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COURT OF APPEALS  
DIVISION II

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NO. 36325-9-II

STATE OF WASHINGTON

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

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STATE OF WASHINGTON,

Respondent,

v.

FAULOLUA FAAGATA,

Appellant.

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FILED  
COURT OF APPEALS DIV. II  
STATE OF WASHINGTON  
2007 NOV 28 PM 4:38

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

The Honorable Ronald Culpepper, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's convictions for first degree murder and second degree murder violate double jeopardy.

2. The court erred when it only conditionally dismissed appellant's second degree murder conviction.

3. The trial court erred in entering an exceptional sentence of 450 months where there was insufficient evidence to support the jury's deliberate cruelty finding.

Issues Pertaining to Assignments of Error

1. Appellant was charged and convicted of both first degree murder and second degree felony murder for the death of a single victim. Where there was only one victim and the crimes occurred at the same time and place does appellant's conviction for both first degree murder and second degree felony murder violate double jeopardy?

2. Where appellant's convictions for both first degree murder and second degree felony murder violate double jeopardy, did the court err when it denied appellant's motion to dismiss the felony murder conviction and instead conditionally dismissed that conviction allowing it to be reinstated if appellant's first degree murder conviction was reversed on appeal or on a collateral attack?

3. Was the exceptional sentence invalid where the jury's finding of deliberate cruelty is not supported by the evidence?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Procedural History

On August 16, 2006, Faulolua Faagata was charged by amended information filed in Pierce County Superior Court with first degree murder (Count 1) under RCW 9A.32.030(1)(a) and second degree felony murder (Count II) under RCW 9A.32.050(1)(b). CP 5-6. Jason Outler was the named victim in both counts. Id. In addition, both counts alleged Faagata was armed with a firearm and both alleged as an aggravating element that Faagata's conduct in the commission of the crimes manifested deliberate cruelty. CP 5-6.

A jury found Faagata guilty as charged. CP 78-82. The jury also found the aggravating element of deliberate cruelty. CP 83-84.<sup>2</sup>

On May 4, 2007, the court entered a judgment and sentence on Count I, the first degree murder conviction. CP 107-118. The court,

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<sup>1</sup> RP refers to the verbatim report of proceedings of the trial and pretrial hearings, which are sequentially numbered. The verbatim report of proceedings of the May 4, 2007 sentencing hearing is designated 2RP.

<sup>2</sup> The special verdict form related to the issue of deliberate cruelty is captioned Special Verdict Form 1-B Count II (Murder) but states, "We, the jury, return a special verdict by answering as follows: At the time the defendant committed the crime of murder in the first or second degree, Count I, did the defendant's conduct manifest deliberate cruelty to the victim (yes or no)." CP 83 (emphasis added). It appears the reference to Count II in the caption was a scrivener's error.

however, denied Faagata's motion to dismiss Count II, the second degree felony murder conviction, and instead only conditionally dismissed the conviction "with the understanding" that should Count I be reversed Count II could be reinstated. 2RP 24.

The standard range sentence for the first degree murder conviction, including the 60 month firearm enhancement, is 300-380 months. Id. Based on the jury's special verdict finding deliberate cruelty, the court imposed an exceptional sentence of 450 months. Id.

This timely appeal follows. CP 123.

## 2. Substantive Facts

In the early morning hours of July 4, 2006, Jason Outler, some of his co-workers and his friend, Kenneth Legary, were drinking at the Hob-Nob. RP 173-176. 193, 405. Legary testified that shortly before the bar closed, he and Outler were outside in a "smoking area" when a car driven by Faagata pulled up. RP 412, 416. According to Legary, Outler was waiting for a cab to take him home but he asked Faagata for a ride home instead. Outler offered to pay Faagata for the ride and Faagata agreed. RP 416. Outler got into Faagata's car and the two left. RP 417.

At about 1:45 a.m. James Meyer, William Meeks, Lauren Carpenter, Alex Milham and Teresa Connick, saw two men get out of a car and struggle with each other. RP 253, 274, 291, 316. Meyer testified

the driver of the car told the passenger (later identified as Outler) he (the driver) wanted his money. RP 316. Meyers testified he then heard the driver say he had a gun, RP 317, however, Meyers told police he heard the driver say, "Now I have the gun." RP 331. Meyers yelled at the two that he had called police and in response he heard Outler tell the driver "let's just stop" and "don't worry about it, you're the man." Id. At that point the driver stood over Outler and shot him 3 times. RP 319.

Meeks testified that at one point during the struggle he heard one of the men say, "look who has the gun now, mother fucker." RP 254. He then saw a man stand over Outler and fire five shots. RP 256. Three of the shots were in rapid succession. The shooter paused, fired again, and after another short pause fired a fifth time. RP 265-66, 269. Meeks said he believed the men were fighting over the gun. RP 270.

Carpenter said the shooter fired three shots into Outler while Outler was on the ground. The shooter then touched Outler's body, put the gun close to his butt and fired again. RP 278-79. After another short pause the shooter put the gun next to the back of Outler's head and fired a fifth shot. Id.

Milham also testified the shooter shot Outler three times in the back while Outler was on the ground RP 295. After a pause, the shooter

shot Outler in the butt and after another pause he shot Outler in the back of the head. RP 295.

The State's forensic pathologist testified Outler was shot five times. RP 557, 586. Outler was shot twice in the back, twice in the buttocks and once in the back of the head. RP 561-579. One back wound and the head wound were contact wounds. RP 565, 579. Outler may have survived the back wounds if he had received immediate medical attention. RP 615-616, 623. The back wounds damaged Outler's spinal cord, however, and would have caused paralysis from the waist down, which would have rendered it impossible for him to feel anything from the waist down. RP 614.

Faagata, who was born in America Samoa and came to the United States in 2003, RP 634-35, testified he arrived at the Hob-Nob about midnight. RP 638. Sometime before 1:30 a.m., his friend, Richard Veily, came to pick him up and drive him home. RP 638-39. When Veily arrived he handed Faagata the keys to the car and told him to move the car while he (Veily) went inside the bar to use the bathroom. RP 639.

As Faagata was moving the car Outler approached and asked Faagata for a ride home. RP 640. Outler offered Faagata \$80.00 for the ride so Faagata agreed. RP 640. Faagata could not find Veily so he and

Outler left. 641. When Outler got into the car he handed Faagata a wad of money that Faagata put on the car's dashboard without counting. RP 641.

Outler then led Faagata to a nearby 7-11 store where Faagata stopped the car. Outler told Faagata he only lived a block from the store so Faagata told Outler to walk the rest of the way home. RP 642. Outler refused telling Faagata since he paid him he wanted Faagata to take him to his house. RP 642.

Faagata drove Outler a short distance from the store when Outler told him to stop. RP 643. Outler got out of the car and Faagata counted the money Outler had given him earlier when he got into car. Id. Outler had only given Faagata \$16.00 instead of the \$80.00 he promised so Faagata got out of the car and confronted Outler. RP 643-44.

When Faagata confronted Outler, Outler pulled out a gun and fired a shot. RP 644. Faagata rushed Outler and the two fell to the ground and struggled over the gun. RP 645. Faagata had his hand near the trigger when Outler bite his arm and the gun fired twice. RP 646, 655. Faagata heard Outler say he was shot. RP 655. Faagata then stood up and shot Outler three times because he was angry Outler had shot at him and he lost his temper. RP 647, 655. After he shot Outler, Faagata dropped the gun and left. RP 647.

Two days later Faagata went to police with some of his family members. RP 474, 648. Faagata's statement to police was substantially the same as his trial testimony. RP 480-483.

C. ARGUMENTS

1. FAAGATA'S CONVICTIONS FOR BOTH FIRST DEGREE MURDER AND SECOND DEGREE FELONY MURDER VIOLATE DOUBLE JEOPARDY AND REQUIRE THAT HIS SECOND DEGREE FELONY MURDER CONVICTION BE VACATED.

Both the Fifth Amendment of the United States Constitution<sup>3</sup> and Article 1, § 9 of the Washington Constitution<sup>4</sup> prohibit double jeopardy. The federal and state provisions offer identical protections. State v. Tvedt, 153 Wn. 2d 705, 710, 107 P.3d 728 (2005); State v. Adel, 136 Wn.2d 629, 632, 965 P. 2d 1072 (1998).

Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense. In re Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). An indication the legislature intended two crimes to constitute the same

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<sup>3</sup> The Fifth Amendment of the United States Constitution states, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb[.]"

<sup>4</sup> Art. 1, § 9 of the Washington Constitution provides, "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense."

offense is where the crimes are identical in both fact and law. State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995).

If the crimes are not identical in both law and fact, however, the court may turn to other aids in determining legislative intent. Washington courts have found a violation of double jeopardy despite a determination that the offenses contain different legal elements. State v. Schwab, 98 Wn.App. 179, 184-85, 988 P.2d 1045 (1999).

In State v. Gohl, 109 Wn.App. 817, 821, 37 P.3d 293 (2001) the court held convictions for both assault and attempted murder against the same victim violate double jeopardy because attempted first degree murder and first degree assault convictions are the same in law and in fact. Moreover, the court reasoned “where the harm is the same for both offenses, it would be inconceivable that the Legislature intended double punishment for both.” State v. Gohl, 109 Wn.App. at 821.

In Schwab, the court found convictions for second degree felony murder and first degree manslaughter for a single homicide, despite different elements, violated double jeopardy. The Schwab court reasoned that there can only be one homicide conviction from one death because under the plain language of the homicide statute, RCW 9A.32, “the legislature did not intend to provide multiple punishments for a single homicide.” Schwab, 98 Wn. App. at 188-89.

Here Faagata's first degree murder conviction (Count I)<sup>5</sup> and second degree felony murder conviction based on the underlying felony of assault (Count II)<sup>6</sup> violate double jeopardy under the holdings in Gohl and Schwab. First, there was only one victim and both offenses occurred at the same time and place. Second, both first degree murder and second degree felony murder are proscribed under the homicide statute and the legislature did not intend multiple punishment for the single homicide. See RCW 9A.32.030(1)(a) and RCW 9A.32.050(1)(b). Third, Faagata could not have committed first degree murder without also committing second degree assault as charged so the offenses are the same in law and fact.<sup>7</sup>

Prior to sentencing Faagata moved to dismiss Count II, the felony murder conviction, on the grounds that a conviction on both the first degree murder (Count I) and the felony murder charges violated double jeopardy, even if he was not subsequently sentenced on each. CP 85-106; 2RP 5-18. 22-23. The court, however, ruled it would only dismiss Count II "conditionally with the understanding that should Count I be reversed or

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<sup>5</sup> A person commits first degree murder when with premeditated intent he causes the death of another. RCW 9A.32.030(1)(a).

<sup>6</sup> A person is guilty of murder in the second degree when he commits or attempts to commit any felony, including assault, and, in the course of and in furtherance of the felony he causes the death of another. RCW 9A.32.050(1)(b).

<sup>7</sup> A person is guilty of second degree assault if he intentionally assaults another and thereby recklessly inflicts substantial bodily harm. RCW 9A.36.021(1)(a).

something happened with that, collateral attack, it can be reinstated...”

2RP 24. The court erred in denying Faagata’s motion.

In denying the motion, the trial court relied on this Court’s decision in State v. Womac, 130 Wn. App. 450, 458, 123 P.3d 528, reversed, 160 Wn.2d 643, 160 P.3d 40 (2007). A few weeks after Faagata was sentenced, the Washington Supreme Court issued its decision in State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007). Womac was charged and convicted of both homicide by abuse (Count I), second degree felony murder (Count II), and first degree assault (Count III) for the death of his son. Id. at 647. The trial court denied Womac's double jeopardy motion to dismiss Counts II and III. Id. On appeal, this Court affirmed Womac's conviction for Count I and “directed the trial court to ‘conditionally dismiss Counts II and III,’ allowing for reinstatement should Count I later be reversed, vacated, or set aside.” Womac, 160 Wn.2d at 647, citing 130 Wn. App. at 460.

The Washington Supreme Court held that this Court’s decision to sanction a conditional dismissal was without legal support. Womac, 160 Wn.2d 658. The Court reasoned that because Womac was charged with three separate offenses, and judgments on all three offenses violated double jeopardy, the appropriate remedy was to vacate two of the three counts. Id. at 660; see Calle, 125 Wn.2d at 775 (double jeopardy is

violated when a defendant receives multiple convictions for a single offense regardless of whether concurrent sentences are imposed).

Although Faagata was only sentenced on the first degree murder charge, the trial court in its oral ruling only dismissed Count II “conditionally with the understanding that should Count I be reversed or something happened with that, collateral attack, it can be reinstated...” RP 24.<sup>8</sup> Under the Washington Supreme Court’s holding in Womac, Faagata is entitled to an order vacating the felony murder charge (Count II).

2. THE JURY’S DELIBERATE CRUELTY FINDING IS UNSUPPORTED BY THE EVIDENCE AND AS A MATTER OF LAW CANNOT SUPPORT THE COURT’S EXCEPTIONAL SENTENCE.

The jury found by special verdict that Faagata’s conduct during the commission of the offense manifested deliberate cruelty. Based on that finding the court imposed an exceptional sentence. The evidence did not support the element of deliberate cruelty. The special verdict should be dismissed with prejudice and Faagata should be resentenced to a standard range sentence.

The Sixth Amendment requires the State to prove, and a jury to find beyond a reasonable doubt, all facts necessary to support an

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<sup>8</sup> It does not appear from the record that the court reduced its oral ruling to a written order. “[I]n the absence of a written finding on a particular issue, an appellate court may look to the oral opinion to determine the basis for the trial court’s resolution of the issue.” In re Marriage of Griffin, 114 Wash.2d 772, 777, 791 P.2d 519 (1990).

exceptional sentence. U.S. Const. amend. 6; Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 2537, 159 L. Ed. 2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); RCW 9.94A.537. Consequently, aggravating circumstances are treated as elements of the charged crime for constitutional purposes. Apprendi, 120 S. Ct. at 2364-66; accord, Harris v. United States, 536 U.S. 545, 122 S. Ct. 2406, 2419, 153 L. Ed. 2d 524 (2002) ("[T]hose facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis.").

A conviction or special verdict should be reversed where no rational trier of fact, viewing the evidence in a light favorable to the State, could have found every element of the crime charged beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The existence of a fact cannot rest in guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). If the reviewing court finds insufficient evidence to prove an element, reversal is required. State v. Hickman, 135 Wn.2d at 103. Retrial following reversal for insufficient evidence is prohibited under the double jeopardy. Id.

The "deliberate cruelty" aggravating circumstance is defined by statute as follows: "The defendant's conduct during the commission of

the current offense manifested deliberate cruelty to the victim.” RCW 9.94A.535(3)(a).

During more than twenty years since enactment of the Sentencing Reform Act (SRA), Washington courts have interpreted and applied the "deliberate cruelty" aggravating circumstance.<sup>9</sup> Two decades of common law have developed legal principles refining what constitutes deliberate cruelty.<sup>10</sup> As a matter of law "[d]eliberate cruelty consists of gratuitous violence, or other conduct which inflicts physical, psychological or emotional pain as an end in itself." State v. Serrano, 95 Wn. App. 700, 712-13, 977 P.2d 47 (1999) (quoting State v. Strauss, 54 Wn. App. 408, 418, 773 P.2d 898 (1989)). Moreover, the cruelty must be "of a kind not usually associated with the commission of the offense in question." Serrano, at 713 (quoting State v. Payne, 45 Wn. App. 528, 531, 726 P.2d 997 (1986) and State v. Schantzen, 308 N.W. 2d 484, 487 (Minn. 1981)).

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<sup>9</sup> Before Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 2537, 159 L. Ed. 2d 403 (2004) the SRA allowed a sentencing court to impose an exceptional sentence above the standard range if it found "substantial and compelling reasons." RCW 9.94A.535. Those reasons could be based upon statutory or non-statutory aggravating factors. Id. The SRA only required a judge to find the aggravating factors by a preponderance of the evidence. RCW 9.94A.530(2); State v. Sanchez, 69 Wn. App. 195, 203, 848 P. 2d 735, rev. denied, 121 Wn.2d 1031 (1993). The United States Supreme Court declared these sentencing provisions unconstitutional in Blakely. 542 U.S. at 300-301. In response, the legislature enacted RCW 9.94A.537, which requires a jury to determine whether a statutory aggravating factor exists beyond a reasonable doubt.

<sup>10</sup> In enacting the SRA, the Legislature envisioned this common law development. RCW 9.94A.585(6); State v. Ratliff, 46 Wn. App. 325, 333, 730 P.2d 716 (1986).

In instances of first degree murder where the courts have found deliberate cruelty, the defendant's conduct far exceeded what is required to establish premeditated murder. In State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996), the defendant assaulted the victim in at least two places in her apartment. At each location the force of the attack splattered blood on the walls of her home. The defendant struck her in the mouth and kicked her in the ribs, manually strangling her with such force that bones and cartilage in her neck were broken, and stabbed her, leaving gaping wounds in her chest. He ripped an earring from her ear, used a fork to puncture her back, arm, and thigh, and raped her as she bled to death. This "prolonged, exceedingly violent assault" was conduct which far exceeded that required for conviction of premeditated murder. State v. Copeland, 130 Wn.2d at 297.

In State v. Scott, 72 Wn. App. 207, 866 P.2d 1258 (1993), the victim was elderly, weak, and had diminished mental faculties. The defendant could easily have killed her by strangulation, which he did, but only after physically and sexually assaulting her. The medical examiner found the victim suffered manual and ligature strangulation as separate acts of violence. In addition, the defendant inflicted several blows to her head, face, and ribs, which occurred in three different rooms and resulted in 20 broken bones. These, the court found, were additional violent acts

beyond those normally associated with premeditated murder. State v. Scott, 72 Wn. App. at 214-15.

These cases illustrate that to support a deliberate cruelty aggravator in a first degree murder case the evidence must show prolonged attacks or torture and lingering suffering. See also State v. Harmon, 50 Wn. App. 755, 757-59, 750 P.2d 664, review denied, 110 Wn.2d 1033 (1988) (defendant cut victim's throat three times during a period extending over a number of hours and bragged that victim was "jumping around like a chicken with his head cut off"); State v. Drummer, 54 Wn. App. 751, 775 P.2d 481 (1989) (defendant manifested deliberate cruelty because victim was "tortured prior to being killed"); State v. Campas, 59 Wn. App. 561, 799 P.2d 744 (1990) (defendant repeatedly bludgeoned and stabbed victim, leaving her barely alive and in pain until she died the next day); State v. Ross, 71 Wn. App. 556, 861 P. 2d 473 (1994) (defendant inflicted more than 100 wounds, and there was evidence of a protracted struggle, including two dozen stab marks in the walls where the defendant missed his victim while attempting to stab her); State v. Buckner, 74 Wn. App. 889, 896-97, 876 P.2d 910 (1994) ("brutal tortuous violence where the victim [was] stabbed repeatedly and left to die leisurely").

On the other hand, courts have held a finding of deliberate cruelty is unsupported where it is based on the infliction of more wounds than

necessary to cause the victim's death or on the location of the wounds. In Serrano, a second degree murder case, the defendant shot the victim five times. The trial court imposed an exceptional sentence in part by finding the offense was deliberately cruel. The Serrano Court reversed, holding that the infliction of five wounds was not the gratuitous infliction of pain as an end to itself. State v. Serrano, 95 Wn. App. at 713; see also State v. Payne, 58 Wn. App. 215, 220, 795 P.2d 134, 805 P.2d 247 (1990) (even though the victim was shot six times in the back by her brother the court held the crime was not "heinous, cruel or depraved" and did not support a manifest injustice disposition for first degree murder).

The facts here are more like the facts in Serrano than the facts in Copeland or Scott. Even though Outler was shot five times it does not support a finding of gratuitous infliction of pain as an end to itself. The five wounds were inflicted within seconds and Outler died immediately after he was shot in the head. Additionally, the evidence shows that as a result of the back wounds it was likely Outler was paralyzed from the waist down, which would have possibly rendered it impossible for him to feel the subsequent shot into his buttocks. RP 614. Thus, that shot, as well as the shot to the head, which resulted in Outler's immediate death, did not gratuitously inflict pain.

Furthermore, while the crime here was cruel, which is likely why the jury found the deliberate cruelty element, the cruelty was not of a kind not usually associated with the commission of first degree murder. The wounds and number of shots were inherent in the finding of premeditated intent, which is what the State argued to the jury to support its theory of the case. RP 734-736.

The evidence shows the number and location of the shots were not inflicted with the separate intent to humiliate, torture or cause gratuitous pain. The evidence does not show a cruelty beyond that normally associated with premeditated murder. This Court should dismiss the special verdict, reverse Faagata's exceptional sentence and remand for resentencing within the standard range.

D. CONCLUSION

For the above reasons, this Court should remand to the trial court and direct it to enter an order vacating Count II. Additionally, this Court should dismiss the special verdict, reverse the exceptional sentence and remand for resentencing within the standard range.

DATED this 27 day of November, 2007.

Respectfully submitted,

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

STATE OF WASHINGTON )

Respondent, )

vs. )

FAULOLUA FAAGATA, )

Appellant. )

COA NO. 36325-9-II

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STATE OF WASHINGTON  
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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28<sup>TH</sup> DAY OF NOVEMBER 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KATHLEEN PROCTOR  
PIERCE COUNTY PROSECUTING ATTORNEY  
930 TACOMA AVENUE SOUTH  
ROOM 946  
TACOMA, WA 98402

[X] FAULOLUA FAAGATA  
DOC NO. 306380  
WASHINGTON STATE CORRECTIONS CENTER  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

STATE OF WASHINGTON  
BY PKM  
DEPUTY

FILED  
COURT OF APPEALS  
DIVISION II  
07 NOV 30 AM 11:42

**SIGNED** IN SEATTLE WASHINGTON, THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2007.

x Patrick Mayovsky