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Treat as motion  
on the merits to affirm.  
EB Schatz

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID LEE SANDHOLM,

Appellant.

NO. 38772-7-II

MOTION TO DISMISS APPEAL

I. IDENTITY OF MOVING PARTY:

Respondent, State of Washington, requests the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT:

The State respectfully requests that this court dismiss the appeal where defendant failed to present an issue subject to appellate review.

III. FACTS RELEVANT TO MOTION:

On March 10, 2008, the Pierce County Prosecuting Attorney's Office filed an information charging David Lee Sandholm, hereinafter "defendant," with one count of burglary in the second degree. CP 1. The matter proceeded to jury trial before the Honorable Thomas P. Larkin on November 4, 2008. RP 5. After hearing the evidence, the jury convicted defendant as charged. CP 52.

1 The trial court sentenced defendant on January 14, 2009. RP 360-376. At the  
2 sentencing hearing, the parties agreed, based on the defendant's offender score of 12, that  
3 the defendant's standard sentencing range for the burglary was 51 to 68 months. RP 361,  
4 367; CP 57-59. The State asked the court to impose the 68 months high-end standard  
5 range sentence. RP 361. Defendant asked the court to impose an exceptional sentence  
6 downward. RP 367-371; CP 102-122. The court heard arguments in favor and against an  
7 exceptional sentence downward. RP 361-371. After considering the arguments,  
8 defendant's criminal history, and defendant's current case, the court imposed the low-end  
9 standard range sentence of 51 months. RP 376; CP 87-99. On appeal, defendant argues  
10 that because his sentence is disproportionate to the crime he committed, the trial court  
11 erred in failing to impose an exceptional sentence downward. Appellant's Brief, 6.

12 IV.   GROUNDS FOR RELIEF AND ARGUMENT:

- 13  
14 1. THIS COURT SHOULD DISMISS DEFENDANT'S APPEAL,  
15 WHERE THE TRIAL COURT PROPERLY SENTENCED  
16 DEFENDANT WITHIN THE STANDARD RANGE MAKING  
THE ISSUE RAISED ON APPEAL NOT SUBJECT TO  
APPELLATE REVIEW.

17 When the Legislature enacted the Sentencing Reform Act ("SRA"), it included a  
18 provision stating sentences imposed within the statutorily established standard ranges are  
19 not subject to appellate review. RCW 9.94A.585(1).<sup>1</sup> A court's refusal to impose an  
20 exceptional sentence downward is not appealable. See *State v. Rousseau*, 78 Wn. App.  
21 774, 776, 898 P.2d 870 (1995); *State v. Friedrich – Tibbets*, 123 Wn.2d 250, 252, 866  
22 P.2d 1257 (1994).

23  
24  
25 <sup>1</sup> RCW 9.94A.585(1): A sentence within the standard sentence range, under RCW 9.94A.510 or 9.94A.517,  
for an offense shall not be appealed. For purposes of this section, a sentence imposed on a first-time offender  
under RCW 9.94A.650 shall also be deemed to be within the standard range for the offense and shall not be  
appealed.

1 By establishing presumptive sentence ranges, the Legislature effectively structured  
2 the trial court's discretion; thus, when the sentence given is within the presumptive  
3 sentence range, there can be no abuse of discretion as a matter of law and no right to  
4 appeal based on that issue. *State v. Ammons*, 105 Wn.2d 175, 183, 718 P.2d 796 (1986).  
5 There are some limitations on the scope of this bar to appellate review. As stated by the  
6 Washington Supreme Court:

7 ... this prohibition does not bar a party's right to challenge the underlying  
8 legal conclusions and determinations by which a court comes to apply a  
9 particular sentencing provision. Thus, it is well established that appellate  
review is still available for the correction of legal errors or abuses of  
discretion in the determination of what sentence applies.

10 *State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214, 1215-1216 (2003)(citations  
11 omitted). The Supreme Court has consistently given effect to this provision stating that  
12 "for a 'procedural' appeal to be allowed under *Ammons*, it must be shown that the  
13 sentencing court had a duty to follow some specific procedure required by the SRA, and  
14 that the court failed to do so," otherwise the appeal is barred. *State v. Mail*, 121 Wn.2d  
15 707, 854 P.2d 1042 (1993). When the Court of Appeals ignores the limitations of RCW  
16 9.94A.585(1) or *Mail*, the Supreme Court will enforce the limitations. *State v. Friederich*  
17 – *Tibbets*, 123 Wn.2d 250, 866 P.2d 1257 (1994).

18 In the case now before the court, both parties agreed as to defendant's offender  
19 score and standard sentencing range in the trial court. RP 361, 367. Defendant does not  
20 challenge the calculation of his offender score on appeal. Appellant's Brief, 6. Nor does  
21 defendant allege that the trial court failed to follow required procedures during sentencing.  
22 *Id.* The record of the sentencing hearing shows that the trial court did not refuse to  
23 consider the possibility of an exceptional sentence. RP 374-376. Nothing in the record  
24 indicates the court refused to consider an exceptional sentence because of defendant's race,  
25 sex, or religion. *Id.* Rather, the record indicates the court listened to, and considered,

1 arguments for and against giving an exceptional sentence downward. *Id.* Based on the  
2 arguments, facts of the case, defendant's current behavior, and defendant's criminal  
3 history, the court decided the low-end standard range was an appropriate sentence. RP  
4 376.

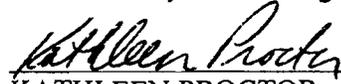
5 Defendant received a standard range sentence based upon an uncontested offender  
6 score where the court did not fail to follow the procedures required by the SRA. Under  
7 RCW 9.94A.585(1) and relevant case law, defendant's sentence is not appealable.

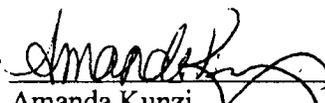
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9 **IV. CONCLUSION:**

10 For the foregoing reasons, the State respectfully asks this court to dismiss  
11 defendant's appeal.

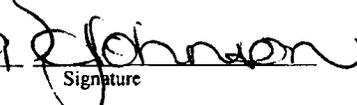
12 DATED: September 30, 2009.

13 MARK LINDQUIST  
14 Pierce County Prosecuting Attorney

15   
16 KATHLEEN PROCTOR  
17 Deputy Prosecuting Attorney  
18 WSB # 14811

19   
20 Amanda Kunzi  
21 Appellate Intern

22 Certificate of Service:  
23 The undersigned certifies that on this day she delivered by U.S. mail and/or  
24 ABC-LMI delivery to the attorney of record for the appellant and appellant  
25 c/o his or her attorney true and correct copies of the document to which this  
certificate is attached. This statement is certified to be true and correct under  
penalty of perjury of the laws of the State of Washington. Signed at Tacoma,  
Washington, on the date below.

24 9/30/09   
25 Date Signature