

No. 63296-5-1

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

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STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER SUMNER,

Appellant.

---

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

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BRIEF OF APPELLANT

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GREGORY C. LINK  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
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FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 OCT 30 PM 4:56

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A. SUMMARY OF ARGUMENT

Christopher Sumner contends the trial court erred in setting a restitution amount without first determining the actual loss and instead simply adopting the amount requested by the victim.

B. ASSIGNMENT OF ERROR

In the absence of sufficient proof to establish either an actual loss by the victim or a causal connection between such loss and the crime, the trial court erred in entering the restitution order in this case.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The superior court's authority to order restitution is limited to loss or damage caused by the crime in question. Where the State did not prove the actual value of the victim's loss did the court err in imposing restitution?

D. STATEMENT OF CASE

Mr. Sumner pleaded guilty plea to one count of third degree malicious mischief and one count of harassment. CP 10-22, 25-28. The State subsequently sought restitution in the amount of

\$2,706.05 for damage allegedly caused by Mr. Sumner to a 1997 Chevrolet Tahoe owned by the victim Tianna Fulgenzi-Whitmarsh .<sup>1</sup>

Mr. Sumner objected to the amount requested. Mr. Sumner submitted evidence establishing the replacement value of the car was less than the claimed cost of repair. 4/1/09 RP 3-4; Appendix at 17.<sup>2</sup> He also argued the claimed estimate failed to segregate costs associated with repair of preexisting damage to the vehicle from a previous roll-over accident. Id.

While acknowledge there was “ambiguity” as to the proof of what damages in the estimate were a result of the crime and which were preexisting, the State contended that was irrelevant. 4/1/09 RP 15.

The court determined the value of the car was irrelevant in light of the repair estimate, and as a condition of his suspended sentence ordered Mr. Sumner to pay the cost of repair. 4/1/09 RP 19; CP 29.

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<sup>1</sup> Because the State did not file its motion or any documentation of the amount requested and the facts supporting that amount, or otherwise attempt to make a record, Mr. Sumner is limited to citing the Verbatim Report of the Restitution hearing.

<sup>2</sup> Exhibits 5 and 6, submitted by Mr. Sumner are attached as an Appendix. A supplemental designation of clerk's papers has been filed as well.

E. ARGUMENT

THE STATE DID NOT PROVE THE CLAIMED  
AMOUNT OF RESTITUTION WAS CAUSED BY MR.  
SUMNER'S CRIMINAL ACT

1. Restitution is a strictly statutory remedy authorized only for damages causally connected to the crime of conviction. "The authority to impose restitution is not an inherent power of the court, but is derived from statutes." State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). A restitution order is void when the trial court deviates from the parameters of the restitution statute. State v. Dauenhauer, 103 Wn.App. 373, 378, 12 P.3d 661 (2000); State v. Hefa, 73 Wn.App. 865, 866-67, 871 P.2d 1093 (1994).

RCW 9.92.060 provides in pertinent part:

As a condition to suspension of sentence, the superior court . . . may require the convicted person . . . to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question or when the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.

Restitution is permitted only for loss that is causally connected to the offense of conviction. State v. Kinneman, 155 Wn.2d 272, 286, 119 P.3d 350 (2005). The prosecution bears the burden of establishing a sufficient causal connection by a

preponderance of the evidence. State v. DeDonado, 99 Wn.App. 251, 256, 991 P.2d 1219 (2000). The State does not meet this burden merely because an insurer or victim submits a list of expenditures. Id. at 257.

2. The State did not prove the amount of claimed loss was due to damage caused by Mr. Sumner. The State did not establish by the actual loss suffered as a result of Mr. Sumner's actions. In support of his objection, Mr. Sumner offered a price report from Kelley Blue Book for the trade-in value of the vehicle, that listed the value from \$1,275 to \$2,150 depending upon whether the vehicle condition was Fair, Good, or Excellent. Appendix at 6-7. That report also indicated a vehicle with a branded title was deemed in "poor condition" and no value could be reported. Appendix at 2. In conjunction with the price report, Mr. Sumner submitted a "Carfax" vehicle history for Ms. Fulgenzi-Whitmarsh's vehicle. Appendix at 1-5. That history indicates the car was involved in a rollover accident in January 2007, and was deemed a "Total Loss Vehicle." Appendix at 3. A "Rebuilt Title" was issued the vehicle in each of the 3 years before the current event. Appendix at 4. Thus, there was no readily available price report for the vehicle.

The State responded that the price report submitted by Mr. Sumner was for the trade-in value of the car as opposed to the sale value, and thus not necessarily helpful. 4/1/09 RP 11-12. The State did not offer any evidence that the value of the car was actually higher than what defense counsel offered. 4/1/09 RP 15. Instead, the State responded that because damage had been caused by Mr. Sumner, and because Ms. Fulgenzi-Whitmarsh had an estimate of what the cost of repair would be, the court should not bother to segregate the cost of repairing preexisting damage as opposed to damage caused by Mr. Sumner. 4/1/09 RP 12. For instance the State argued:

There may have been damage say to the hood, underside from the roll-over. That doesn't matter. The fact that it now has to be repaired because of the defendant's actions that will be paid by the defendant.

RP 12.

The State was the party required to establish the value of the loss. The State was required then to differentiate the cost of repair preexisting defects from the cost of repairing the damage Mr. Sumner was alleged to have caused. The State made no effort to do so. Ms. Fulgenzi-Whitmarsh was entitled to have her car returned to the condition it was in before the crime. Ms. Fulgenzi-

Whitmarsh is not entitled to have Mr. Sumner pay to repair preexisting damage.

The State conceded “I think . . . there is some ambiguity here about what he actually did given [the photographs submitted as Exhibits 1 to 4]<sup>3</sup> and given the prior accident. 4/1/09 RP 15. But, the State contended, because a repair estimate of \$2,706.05 had been submitted that was the value of the loss, because that “was the only concrete estimate of value.” Of course that was because the State had not bothered to determine (1) the actual value of the vehicle before the damage, or (2) what the preexisting damage and cost to repair it was.

Restitution must be based upon easily ascertainable damages, and the State must establish what that damage is. If the State agrees “there is ambiguity” as to what damage Mr. Sumner caused the damages are not easily ascertainable. The State attempted to wave aside this problem by arguing the court need not be precise as the statute allows a restitution award of two times the actual loss. If the court does not know what the actual loss is it cannot order twice that undetermined amount. Moreover, simply saying that a court has this general authority in no way legitimizes

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<sup>3</sup> Exhibits 1 to 4, are not included in the Appendix but have been designated.

the amount imposed here: if the actual value of the loss in this case is only \$1,000 even two times that amount is less than the \$2,700 imposed.

The court went even further and dismissed entirely the idea that the value of the car was even relevant, saying “I’m not here today to determine what the replacement value of this car is.

4/1/09 RP 18. Instead the court believed its only obligation was to determine “whether this is a reasonable request.” Nowhere in RCW 9.92.060 does the legislature task a court with determining the reasonableness of a request. Instead, the court must determine the value of the damages and order Mr. Sumner to pay those and those alone. The court did not do so.

Determining the amount of restitution requires more than simply that a number has been presented to the court. Instead it must require that that number has some readily identifiable link to the damages caused by the crime alone, and that number represents the actual value of the loss. The State made no effort to establish the value of the item, or to determine the resulting damages. The State acknowledged the uncertainty of the estimate. Yet in the end the State dismissed that doubt and urged the court to impose what Ms. Fulgenzi-Whitmarsh requested.

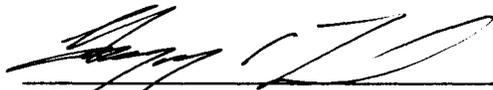
Restitution is not designed to place the victim in a better position than she was in prior to the crime. Prior to the crime Ms. Fulgenzi-Whitmarsh had a 12-year-old vehicle which had been totaled and had more than 125,000 miles. Because the value of that vehicle is less than the cost of repair she, is entitled only to the lesser value. The trial court never determined the amount of lost value, and thus the restitution imposed is unlawful.

In the absence of proof of easily ascertainable damages, the trial court erred in ordering restitution in this case.

F. CONCLUSION

For the reasons above this Court must reverse Mr. Sumner's restitution order.

Respectfully submitted this 30<sup>th</sup> day of October, 2009.

  
\_\_\_\_\_  
GREGORY C. LINK – 25228  
Washington Appellate Project – 91052  
Attorney for Appellant

For Personal Use Only

**CARFAX** CARFAX® Vehicle History Report™  
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Vehicle Information:

1997 GMC YUKON  
1GKEK13R2VJ761893  
4 DR. WAGON/SPORT UTILITY 5.7L V8 FI  
4 WHEEL DRIVE  
[Standard Equipment](#) | [Safety Options](#)



DOES NOT qualify for the CARFAX Buyback Guarantee



Branded Title: Rebuilt



5 Previous owners



3 Service records available



21 Detailed records available



123,446 Last reported odometer reading

Search for other 1997 GMC YUKON vehicles in Seattle, WA



**SUMMARY**

A CARFAX Vehicle History Report is based only on information supplied to CARFAX. Other information about this vehicle, including problems, may not have been reported to CARFAX. Use this report as one important tool, along with a vehicle inspection and test drive, to make a better decision about your next used car.

<b>OWNERSHIP HISTORY</b>	Owners 1-3	Owner 4	Owner 5
The number of owners is estimated by CARFAX			
Year purchased	1997	2006	2007
Type of owner	Personal	—	—
Estimated length of ownership	8 yrs. 2 mo.	11 months	2 yrs. 2 mo.
Owned in the following states/provinces	Washington	Washington	Washington
Estimated miles driven per year	13,870/yr	—	—
Last reported odometer reading	98,282	116,349	123,446

<b>TITLE PROBLEMS</b>	Owners 1-3	Owner 4	Owner 5
CARFAX guarantees the information in this section			
<a href="#">Salvage</a>   <a href="#">Junk</a>   <a href="#">Rebuilt</a>	No Problem	No Problem	Alert! Problem Found
<a href="#">Fire/Flood</a>   <a href="#">Hail Damage</a>   <a href="#">Buyback/Lemon</a>	No Problem	No Problem	No Problem
<a href="#">Not Actual Mileage</a>   <a href="#">Exceeds Mechanical Limits</a>	No Problem	No Problem	No Problem
Alert! Severe problems were reported by a state Department of Motor Vehicles (DMV). This vehicle does not qualify for the CARFAX Buyback Guarantee.			

<b>OTHER INFORMATION</b>	Owners 1-3	Owner 4	Owner 5
Not all accidents or other issues are reported to CARFAX			
<b>Total Loss Check</b> Total loss reported on 02/05/2007.	<input checked="" type="checkbox"/> No Issues Reported	<input checked="" type="checkbox"/> No Issues Reported	Total Loss
<b>Structural / Frame Damage Check</b>	<input checked="" type="checkbox"/> No Issues	<input checked="" type="checkbox"/> No Issues	<input checked="" type="checkbox"/> No Issues

No structural / frame damage reported to CARFAX.	Reported	Reported	Reported
<b>Airbag Deployment Check</b> No airbag deployment reported to CARFAX.	<input checked="" type="checkbox"/> No Issues Reported	<input checked="" type="checkbox"/> No Issues Reported	<input checked="" type="checkbox"/> No Issues Reported
<b>Odometer Rollback Check</b> No indication of an odometer rollback.	<input checked="" type="checkbox"/> No Issues Indicated	<input checked="" type="checkbox"/> No Issues Indicated	<input checked="" type="checkbox"/> No Issues Indicated
<b>Accident / Damage Check</b> See State DMV-reported Title Problems above. Accident reported on 01/13/2007.	<input checked="" type="checkbox"/> No Issues Reported	<input checked="" type="checkbox"/> No Issues Reported	Alert! Problem Found
<b>Manufacturer Recall Check</b> Check with an authorized GMC dealer for any open recalls.	<input checked="" type="checkbox"/> No Recalls Reported	<input checked="" type="checkbox"/> No Recalls Reported	<input checked="" type="checkbox"/> No Recalls Reported
<b>Basic Warranty Check</b> Original manufacturer warranty likely voided by manufacturer after vehicle was severely damaged.	<input checked="" type="checkbox"/> Warranty Active	<input checked="" type="checkbox"/> Warranty Active	Warranty Voided

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**DETAILS**

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A CARFAX Vehicle History Report is based only on information supplied to CARFAX. CARFAX checked over 6 billion vehicle history events and found 21 record(s) for this 1997 GMC YUKON (1GKEK13R2VJ761893).

Owner 1		Date:	Mileage:	Source:	Comments:
Purchased:	1997	11/15/1997	642	Washington Motor Vehicle Dept. University Place, WA Title #9732230011	Title or registration issued First owner reported Registered as personal vehicle Loan or lien reported
Type:	Personal				
Where:	Washington				
Est. miles/year:	---				
Est. length owned:	11/15/97 - 11/15/01 (4 years)	11/18/1997		Washington Motor Vehicle Dept. University Place, WA Title #9911731911	Title or registration issued
Owner 2		Date:	Mileage:	Source:	Comments:
Purchased:	2001	11/15/2001		Washington Motor Vehicle Dept. University Place, WA Title #9911731911	Title or registration issued New owner reported
Where:	Washington				
Est. miles/year:	---				
Est. length owned:	11/15/01 - 1/12/02 (1 month)	01/07/2002	44,065	Valley Pontiac Buick GMC Auburn, WA 253-737-2000 <a href="http://www.valleypontiac.com">www.valleypontiac.com</a>	Pre-delivery inspection completed Serpentine belt replaced Manufacturer's recommended maintenance performed Cooling system checked
		01/12/2002		Valley Pontiac Buick	Vehicle sold

GMC  
 Auburn, WA  
 253-737-2000  
[www.valleypontiac.com](http://www.valleypontiac.com)

Owner 3		Date:	Mileage:	Source:	Comments:
Purchased:	2002	01/16/2002		Washington Motor Vehicle Dept. University Place, WA Title #9911731911	Title or registration issued New owner reported
Where:	Washington	01/22/2002	44,085	Washington Motor Vehicle Dept. Auburn, WA Title #0202231714	Odometer reading reported
Est. miles/year:	19,345/yr	01/22/2002		Washington Motor Vehicle Dept. Auburn, WA Title #9911731911	Title or registration issued Loan or lien reported
Est. length owned:	1/16/02 - 1/30/06 (4 years)	11/20/2002	61,337	Washington Inspection Station Auburn, WA	Passed emissions inspection
		07/02/2003	74,819	Jet Chevrolet Federal Way, WA 253-838-7600 <a href="http://www.jetchevrolet.com">www.jetchevrolet.com</a>	Drivability/performance checked
		04/02/2004	88,459	Riverside Ford Sumner, WA 253-863-2211 <a href="http://www.riversidefordsumner.com">www.riversidefordsumner.com</a>	Maintenance inspection completed Tire condition and pressure checked Brakes checked
		10/29/2004	98,282	Washington Inspection Station Auburn, WA	Passed emissions inspection
		10/29/2004		Washington Motor Vehicle Dept. Auburn, WA	Registration updated when owner moved the vehicle to a new location

Owner 4		Date:	Mileage:	Source:	Comments:
Purchased:	2006	01/30/2006	116,349	Washington Motor Vehicle Dept. Title #0202231714	Title issued or updated Registration issued or renewed New owner reported Loan or lien reported Vehicle color noted as Green
Where:	Washington				
Est. miles/year:	---				
Est. length owned:	1/30/06 - 1/3/07 (11 months)				

Owner 5		Date:	Mileage:	Source:	Comments:
Purchased:	2007	01/03/2007		Washington Motor Vehicle Dept. Kent, WA Title #0603013109	Registration issued or renewed New owner reported Vehicle color noted as Green
Where:	Washington	01/13/2007		Washington Police Report Case #2548713	Accident reported in King County Vehicle involved in crash The vehicle overturned
Est. miles/year:	---	02/05/2007		Washington	TOTAL LOSS VEHICLE
Est. length owned:	1/3/07 - present (2 yrs. 2 mos.)				

		Motor Vehicle Dept. Kent, WA Title #0603013109	REBUILT TITLE ISSUED Vehicle color noted as Green
04/13/2007	123,446	Washington Inspection Station Renton, WA	Passed emissions inspection
04/13/2007		Washington Motor Vehicle Dept. Kent, WA Title #0603013109	REBUILT TITLE ISSUED Vehicle color noted as Green
01/03/2008		Washington Motor Vehicle Dept. Kent, WA Title #0710317013	REBUILT TITLE ISSUED Vehicle color noted as Green
01/09/2009		Washington Motor Vehicle Dept. Kent, WA Title #0710317013	REBUILT TITLE ISSUED Vehicle color noted as Green

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## GLOSSARY

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- **Accident / Damage Indicator**

CARFAX receives information about accidents in all 50 states, the District of Columbia and Canada. Different information in a vehicle's history can indicate an accident or damage, such as: salvage auction, fire damage, police-reported accident, crash test vehicle, damage disclosure, collision repair facility and automotive recycler records. Not every accident or damage event is reported and not all reported are provided to CARFAX. Details about the accident or damage event when reported to CARFAX (e.g. severity, impact location, airbag deployment) are included on the Vehicle History Report. CARFAX recommends you obtain a vehicle inspection from your dealer or an independent mechanic.

- According to the National Safety Council, Injury Facts, 2007 edition, 7% of the 245 million registered vehicles in the U.S. were involved in an accident in 2005. Over 75% of these were considered minor or moderate.
- CARFAX depends on many sources for its accident / damage data. CARFAX can only report what is in our database on 30.Mar.2009 17:22:00. New data will result in a change to this report.

- **Washington Police Reports:**

- Provide an estimate of the extent of damage only if the accident resulted in fire damage.
- Are required if the estimated damage exceeds \$700
- Are released to CARFAX approximately 3 months after the accident date

- **First Owner**

When the first owner(s) obtains a title from a Department of Motor Vehicles as proof of ownership.

- **New Owner Reported**

When a vehicle is sold to a new owner, the Title must be transferred to the new owner(s) at a Department of Motor Vehicles.

- **Ownership History**

CARFAX defines an owner as an individual or business that possesses and uses a vehicle. Not all title transactions represent changes in ownership. To provide estimated number of owners, CARFAX proprietary technology analyzes all the events in a vehicle history. Estimated ownership is available for vehicles manufactured after 1994 and titled solely in the US including Puerto Rico. Dealers sometimes opt to take ownership of a vehicle and are required to in the following states: Maine, Massachusetts, New Jersey, Ohio, Oklahoma, Pennsylvania and South Dakota. Please consider this as you review a vehicle's estimated ownership history.

- **Rebuilt/Reconstructed Title**

A Rebuilt/Reconstructed vehicle is a salvage vehicle that has been repaired and restored to operation. These vehicles are often severely damaged before they are rebuilt and refurbished parts are typically used during reconstruction. In most states, an inspection of the vehicle is required before the vehicle is allowed to return to the road.

- **Title Issued**

A state issues a title to provide a vehicle owner with proof of ownership. Each title has a unique number. Each title or registration record on a CARFAX report does not necessarily indicate a change in ownership. In Canada, a registration and bill of sale are used as proof of ownership.

• **Total Loss Vehicle**

An insurance or fleet company declares a vehicle a total loss when a claim exceeds ~ 75% of its pre-damage value or if the vehicle is stolen and not recovered. This damage threshold varies by company. These companies typically take possession and obtain the title. Not all total loss vehicles result in a DMV-reported branded title. This may occur when an insurance company's definition of a total loss is different than the state DMV's definition for a branded title or when the owner of the vehicle is a self-insured company, like a fleet or rental company.

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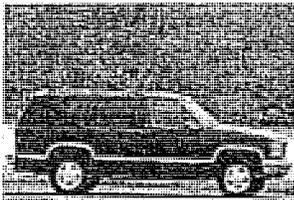


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**1997 GMC Yukon Sport Utility 4D**

**BLUE BOOK® TRADE-IN VALUE**



Condition	Value
✓ Excellent (Selected)	\$2,150
Good	\$1,825
Fair	\$1,275

**Vehicle Highlights**

Mileage: 123,446  
 Engine: V8 5.7 Liter  
 Transmission: Automatic  
 Drivetrain: 4WD

**Selected Equipment**

Standard  
 Power Steering  
 AM/FM Stereo  
 Dual Front Air Bags  
 ABS (4-Wheel)

**Blue Book Trade-In Value**

Trade-in Value is what consumers can expect to receive from a dealer for a trade-in vehicle assuming an accurate appraisal of condition. This value will likely be less than the Private Party Value because the reselling dealer incurs the cost of safety inspections, reconditioning and other costs of doing business.

**Vehicle Condition Ratings**

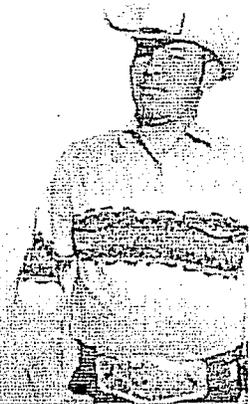
✓ **Excellent** (Selected)  
 00000 **\$2,150**

- Looks new, is in excellent mechanical condition and needs no reconditioning.
- Never had any paint or body work and is free of rust.
- Clean title history and will pass a smog and safety inspection.
- Engine compartment is clean, with no fluid leaks and is free of any wear or visible defects.
- Complete and verifiable service records.

Less than 5% of all used vehicles fall into this category.

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**Good**

**GOOD**

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- Free of any major defects.
- Clean title history, the paints, body, and interior have only minor (if any) blemishes, and there are no major mechanical problems.
- Little or no rust on this vehicle.
- Tires match and have substantial tread wear left.
- A "good" vehicle will need some reconditioning to be sold at retail.

Most consumer owned vehicles fall into this category.

**Fair**

**FAIR**

**\$1,275**

- Some mechanical or cosmetic defects and needs servicing but is still in reasonable running condition.
- Clean title history, the paint, body and/or interior need work performed by a professional.
- Tires may need to be replaced.
- There may be some repairable rust damage.

**Poor**

**POOR**

**N/A**

- Severe mechanical and/or cosmetic defects and is in poor running condition.
- May have problems that cannot be readily fixed such as a damaged frame or a rusted-through body.
- Branded title (salvage, flood, etc.) or unsubstantiated mileage.

Kelley Blue Book does not attempt to report a value on a "poor" vehicle because the value of these vehicles varies greatly. A vehicle in poor condition may require an independent appraisal to determine its value.

\* Washington 3/31/2009

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

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 63296-5-I
	)	
CHRISTOPHER SUMNER,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF OCTOBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> CHRISTOPHER SUMNER 23810 30 <sup>TH</sup> AVE SE #16 KENT, WA 98032	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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STATE OF WASHINGTON  
2009 OCT 30 PM 4:56

**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF OCTOBER, 2009.

X \_\_\_\_\_ 

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