ineffective assistance, requiring reversal?

(Assignment of Error 1)

2. An accused person has the right under the Sixth and Fourteenth Amendments to require the State to prove the essential elements of a criminal charge to a jury beyond a reasonable doubt. The corollary to the State's burden is the accused's constitutional

right to be presumed innocent. Facts which increase the maximum punishment to which an accused person is exposed are elements of the aggravated crime. The court bifurcated the proceedings and required the jury to determine whether aggravating circumstances had been proven in a separate phase from the guilt phase on the underlying offense. In its instructions in the aggravating circumstances phase, the court omitted instructions on the presumption of innocence and further informed the jury that its duty to decide aggravating circumstances flowed from its having found Sao guilty. Was the failure to instruct the jury at the aggravating circumstances phase constitutional error? Was the error rendered structural by prejudicial inferences which undermined the State's burden of proof? (Assignment of Error 2)

3. Mr. Sao was charged with felony murder by way of assault of a child in the first or second degree. The age of the victim is an element of assault of a child in the first or second degree. The infant victim was argued to be particularly vulnerable due to his extreme youth. Did the court err in failing to instruct the jury not to consider those factors already considered by them in reaching their guilty verdict and considered by the Legislature in setting the standard range for the offense? (Assignment of Error 3)

4. The Due Process Clause of the Fourteenth Amendment requires criminal statutes provide the public with adequate notice of proscribed conduct and be drawn with sufficient specificity to prevent arbitrary or *ad hoc* enforcement. Laws which permit substantial subjectivity by judges and juries will violate due process vagueness prohibitions. Did the “particular vulnerability” aggravating circumstance here violate due process vagueness prohibitions? (Assignment of Error 4)

5. The court imposed a 600-month sentence based on the jury’s findings that the victim was particularly vulnerable and that the defendant abused a position of trust. Even assuming that “particular vulnerability” was a valid basis to impose an exceptional sentence, did the court’s failure to define these terms to the jury render them unconstitutionally vague, in violation of principles of due process and the Eighth Amendment? (Assignment of Error 5)

6. Even where no single error standing alone merits reversal, the cumulative effect of multiple errors can be to create an enduring prejudice that deprives an accused a fair trial. Should this Court conclude cumulative error denied Sao a fair trial on aggravating circumstances? (Assignment of Error 6)

D. STATEMENT OF THE FACTS

Francisco Sao was charged charged with murder in the second degree – felony murder by way of assault of a child in the first or second degree – as well as felony harassment and tampering with a witness following the death of his three month old son, Trumane Sao. CP 5-6. The only significant issue at trial was whether he had diminished capacity to form the intent to commit assault of a child in the first or second degree.

Mr. Sao lived with Kathleen Chung, his partner of three years and mother of both of his children, three year old Leilani (called “Lala” by her family) and three month old Trumane. RP 376-77. Both Mr. Sao and Ms. Chung were addicted to methamphetamine. Ms. Chung testified she had been using methamphetamine for five years, since she was 14 years old. RP 455. She testified Mr. Sao began using methamphetamine, at her request, only one to three months before the night of Trumane’s death. RP 456-67. Ms. Chung testified that the she and Mr. Sao both smoked methamphetamine daily and that in the week leading up to the incident, Mr. Sao had not slept at all and had not eaten everyday. RP 465-66, 475. Ms. Chung described Mr. Sao’s personality while under the influence of methamphetamine as

“more active,” “sometimes mean,” “get angry quick,” and “snaps easily.”¹ RP 393, 457-58, 476. She testified Mr. Sao sometimes hallucinated while on methamphetamine, and thought he may have been hallucinating the night Trumane died because he was “acting weird” and “looked at [her] weird.” RP 464-65.

On the evening of July 25, 2007, Mr. Sao and Ms. Chung had an argument. RP 396. According to Ms. Chung’s testimony, Mr. Sao threatened to hit Ms. Chung. RP 398. He then went to the bedroom while she stayed in the living room. RP 398. From the living room, Ms. Chung heard two “thumping” noises and thought Mr. Sao was punching the wall. RP 403. She did not hear Trumane cry. RP 405.

According to Mr. Sao’s statements to forensic psychologist Dr. Vincent Gollogly, he was hallucinating and hearing voices that night. RP 822. He stated that while he and Ms. Chung were arguing, when she was in the living room and he was sitting on the bed, he thought he felt their dog, a Miniature Pinscher, touch his leg. RP 822. Without looking at it, he swung around and punched it. RP 822. He realized only later, when he saw Trumane’s

¹ Ms. Chung acknowledged that Mr. Sao had a history of violence prior to methamphetamine use, including several instances of domestic assault against her. RP 490-94.

bruises, that he had actually struck the baby and not the dog. RP 822.

On August 2, 2007, Mr. Sao was interrogated by Lakewood Police Detective Brent Eggleston. RP 522. He initially told Detective Eggleston Trumane already had bruises on his stomach and face when Mr. Sao returned home from work, and Ms. Chung admitted to him that she had dropped the baby. RP 559, 571. He stated that while he was giving Trumane a bath the baby swallowed some water and he noticed his belly was distended afterwards. RP 561-62, 571, 573. He also admitted to spanking the child that evening. RP 656. After further interrogation, Mr. Sao stated that following the couple's argument, he punched Trumane once in the stomach, "not on purpose, it was an accident." RP 662. He then stated he punched Trumane on the stomach "probably three times, full, hard blows," then flipped the baby over and spanked him on the bottom three to five times, and then laid the baby on his back on the bed and went outside to smoke a cigarette. RP 664, 667.

Ms. Chung testified Mr. Sao came back out to the living room and Ms. Chung went to the bedroom. RP 406. She noticed that Trumane's lips were blue, he was having trouble breathing, and his stomach was swollen; when she picked him up his body felt

limp and cold. RP 407-08.

Ms. Chung suggested taking him to the hospital; Mr. Sao replied “not yet.” RP 408-09. He then attempted CPR on the infant, but Trumane did not respond, although he was still breathing. RP 409-11. Mr. Sao tried to warm him up, but his condition worsened. RP 412. Ms. Chung suggested going to the hospital again and Mr. Sao said he would take them there; they did not call 911 because their telephone was disconnected. RP 413.

Around this time, Mr. Sao’s friend Rina Sak and his girlfriend dropped by to get money owed to him for methamphetamine. RP 413. Both looked at Trumane, saw that he was “purple” and “ice cold” and told the couple to take him to the hospital. RP 415, 514-19. after they left, Ms. Chung and Mr. Sao got ready to go to the hospital. RP 415. Mr. Sao lifted up Trumane’s onesie, revealing bruises and told her he had hit him. RP 415-16, 666. Ms. Chung then grabbed Trumane and ran out of the apartment. RP 417. On her way to her car Ms. Chung realized he was not breathing. RP 418. A neighbor called an ambulance, which arrived within five minutes. RP 420.

Dr. James Lee, emergency medicine doctor at Saint Clare Hospital, saw Trumane when he came into the emergency room at

11:14 p.m., non-responsive and with no pulse. RP 623-24.

Trumane was pronounced dead at 11:25 p.m.. RP 630.

Dr. Eric Leon Kiesel, forensic pathologist and Pierce County medical examiner performed an autopsy on Trumane Sao on July 26, 2007. RP 716. He concluded the cause of death was blunt force trauma to the abdomen. RP 741.

Detective Eggleston testified that after Mr. Sao's arrest, he learned of telephone calls between Mr. Sao in Pierce County Jail and Ms. Chung. RP 681. He served a search warrant on the jail and obtained a disc containing 78 calls from Mr. Sao to Ms. Chung from August 16 to 22, 2007. RP 684. Portions of this CD were played for the jury. RP 805-06. These calls included references to Mr. Sao's intent to "plead temporary insanity." RP 765.

Detective Eggleston also testified to a summary of one recorded call not played for the jury. In that call, Ms. Chung and Mr. Sao agreed their methamphetamine use had played a role in Trumane's death. Ms. Chung stated they "got caught up with the wrong drug at the wrong time." RP 796. Mr. Sao said he "didn't think it would take over him, but it did and made him snap." RP 796.

Forensic psychologist Dr. Vincent Gollogly testified he was

retained to evaluate Mr. Sao. RP 817. He interviewed Mr. Sao for two to three hours and reviewed the police report and determination of probable cause. RP 821. Mr. Sao told Dr. Gollogly he had been high on methamphetamine for four to five days with no sleep. RP 821. Dr. Gollogly diagnosed Mr. Sao with amphetamine-induced psychosis disorder with hallucinations and delusions. RP 825. He testified that he is not aware of any drug more addictive than methamphetamine and that people often become addicted on their first use. RP 824-25. He also testified that once an individual is addicted, continued use is not entirely voluntary; "there is also a compulsion to take it again, so that it's a mixture of voluntary, and ... once you are addicted to it... you have got to keep taking it." RP 824. Dr. Gollogly explained it is possible for a person to engage in purposeful, intentional behavior, such as bathing a baby, while experiencing hallucinations and delusions. RP 828-29. Dr. Gollogly concluded it was possible that Mr. Sao was unable to form the intent to commit the crime. RP 828.

Western State Hospital Forensic Psychologist Marilyn Ronnel testified she and fellow forensic psychologist Phyllis Knopp evaluated Mr. Sao and determined he was not acting under diminished capacity because "emotional states that do not

overwhelm cognitions of regular intent do not rise to the level of diminished capacity.” RP 934. She testified Mr. Sao’s ability to carry on conversations, prepare food, and bathe the baby indicated he was able to act in an organized, purposeful, goal-directed way, and that hallucinations and delusions do not establish diminished capacity. RP 932, 946.

The jury convicted Mr. Sao as charged. CP 81.

In a bifurcated proceeding, the parties presented additional argument but no further evidence regarding aggravating circumstances: (1) whether Mr. Sao knew or should have known that the victim was particularly vulnerable or incapable of resistance, and (2) whether Mr. Sao used his position of trust to facilitate the commission of the crime. The jury found both aggravating factors. RP 1044-47; CP 70.

The court imposed an exceptional sentence of 600 months on the murder charge, almost double the high end of the statutory range, and 16 months on each of the other charges, to be served concurrently. CP 81-94. Mr. Sao timely appeals. CP 80.

D. ARGUMENT

1. MR. SAO'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED BY HIS ATTORNEY'S FAILURE TO REQUEST AN INSTRUCTION PROPERLY ALLOCATING THE STATE'S BURDEN OF PROOF ON DIMINISHED CAPACITY.

The federal and state constitutions provide the accused with the right to representation of counsel and to due process of law.

U.S. Const., amends. 6, 14; Wash. Const., art. 1, § 3, 22.

In order to prevail on a claim of ineffective assistance, a defendant must show: (1) that his or her lawyer's performance fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Here, defense counsel did not propose any instruction which would have properly allocated the State's burden of proof regarding diminished capacity evidence. Where a defense negates an essential ingredient of the crime, the jury must be instructed that

the State bears the burden to disprove the defense beyond a reasonable doubt unless a legislative intent to shift the burden may be discerned from the statutory definition of the defense. State v. McCullum, 98 Wn.2d 484, 491-93, 656 P.2d 1064 (1983). Such a rule is consistent with an accused person's due process right to adequate jury instructions.

The trial court issued the standard instruction on diminished capacity contained in WPIC 18.20:

Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form the intent to assault and recklessly inflict great bodily harm or substantial bodily harm.

CP 42.

Defense counsel did not object or propose an alternate instruction. This instruction failed to adequately guide the jury regarding how to assess evidence of diminished capacity and, because the diminished capacity evidence negated the State's proof of mens rea, ultimately relieved the State of its burden of proof. Because of the error, the jurors were free to consider or reject diminished capacity evidence according to any standard they chose, in derogation of Mr. Sao's constitutional right to due process of law. The error requires reversal.

a. An accused is entitled to jury instructions that accurately state the law and allow the defense to argue its theory of the case. Consistent with due process, the State must prove each element of the charged offense and the instructions must inform the jury as to each element. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Thus, an accused person is constitutionally entitled to jury instructions that are not misleading, correctly state the law and sufficiently permit him to argue his theory of the case. State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002); State v. Hackett, 64 Wn. App. 780, 786, 827 P.2d 1013 (1992).

Thus, the defense should have ensured the court would instruct the jury that the State had to prove intent and disprove diminished capacity beyond a reasonable doubt.

i. Because intent is an ingredient of the offense, the state must disprove the defense of diminished capacity beyond a reasonable doubt. In the self-defense context, another circumstance where defense evidence calls into question an accused's ability to form the mens rea for the charged crime, courts have required, consistent with due process, that the jury be instructed the State must disprove the absence of self-defense

beyond a reasonable doubt. See e.g., State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984); State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). In this arena, courts have recognized that jury instructions must more than adequately convey the law of self-defense. Read as a whole, they must make the relevant legal standard “manifestly apparent” to the average juror. State v. Allery, 101 Wn.2d 591, 594-95, 682 P.2d 312 (1984).

Formerly, however, there was substantial confusion as to the allocation of the burden of proof in self-defense cases. See generally, State v. McCullum, 98 Wn.2d at 491-93 (discussing history of instruction). The allocation of the State’s burden to disprove self-defense derived from the McCullum Court’s application of a standard for determining whether the absence of a defense is an element of an offense. 98 Wn.2d at 490. Under that standard, the absence of a defense is an essential element of an offense if (1) the statute reflects the Legislature’s intent to treat the absence of a defense as “one of the elements included in the definition of the offense of which the defendant is charged” or (2) one or more elements of the offense “negates” one or more elements of the offense which the prosecution must prove beyond a

reasonable doubt.² Id. (citing State v. Hanton, 94 Wn.2d 129, 132, 614 P.2d 1280, cert. denied, 449 U.S. 1035 (1980)); see also State v. Camara, 113 Wn.2d 631, 638-39, 781 P.2d 483 (1987) (finding legislative intent to shift burden of proving consent to rape to defendant). Applying this standard, the McCullum court concluded the State must bear the burden – and the jury must correspondingly be instructed – of proving intent and disproving self-defense beyond a reasonable doubt. 98 Wn.2d at 490; Acosta, 101 Wn.2d at 615.

ii. As the State must prove intent and disprove diminished capacity beyond a reasonable doubt, and the jury must be correspondingly instructed. Diminished capacity is a mental condition not amounting to insanity which prevents the defendant from possessing the requisite mental state to commit the crime charged. State v. Furman, 122 Wn.2d 440, 454, 858 P.2d 1092 (1993). The standard for the issuance of a diminished capacity instruction is stringent. It is not enough that the defendant is diagnosed as suffering from a particular mental disorder; the diagnosis must, under the facts of the case, be capable of forensic

² Where the Legislature has evinced an intent that the burden of proof not lie with the State, it is not relevant whether the defense negates an ingredient of the crime unless the allocation of the burden violates due process. Cf. Camara, 113 Wn.2d at 638-89.

application in order to help the trier of fact assess the defendant's mental state at the time of the crime, and the opinion of the expert concerning the defendant's mental disorder must reasonably relate to impairment of the ability to form the culpable mental state to commit the crime charged. State v. Atsbeha, 142 Wn.2d 904, 16 P.3d 626 (2001). An accused who presents sufficient evidence that his ability to form the requisite mens rea was impaired is entitled to have the jury instructed on the diminished capacity defense. Pirtle v. Morgan, 313 F.3d 1160, cert. denied, 123 S.Ct. 2286 (9th Cir. 2002); State v. Damon, 144 Wn.2d 686, 693-94, 25 P.3d 418 (2001); State v. Ellis, 136 Wn.2d 498, 522-23, 963 P.2d 843 (1998).

Historically, Washington jurisprudence on diminished capacity has permitted convictions to stand where the jury is instructed only that evidence of diminished capacity “may be taken into consideration” in deciding whether the defendant had the capacity to form the requisite intent. State v. James, 47 Wn. App. 605, 608-09, 736 P.2d 700 (1987); State v. Sam, 42 Wn. App. 586, 588, 711 P.2d 1114 (1986); State v. Dana, 73 Wn.2d 533, 536, 439 P.2d 403 (1968); WPIC 18.20. These cases have incorrectly dismissed concerns that the “may be taken into consideration” instruction fails to sufficiently define the State’s burden of proof.

The cases, however, have unquestioningly adopted the analytically comparable circumstance of voluntary intoxication, which is statutorily defined.³ Diminished capacity due to mental illness or disorder is not statutorily defined. Nonetheless, the defense has wrongly been subsumed in the same category as voluntary intoxication.⁴ Here, diminished capacity was due to a mental disorder – amphetamine-induced psychosis disorder – which was in turn caused by voluntary intoxication, but the actual diagnosed disorder was distinct and separate from the voluntary intoxication. The jury was given the standard voluntary intoxication

³ Legislative policy considerations have shaped the voluntary intoxication instruction by prohibiting courts from allowing criminal defendants to unfairly benefit from their voluntary intoxication. RCW 9A.16.090 states,

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such mental state.

⁴ At common law, the voluntary intoxication defense was recognized by Washington courts well before the courts permitted a diminished capacity defense due to mental disease or defect. It was not until the early 1960s or 1970s that Washington courts began to recognize mental disease or defect short of insanity as relevant to assessing guilt or innocence in a criminal trial. John Q. LaFond and Kimberly Gaddis, Washington's Diminished Capacity Defense Under Attack, 13 U. Puget Sound L. Rev. 1, 14-15 (1989).

instruction,⁵ which did not clarify the distinction in the State's burden of proof for diminished capacity. This Court should not conflate the two concepts, but apply the legal standard for diminished capacity.

Washington courts have rationalized the failure to instruct juries that the State must prove the absence of diminished capacity by construing the defense as "a rule of evidence" rather than a defense. See e.g., James, 47 Wn. App. at 608. More recently, however, the Washington Supreme Court has expressly distinguished between the two circumstances, explaining, "voluntary intoxication is not a defense, as such, but a factor the jury may consider in determining if the defendant acted with the specific mental state necessary to commit the crime charged."⁶ Furman, 122 Wn.2d at 454; cf. Ellis, 136 Wn.2d at 523 (issuance of diminished capacity instruction based on mental disease or defect

⁵No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent.

CP 41.

⁶ That a distinction between the two concepts is not merely appropriate but constitutionally necessary is demonstrated by the courts' evolving recognition of the need for expert testimony to establish (1) the existence of the alleged disorder as well as (2) the requisite causal connection between the disorder and the diminished capacity. See, Brett C. Trowbridge, The New Diminished Capacity Defense in Washington: A Report From the Trowbridge Foundation, 36 Gonz. L. Rev. 497, 502-04 (2000-01).

consistent with due process); State v. Hamlet, 133 Wn.2d 314, 320, 944 P.2d 1026 (1997) (noting in dictum differences between burdens of proof in insanity and diminished capacity defenses, and acknowledging that once issue of diminished capacity is raised State must prove absence of the defense beyond a reasonable doubt). Such a distinction is appropriate in light of the fact that the Legislature apparently allocated the burden of proof in voluntary intoxication cases, whereas diminished capacity is a creature of common law.

Diminished capacity evidence disproves the State's evidence of intent and, in some circumstances, may negate that evidence altogether.⁷ Thus, according to the McCullum standard, the notion that the diminished capacity defense is more a "rule of evidence" than a defense is nothing more than a judicially-created chimera. The lack of adequate diminished capacity instructions, therefore, prejudicially obstructs an accused's right to have the State prove the elements of the charged crime beyond a

⁷ In this regard, the diminished capacity defense must be distinguished from the insanity defense, which our Supreme Court has held neither negates nor is even related to element of mens rea or intent. RCW 10.77.030(2); State v. Box, 109 Wn.2d 320, 330, 745 P.2d 23 (1987). Thus, the Court has held there is no due process problem presented by shifting the burden to the defense to prove insanity by a preponderance of the evidence. Box, 109 Wn.2d at 330.

reasonable doubt. Winship, 397 U.S. at 364, Acosta, 101 Wn.2d at 615.

b. Failure to properly instruct the jury violates Due Process, which requires the state prove all elements beyond a reasonable doubt. It is axiomatic that the due process clauses of the federal and state constitutions protect the accused against conviction except by proof beyond a reasonable doubt of every element of the crime. U.S. Const. amend. 6, U.S. Const. amend. 14; Wash. Const. art. 1, §§ 3, 21, 22; Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Winship, 397 U.S. at 364. Included in these elements the State must prove is the mental state associated with the crime charged. Mullaney v. Wilbur, 421 U.S. 624, 699, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). However, the diminished capacity instructions given by the court failed to inform the jury how to weigh the diminished capacity evidence. Dr. Gollogly's expert testimony established Sao's inability to form the intent to commit assault of a child was caused by amphetamine-induced psychosis. But no instruction provided the jurors with guidance as to how to assess the evidence.

Instead of informing the jury the State had to prove intent and disprove diminished capacity beyond a reasonable doubt, the

court issued WPIC 6.51, the standard pattern jury instruction regarding expert testimony. CP 106; WPIC 6.51.⁸ CP 35. The other diminished capacity instruction given by the court essentially mirrored the expert instruction, telling the jury that voluntary intoxication evidence “may be taken into consideration” in deciding whether Sao was able to form intent and failing to inform them how to otherwise measure the diminished capacity evidence. CP 41; WPIC 18.10; WPIC 18.20.

Thus, depending on whether or not the jurors found evidence of mental health disorders compelling generally, the permissive instruction authorized the jurors to consider – or to utterly discount – the diminished capacity instruction without reference to the strength of the State’s evidence or the merits of the defense. Because the instruction directed a subjective

⁸ WPIC 6.51 provides,

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness’ information, together with the factors already given you for evaluating the testimony of any other witness.

consideration of the evidence, unmoored in legal principles, it was fatally deficient.

Evidence of diminished capacity negates the mens rea for an offense. The inadequate diminished capacity instructions issued by the court, however, prejudicially obstructed Sao's right to have the State prove the elements of the charged crime beyond a reasonable doubt, and violated well-settled principles regarding allocation of the State's burden of proof. Winship, 397 U.S. at 364, Acosta, 101 Wn.2d at 615; McCullum, 98 Wn.2d at 490.

Consistent with due process, Sao was entitled to have the jury instructed that to convict him of felony murder, the State bore the burden of proving intent and disproving diminished capacity beyond a reasonable doubt. Because the instructions were prejudicially deficient, reversal is required. Winship, 397 U.S. at 364.

c. The error was prejudicial. The only significant issue on the murder charge was whether Mr. Sao lacked the capacity to form the intent to commit assault of a child in the first or second degree. The defense presented substantial evidence of Mr. Sao's diminished capacity through Dr. Gollogly's testimony, corroborated by evidence of Mr. Sao's heavy methamphetamine

use. The State also presented evidence to contradict the diminished capacity theory. Due process required the jury weigh and evaluate this evidence by the correct standard and hold the State to its burden of proof to disprove diminished capacity. Since the jury was not so instructed, there is no way to know whether the correct standard was applied. Therefore, defense counsel's omission resulted in derogation of Mr. Sao's constitutional right to due process of law.

2. THE TRIAL COURT'S INSTRUCTIONS ON AGGRAVATING CIRCUMSTANCES DIMINISHED THE STATE'S BURDEN OF PROOF, IMPROPERLY AUTHORIZED SAO'S SENTENCE TO BE INCREASED BASED ON FACTS CONTEMPLATED BY THE LEGISLATURE, WERE AMBIGUOUS, AND VIOLATED DUE PROCESS VAGUENESS PROHIBITIONS.

a. The trial court undermined the State's Fourteenth Amendment obligation to prove the aggravating circumstances beyond a reasonable doubt by failing to instruct the jury on the presumption of innocence. In the second part of the bifurcated trial, two aggravating factors were submitted to the jury. The court instructed the jury:

The defendant has previously been found to be guilty of murder in the second degree. The jury's verdict establishes the existence of those facts and

circumstances which are the elements of the crime. The jury will now determine whether any of the following aggravating circumstances exist:

- 1) Whether the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance.
- 2) Whether the defendant used his position of trust to facilitate the commission of the crime.

CP 61.

The State has the burden of proving the existence of each aggravating circumstance beyond a reasonable doubt. In order for you to find the existence of an aggravating circumstance in this case, you must [sic] unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

Multiple aggravating circumstances have been alleged. You should consider each of the allegations separately. Your verdict on one allegation should not control your verdict on the other allegation.

CP 64.

The court failed to instruct to the jury regarding the presumption to be applied to the aggravating factors, rendering the verdict and ensuing sentence constitutionally deficient, requiring reversal.

i. Mr. Sao had the Due Process right to have the jury instructed that he was presumed innocent of each element of the offense. The Due Process Clause of the Fourteenth Amendment “protect[s] the accused against conviction except upon proof

beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” Winship, 397 U.S. at 364. The presumption of innocence is likewise fundamental to a fair trial, Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1895), and has repeatedly been stated to be essential by both the Legislature and the courts. RCW 10.58.020; In re Lile, 100 Wn.2d 224, 227, 668 P.2d 581 (1983).

Proper instructions on the presumption of innocence serve to anchor and define the State’s burden of proof.

It is true that the presumption of innocence and the State’s burden are closely related. Yet the presumption of innocence instruction conveys to the jury a special and additional caution to consider only the evidence before them and not to surmise anything based on a defendant’s present situation.

Lile, 100 Wn.2d at 227.

As stated in Winship,

The [reasonable doubt] standard provides concrete substance for the presumption of innocence -- that bedrock “axiomatic and elementary” principle whose “enforcement lies at the foundation of the administration of our criminal law.” As the dissenters in the New York Court of Appeals observed, and we agree, “a person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.”

Winship, 397 U.S. at 363 (internal citations omitted).

The Washington Supreme Court has found the failure to submit instructions to the jury regarding the presumption of innocence to be structural error warranting reversal of the conviction. State v. McHenry, 88 Wn.2d 211, 213-14, 558 P.2d 188 (1977); but see Kentucky v. Wharton, 441 U.S. 786, 789, 99 S.Ct. 2088, 60 L.Ed. 2d 640 (1979) (failure to instruct on presumption of innocence reviewed under constitutional harmless error standard). Sao submits that under the unique circumstances here, the structural error standard must apply. Under either standard of review, however, the Court's failure to instruct the jury that Sao was presumed innocent of the aggravating circumstances requires reversal.

ii. The aggravating circumstances are elements of the offense. In Apprendi and Blakely, the United States Supreme Court clarified the long-standing requirement that *any* fact that increases the maximum punishment faced by a defendant must be submitted to a jury and proved beyond a reasonable doubt. Blakely v. Washington, 542 U.S. at 306-07; Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This is true even when the fact is labeled

a “sentencing factor” or “sentence enhancement” by the Legislature. Blakely, 542 U.S. at 306-07; Apprendi, 530 U.S. at 482-83.

In Ring v Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the United States Supreme Court addressed aggravating factors that permitted the court, not a jury, to impose the death penalty rather than life imprisonment. The Court held “aggravating circumstances that make a defendant eligible for the death penalty or an exceptional sentence ‘operate as the functional equivalent of an element of a greater offense.’” Ring, 536 U.S. at 609, quoting Apprendi, 530 U.S. at 494 n.19.

In Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003), the Court reiterated this principle:

Our decision in [Apprendi] clarified what constitutes an “element” of an offense for purposes of the Sixth Amendment’s jury-trial guarantee. Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact – no matter how the State labels it – constitutes an element, and must be found by a jury beyond a reasonable doubt.

Sattazahn, 537 U.S. at 111.

Likewise, in Harris v. United States, 536 U.S. 545, 557, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002), the Court explained, “Apprendi

said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime -- and thus the domain of the jury -- by those who framed the Bill of Rights."

The Legislature intended its 2005 amendments to the SRA's exceptional sentencing procedure to conform the statute to Blakely.

The Legislature specifically found:

The legislature intends to conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in Blakely. In that case, the United States supreme court held that a criminal defendant has a Sixth Amendment right to have a jury determine beyond a reasonable doubt any aggravating fact, other than the fact of a prior conviction, that is used to impose greater punishment than the standard range or standard conditions. The legislature intends that aggravating facts, other than the fact of a prior conviction, will be placed before the jury. The legislature intends that the sentencing court will then decide whether or not the aggravating fact is a substantial and compelling reason to impose greater punishment. The legislature intends to create a new criminal procedure for imposing greater punishment than the standard range or conditions and to codify existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances.

Laws 2005, ch. 68, § 1.

Thus, the Legislature required the facts supporting aggravating factors be found by a unanimous jury beyond a

reasonable doubt. Laws 2005, ch. 68, § 5. In State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007), our Supreme Court found the statutory amendments could be applied retrospectively without offending due process and *ex post facto* prohibitions. While the role of aggravators as elements of the offense was not integral to the Pillatos Court's opinion and so was not addressed in depth, the Court has previously acknowledged this basic precept of Sixth Amendment jurisprudence. State v. Mills, 154 Wn.2d 1, 9, 109 P.2d 415 (2005). In keeping with this axiomatic principle, concurring justices Sanders and Chambers specifically found that because the aggravators are the basis for enhanced penalties, they are essential elements of the crime. Pillatos, 159 Wn.2d at 483 (citing Apprendi, 530 U.S. at 490 and State v. Goodman, 150 Wn.2d 774, 785-86, 83 P.3d 410 (2004) (Sanders, J., concurring)). To summarize, under any reasonable construction of Apprendi, Blakely, and their progeny, aggravating circumstances are elements of the crime.

iii. Because the instruction given by the trial court undercut the presumption of innocence, this Court should find the error structural. Because aggravators are elements, Sao had the due process right to have the jury instructed that he was presumed

innocent of the aggravators. Sattazahn, 537 U.S. at 111; Ring, 536 U.S. at 609; Apprendi, 530 U.S. at 494; Winship, 397 U.S. at 393.

The instructions crafted by the trial court, however, conveyed precisely the opposite impression, for two reasons.

The first supplemental instruction began, “The defendant has previously been found to be guilty of murder in the second degree.” CP 61. Although a separate supplemental instruction informed the jury that the State had the burden of proving the existence of “an aggravating circumstance” beyond a reasonable doubt, neither instruction in any way informed the jury that the aggravating circumstances themselves had to be considered akin to elements. Nor did the court’s instructions orient the State’s burden of proof with respect to any constitutional presumption. In actuality, the court’s instructions undercut the State’s burden to prove the aggravating circumstances beyond a reasonable doubt by in effect telling the jury that having found him guilty, they could then presume him guilty when considering the aggravating circumstances.

Second, and more critically, the jurors were likely to infer the absence of an instruction on the presumption of innocence in the aggravating circumstances phase meant the presumption did not

apply. Stated differently, because the court issued the presumption of innocence instruction at the guilt phase of the proceeding, but omitted it from the instructions at the aggravators phase, the reasonable inference to be drawn was that the omission was deliberate. For both of these reasons, therefore, the omission of an instruction on the presumption of innocence rendered the reasonable doubt instruction nugatory.

Some federal constitutional errors are subject to harmless error analysis, but others “will always invalidate the conviction” and are considered “structural” errors. Sullivan v. Louisiana, 508 U.S. 275, 278-79, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). Among the errors deemed structural by the United States Supreme Court are the issuance of a constitutionally-deficient reasonable doubt instruction, Sullivan, 508 U.S. at 279; the total deprivation of the right to counsel, Gideon v. Wainwright, 372 U.S. 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); trial by a biased judge, Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed.2d 749 (1927); and the denial of the right to self-representation. McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). As in Sullivan, an examination of the harmless error rule itself establishes which constitutional standard must apply. See Sullivan, 508 U.S. at 279.

An error of constitutional magnitude is harmless only if the appellate court is convinced beyond a reasonable doubt that the jury would not have convicted absent the error. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). “The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.” Sullivan, 508 U.S. at 279 (emphasis in original). Where the reviewing court cannot state with confidence that the guilty verdict is based on an actual jury finding of guilty-beyond-a-reasonable doubt, “the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless.” Id. at 280 (emphasis in original).

Here, the jurors were given the erroneous impression that no presumption of innocence should rightfully apply at the aggravating circumstances phase of the proceedings and, moreover, that their guilty verdict on the underlying offense was a relevant consideration with respect to deciding whether the aggravators had been proven. This grave misstatement of the State’s burden was

substantially compounded by the Court's failure to admonish the jurors not to consider facts relied upon in convicting on the underlying offense when deciding the aggravating circumstances.

Thus, as in Sullivan, operation of a harmless error rule is fundamentally illogical: the jurors commenced from the perspective of presuming Sao guilty, thus the further finding of aggravating circumstances may have amounted to no more than checking a box.

The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt -- not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error . . . [T]he essential connection to a "beyond a reasonable doubt" factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings. A reviewing court can only engage in pure speculation -- its view of what a reasonable jury would have done. And when it does that, "the wrong entity judge[s] the defendant guilty."

Sullivan, 508 U.S. at 580-81 (internal citations omitted; emphases in original). As in Sullivan, this Court should conclude the error here was structural. The judgment should be reversed and the case remanded with direction the jury findings be vacated.

b. Failure to define “particularly vulnerable” violated the Due Process vagueness doctrine. The due process vagueness doctrine has a twofold purpose: (1) to provide the public with adequate notice of what conduct is proscribed and (2) to protect the public from arbitrary or ad hoc enforcement. City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000); State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001). “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 of arbitrary and discriminatory application.” Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

The supplemental instructions provided some guidance as to the meaning of “position of trust.” CP 63. But the instructions provided no guidance as to the “particular vulnerability” aggravator.

The jury was instructed:

A victim is “particularly vulnerable” if he or she is more vulnerable to the commission of the crime than the typical victim of assault of a child in the first or second degree. The victim’s vulnerability must also be a substantial factor in the commission of the crime.

CP 62. No further definition was provided.

Prior to Blakely, it was assumed that the sentencing judge’s

own understanding of what was contemplated by the Legislature in setting the standard range for the offense would be factored into his or her determination of whether the State had met its burden of proving the existence of aggravating factors. State v. Nordby, 106 Wn.2d 514, 518-19, 723 P.2d 1117 (1986).

For this reason, the determination of whether a victim was “particularly vulnerable” survived vagueness challenges, because exceptional sentencing necessarily involved consideration and comparison of other similar crimes by the sentencing judge. Former RCW 9.94A.390(2)(b); State v. Cardenas, 129 Wn.2d 1, 10, 914 P.2d 57 (1996)

Here, by contrast, the jury’s determination that Trumane Sao was “particularly vulnerable and incapable of resistance” was unmoored and subjective. There was no implicit comparative standard for the jury to measure whether he was exceptionally vulnerable and the court did not define the term.

As noted, under the SRA’s discretionary judicial sentencing scheme, the Legislature recognized

between the seriousness of a particular crime and the seriousness inherent in all violations of that defined crime. For example, many violent crimes are “particularly cruel” and their victims are, at least at the time of the crime, “particularly vulnerable.”

David Boerner, Sentencing in Washington, §§9.6; 9.7 at 9-12-13 (1985) (discussing the influence of Minnesota's Sentencing Reform Act on the Washington's Sentencing Guidelines' Commission's intent that the circumstances of the crime play a role in the exceptional sentence process).

Thus, by submitting the aggravator to the jury, the court violated due process vagueness principles in three ways: first, the court did not instruct the jury to disregard that vulnerability inherent in any assault of a child in the second degree. Second, the jury necessarily did not assess what would have rendered Trumane *particularly* vulnerable. Third, there is no way to ascertain that the jurors all used the same definition of this legal terms of art in deciding that the State had proven the aggravators' existence.

3. EVEN ASSUMING THE VALIDITY OF THE PARTICULAR VULNERABILITY FINDING, THIS COURT MUST REMAND FOR RESENTENCING BECAUSE THE TRIAL COURT FAILED TO CORRESPOND THE LENGTH OF THE EXCEPTIONAL SENTENCE TO THE AGGRAVATING FACTOR AND THE SENTENCE IMPOSED WAS CLEARLY EXCESSIVE.

The parties agreed Mr. Sao's standard range for the murder count was 216 to 316 months based on an offender score of 7. The State filed a sentencing memorandum requesting the court

impose an exceptional sentence of 600 months for the murder count. CP 71. The State argued that an exceptional sentence of 600 months – almost double the high end of the standard range – was necessary to deliver appropriate punishment due to the aggravating factors of particular vulnerability and abuse of a position of trust. The State argued this sentence would be less than that imposed in other cases where children under two years of age were killed by their parents, although the convictions in those cases were a lesser degree (homicide by abuse, which is equivalent to murder in the first degree). State v. Berube, 150 Wn.2d 498, 79 P.3d 1144 (2003); State v. Russell, 69 Wn. App. 237, 848 P.2d 743 (1993); State v. Creekmore, 55 Wn. App. 852, 783 P.2d 1068 (1989).

The trial court imposed the requested sentence. CP 95-98. Its oral and written findings essentially reiterated the jury found both aggravators charged. RP 1075-77; CP 95-98.

a. The SRA requires that punishment be just and proportionate to the seriousness of the offense and the offender's criminal history. In crafting the determinate sentencing scheme of the SRA, the Legislature's intent was to make the criminal justice system accountable to the public by "developing a system for the

sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences.” RCW 9.94A.010. The Legislature declared the purposes of the act, in part, to be to

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender’s criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses.

....

RCW 9.94A.010.

b. The sentence imposed by the court was clearly excessive. A judge abuses his discretion in imposing an exceptional sentence where the sentence imposed is “clearly excessive.” Former RCW 9.94A.585(4); State v. Batista, 116 Wn.2d 777, 792, 808 P.2d 1141 (1991). Further, where some of the trial court’s justifications for imposing an exceptional sentence are improper, the sentence should be reversed unless a reviewing court is confident that the principal justifications on which the trial court relied are proper and that the trial court, on remand, would impose the same sentence absent the improper justifications. Farmer, 116 Wn.2d at 432.

Here, in its written findings and conclusions for the exceptional sentence, the court merely stated it agreed with the jury in finding both aggravating circumstances, and this provided a substantial and compelling reason to exceed the standard range. CP 95-98. In its oral ruling the court reviewed the facts, but did not specifically explain why it elected to impose 600 months or attempt to tie the sentence length to the aggravators found by the jury.

In State v. Ritchie, 126 Wn.2d 388, 894 P.2d 1208 (1995), the Washington Supreme Court decided that a judge who has elected to depart from the standard range is not required to give reasons correlating the length of the exceptional to the aggravating factor providing the “substantial and compelling reasons” for the departure. 126 Wn.2d at 392. The Court noted, however, that where the sentence length has in no way been linked to the aggravating factors cited by the court, the sentence may be reviewed for an abuse of discretion if it is “clearly excessive.” Id., see also, Farmer, 116 Wn.2d at 432.

The Ritchie decision has been criticized because it precludes review of the length of an exceptional sentence by rendering judges’ sentencing decisions standardless. Ritchie, 126 Wn.2d at 405-17 (Madsen and Guy, JJ., dissenting); see also

Boerner, §§9.2, 9.4 at 9-2 – 9.5; 9.10 – 9.11 (discussing the purpose of substantive appellate review of exceptional sentences and the requirement that reasons for deviating from the standard range be stated). The Ritchie holding is also arguably unconstitutional because it denies a defendant his appeal of right by making judges' "discretionary" sentencing decisions unreviewable. Const. Art. I, § 22.

As discussed above, one of the court's two justifications for imposing an exceptional sentence – the "particular vulnerability" factor – was improper. This Court cannot be confident that the court would have imposed the same 600-month sentence based solely on the finding of abuse of a position of trust. This Court should find the 600-month sentence was clearly excessive, contrary to the purposes of proportionality enunciated in the SRA. This Court should reverse and remand for resentencing.

4. CUMULATIVE ERROR DENIED MR. SAO A FAIR TRIAL ON THE AGGRAVATING CIRCUMSTANCES.

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find the errors combined together denied the defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 685 P.2d

668 (1984). The doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Although Mr. Sao contends that each of the errors set forth above, viewed on its own, engendered sufficient prejudice to merit reversal, he alternatively argues the errors together created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict. The jury was not instructed that they had to presume Sao innocent of the aggravating circumstances and was further given the incorrect impression from the court's instructions that the presumption of innocence did not apply. Compounding this error, the jurors were not told to base their verdict on the aggravating circumstances on facts other than the facts they relied upon in reaching their verdict on the underlying offense. Moreover, the particular vulnerability factor was constitutionally vague and therefore permitted guilty findings based on highly subjective considerations.

Given the magnitude and breadth of the errors committed by the trial court in the aggravating circumstances phase of the proceedings, the court's determination that each factor alone, could

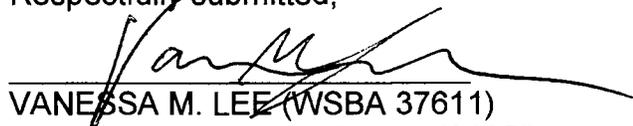
justify the exceptional sentence cannot stand. For all of these reasons, even if this Court does not find the errors standing alone merit reversal, reversal is required given their cumulative prejudicial effect.

E. CONCLUSION

Based on the foregoing, Francisco Sao respectfully requests this Court reverse his conviction and remand for a new trial. Alternately, he asks this Court to vacate the judgment and remand for entry of a standard range sentence.

DATED this 18th day of May, 2009.

Respectfully submitted,



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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 38164-8-II
v.)	
)	
FRANCISCO SAO,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF MAY, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KATHLEEN PROCTOR PIERCE COUNTY PROSECUTING ATTORNEY 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> FRANCISCO SAO 321749 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WY CLALLAM BAY, WA 98326	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF MAY, 2009.

X _____ *grd*

FILED
COURT OF APPEALS
DIVISION II
09 MAY 19 11:11:36
STATE OF WASHINGTON
BY *grd*
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Washington Appellate Project
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1511 Third Avenue
Seattle, Washington 98101
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