

62247-1

62247-1

NO. 62247-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DEMICKO THOMAS,

Appellant.

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COURT OF APPEALS  
STATE OF WASHINGTON  
FILED

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD F. McDERMOTT

**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	3
C. <u>ARGUMENT</u> .....	5
1. THE COURT PROPERLY ALLOWED THOMAS TO REPRESENT HIMSELF AT THE RESENTENCING .....	5
a. Relevant Facts .....	6
b. Argument .....	12
2. THE SENTENCING COURT PROPERLY IMPOSED CONSECUTIVE FIREARM ENHANCEMENTS ON THE CHARGES THAT INVOLVED THE "SAME CRIMINAL CONDUCT" .....	19
3. MULTIPLE FIREARM ENHANCEMENTS DO NOT VIOLATE DOUBLE JEOPARDY .....	22
4. THOMAS WAS NOT PREJUDICED BY THE SCRIVENER'S ERROR IN THE AMENDED INFORMATION.....	29
D. <u>CONCLUSION</u> .....	36

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Faretta v. California, 422 U.S. 806,  
95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)..... 12

Washington State:

City of Bellevue v. Acrey, 103 Wn.2d 203,  
691 P.2d 957 (1984)..... 13

In re Personal Restraint of Mayer,  
128 Wn. App. 694, 117 P.3d 353 (2005) ..... 31

In re Post Sentencing Review of Charles,  
135 Wn.2d 239, 955 P.2d 798 (1998)..... 25, 26, 29, 33

State v. Adel, 136 Wn.2d 629,  
965 P.2d 1072 (1998)..... 25

State v. Barberio, 121 Wn.2d 48,  
846 P.2d 519 (1993)..... 23, 24

State v. Bisson, 156 Wn.2d 507,  
130 P.3d 820 (2006)..... 33, 34, 35

State v. Breedlove, 79 Wn. App. 101,  
900 P.2d 586 (1995)..... 12

State v. Broadway, 133 Wn.2d 118,  
942 P.2d 363 (1997)..... 26

State v. Callihan, 120 Wn. App. 620,  
85 P.3d 979 (2004)..... 21

State v. Conlin, 49 Wn. App. 593,  
744 P.2d 1094 (1987)..... 14

<u>State v. DeSantiago</u> , 149 Wn.2d 402, 68 P.3d 1065 (2003).....	20
<u>State v. DeWeese</u> , 117 Wn.2d 369, 816 P.2d 1 (1991).....	13
<u>State v. Frodert</u> , 84 Wn. App. 20, 924 P.2d 933 (1996), <u>review denied</u> , 131 Wn.2d 1017 (1997).....	25
<u>State v. Gocken</u> , 127 Wn.2d 95, 896 P.2d 1267 (1995).....	25
<u>State v. Hahn</u> , 106 Wn.2d 885, 726 P.2d 25 (1986).....	12
<u>State v. Husted</u> , 118 Wn. App. 92, 74 P.3d 672 (2003).....	26
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	35
<u>State v. Knapstad</u> , 107 Wn.2d 346, 729 P.2d 48 (1986).....	8
<u>State v. Mandanas</u> , 139 Wn. App. 1017, 2007 WL 1739702 (2007) (unpublished), <u>review granted</u> , 163 Wn.2d 1021 (2008) (argued October 14, 2008).....	19
<u>State v. Moavenzadeh</u> , 135 Wn.2d 359, 956 P.2d 1097 (1998).....	30
<u>State v. Nguyen</u> , 134 Wn. App. 863, 142 P.3d 1117 (2006), <u>review denied</u> , 163 Wn.2d 1053 (2008); and <u>cert. denied</u> , 129 S. Ct. 644, 172 L. Ed. 2d 626 (2008).....	22
<u>State v. Nordstrom</u> , 89 Wn. App. 737, 950 P.2d 946 (1997).....	13

<u>State v. Recuenco</u> , 163 Wn.2d 428, 180 P.3d 1276 (2008).....	30, 32
<u>State v. Sauve</u> , 33 Wn. App. 181, 652 P.2d 967 (1982).....	23
<u>State v. Sauve</u> , 100 Wn.2d 84, 666 P.2d 894 (1983).....	23
<u>State v. Sinclair</u> , 46 Wn. App. 433, 730 P.2d 742 (1986).....	18
<u>State v. Strodbeck</u> , 46 Wn. App. 26, 728 P.2d 622 (1986).....	14
<u>State v. Thomas</u> , 139 Wn. App. 1065, 2007 WL 2084187 (filed July 23, 2007, as amended) .....	3, 10, 18, 19, 22, 24, 28
<u>State v. Vangerpen</u> , 125 Wn.2d 782, 888 P.2d 1177 (1995).....	30, 32
<u>State v. Varnell</u> , 162 Wn.2d 165, 170 P.3d 24 (2007).....	27, 28

### Constitutional Provisions

#### Federal:

U.S. CONST. amend. V.....	25
U.S. CONST. amend. VI.....	30

#### Washington State:

CONST. art. I, § 22 (amend.10) .....	30
CONST. art. I, § 9.....	25

## Statutes

### Washington State:

LAWS OF 2001, CH. 10, § 6 .....	21, 31
LAWS OF 1995, CH. 129.....	25
RCW 9.41.010.....	20, 27, 31
RCW 9.94A.310 .....	2, 4, 21, 29, 31, 33, 34
RCW 9.94A.400 .....	21
RCW 9.94A.510 .....	2, 4, 29, 31
RCW 9.94A.533 .....	20, 21, 26, 27, 29
RCW 9.94A.589 .....	20, 21
RCW 9.94A.610 .....	5

## Rules and Regulations

### Washington State:

CrR 2.1.....	30
CrR 7.8.....	31
CrR 8.3.....	8
RAP 2.5.....	23, 24

## Other Authorities

BLACK'S LAW DICTIONARY 582 (8 <sup>th</sup> ed. 1999).....	31
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**A. ISSUES PRESENTED**

1. A criminal defendant has a constitutional right to make a knowing, voluntary and intelligent waiver of his right to counsel. At various times throughout the pendency of this case, Thomas unequivocally asserted his right to self-representation and the motions and trial courts found Thomas's waivers valid. Upon remand from an appeal in which the State conceded a sentencing error, Thomas immediately insisted upon representing himself at the resentencing. Thomas understood the seriousness of the charges against him, the possible maximum penalty, the legal issues, and that presenting a defense requires the observance of technical rules. Did the trial court properly allow Thomas to once again represent himself at the resentencing?

2. The law requires the imposition of consecutive firearm enhancements regardless of whether the underlying crimes involve the same criminal conduct. In Thomas's first appeal, the State conceded that the kidnapping and attempted robbery of one victim involved the same criminal conduct and the kidnapping and robbery of a second victim involved the same criminal conduct. A jury found that Thomas had used a firearm during the commission of

each of these four offenses. At the resentencing, was the court required to impose four consecutive firearm enhancements?

3. The proper inquiry under a double jeopardy challenge based on multiple violations of the same criminal statute is what unit of prosecution the legislature intended to punish. The legislature intended courts at sentencing to impose consecutive enhancements based on a single act of possessing a weapon, where there are two or more offenses eligible for an enhancement and irrespective of whether the use of that same firearm is an element of the underlying crime. A jury convicted Thomas of three counts of first degree kidnapping, and one count each of first degree robbery, attempted first degree robbery and first degree assault; each carried a firearm enhancement. Was the court at sentencing required to impose six consecutive enhancements?

4. A scrivener's error in a charging document is not grounds for reversal absent prejudice to the defendant. The Amended Information incorrectly cited Former RCW 9.94A.310 as authority for the firearm enhancements when the operative statute at the time Thomas committed his crimes was RCW 9.94A.510. At the resentencing the trial court permitted the State to file an Amended Information to correct the clerical mistake. Because

Thomas failed to establish that he suffered any prejudice from the error in the charging document, was the filing of an Amended Information proper?

**B. STATEMENT OF THE CASE**

After a jury trial, Thomas was convicted of three counts of first degree kidnapping, and one count each of first degree robbery, attempted first degree robbery, first degree assault and unlawful possession of a firearm in the first degree. CP 364, 370. Six of the offenses carried firearm enhancements. CP 365.

On appeal from those convictions (Court of Appeals No. 56540-1-I), the State conceded that the trial court had erred at sentencing when it found that the attempted robbery and kidnapping of one victim and the robbery and kidnapping of another victim were separate and distinct acts, as opposed to crimes that involved the same criminal conduct. State v. Thomas, 139 Wn. App. 1065, 2007 WL 2084187 (filed July 23, 2007, as amended), at \*13-15. This Court accepted the State's concession, vacated Thomas's sentence and remanded the case for resentencing. Id. at \*31.

The mandate for the appeal issued on May 28, 2008.

CP 34.

Before the resentencing, Thomas unequivocally asserted his right to represent himself at the resentencing. CP 301-02, 309-11. During the resentencing hearings, held on August 19 and 25, 2008, the court granted Thomas's motion to proceed pro se. 8/19/08RP 2-3; 8/25/08RP 12.

At the resentencing, and for the first time, Thomas challenged the sufficiency of the charging document. 8/19/08RP 17-19; 8/25/08RP 15, 19-21. The Amended Information cited to RCW 9.94A.310 as the authority for the firearm enhancements when the operative statute at the time that Thomas committed his crimes was RCW 9.94A.510. CP 7-11, 178-255; 8/25/08RP 15, 19-21. The court found that the numerical citation was a mere scrivener's error and that the error did not affect any substantive rights of Mr. Thomas. 8/25/08RP 21. The court stated,

[E]verybody from day one was operating upon the same exact content of the statute that everybody agrees still applies today, so I will grant [the State's] amendment, because I do believe it is tantamount to a scrivener's error and does not effect (*sic*) any substantive rights of Mr. Thomas.

8/25/08RP 21. The court thus permitted the State to file an Amended Information to correct the clerical error.<sup>1</sup> CP 170-74.

The court imposed standard range sentences for each of the seven offenses and it imposed six consecutive firearm enhancements. CP 287-97, 298-300.

Thomas timely appeals his sentence. CP 175.

**C. ARGUMENT**

**1. THE COURT PROPERLY ALLOWED THOMAS TO REPRESENT HIMSELF AT THE RESENTENCING.**

Thomas claims that the trial court erred by allowing him to proceed pro se at the resentencing hearing without first ascertaining that he had made a knowing and intelligent waiver of his right to counsel. He argues that the court never discussed: (1) the legal issues, (2) the maximum penalty, or (3) the risks and dangers of self-representation. Br. of Appellant at 7. The record clearly indicates otherwise. Thomas repeatedly and unequivocally insisted upon his right to self-representation. This Court should reject his appeal.

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<sup>1</sup> The Amended Information perpetuates the scrivener's error by citing to RCW 9.94A.610, a statute that addresses drug offenders and notice of their release or escape, and that has no relevance to Mr. Thomas's firearm enhancements.

a. Relevant Facts.

Prior to trial on these charges, Thomas moved to discharge his appointed counsel and represent himself. 11/14/03RP 5-20.

Thomas stated, "I do want to proceed pro se." 11/14/03RP 7.

The deputy prosecutor informed Mr. Thomas of the charges against him and the potential penalty for each charge:

[T]he defendant is charged with two counts of robbery in the first degree, two counts of kidnapping in the first degree. . . .He is also charged with one count of assault in the first degree, one count of robbery in the first degree, one count of kidnapping in the first degree and one count of unlawful possession of a firearm in the first degree. . . .

. . . .

[T]he maximum sentence for the defendant is life in prison and a \$50,000 fine on each of the charges . . . except for count eight, which is a [violation of the uniform firearms act] count. I believe it's ten years and \$20,000.

11/14/03RP 2, 9.

On more than one occasion, the court advised Thomas that he was "risking life in prison." 11/14/03RP 18; see also id. at 13 ("Understand that the Court may very well decide to send you to jail for life.").

The court attempted to dissuade Thomas from self-representation by pointing out to him that he lacked the experience of a licensed attorney. 11/14/03RP 10. The court

advised Thomas that he would be required to follow the rules of evidence and criminal procedure. Id. at 10-11. Although Mr. Thomas never formally studied law, he stated that he had been studying the law "since I have been in jail," and he had filed multiple pleadings in the instant case. Id. at 6, 16; see also Appendix A (non-exclusive list of pleadings filed by Mr. Thomas pro se).

The court explained to Mr. Thomas some of the additional risks of self-representation: (1) that he might miss evidentiary issues, (2) any mistakes that he might make at trial would not be grounds for an appeal, (3) his chances of prevailing at trial would be diminished because he would not be represented by an attorney, and (4) his incarceration would limit his ability to prepare his case for trial. 11/14/03RP 13-19. The court again tried to dissuade Mr. Thomas from self-representation:

Because you are not a lawyer, because you don't understand the law, because you don't understand the rules of evidence; and quite frankly, sir, though you are very intelligent you also do not have good enough command of the English language in front of 12 people that will decide your fate. Do you still want to represent yourself?

Mr. Thomas unequivocally responded, "Yes, ma'am."

11/14/03RP 19. The court entered an order granting Thomas the

right to proceed pro se.<sup>2</sup> Supp. CP \_\_ (Sub. no 151, order for withdrawal of attorney). However, the court appointed standby counsel. Id.

Mr. Thomas represented himself between November 14, 2003 and June 2, 2004. Supp. CP \_\_ (Sub. no 151, order for withdrawal of attorney); Supp. CP \_\_ (Sub. no 242, order for withdrawal of attorney/substitution). During that time, Mr. Thomas filed myriad pleadings, including motions to: (1) dismiss,<sup>3</sup> (2) suppress evidence, (3) sever charges, (4) merge the kidnapping and robbery charges, and (5) continue the trial date because of outstanding discovery.<sup>4</sup> He prevailed on a motion to suppress evidence obtained pursuant to an invalid search warrant.<sup>5</sup> In

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<sup>2</sup> The court's order states: "After an in-depth colloquy with the defendant & after an unequivocal request to proceed pro se[,]" it is ordered that the defendant "shall proceed pro se" and that then current counsel is discharged but appointed as standby counsel.

<sup>3</sup> Mr. Thomas filed multiple motions, based on different legal theories, to dismiss: (1) pursuant to CrR 8.3, (2) pursuant to State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986), (3) based on the State's alleged failure to preserve evidence (the names and addresses of witnesses that Thomas claimed were in one of the jewelry stores at the time of the robbery), and (4) based upon selective prosecution and violation of the equal protection clause.

<sup>4</sup> 12/30/03RP 3-32; 3/15/04RP 2-7; 3/16/04RP 16-26; 5/13/04RP 20-21; 6/1/04RP 23-24; CP 402-13; Supp. CP \_\_ (177, motion to dismiss); Supp. CP \_\_ (Sub. no 244, certificate of service); Supp. CP \_\_ (Sub. no 269, request to recall prosecution motion); Supp. CP \_\_ (Sub. no 310F, reply to order to motion to dismiss).

<sup>5</sup> 2/12/04RP 3-4; Supp. CP \_\_ (Sub. no 172, motion to suppress evidence), Supp. CP \_\_ (Sub. no 183, motion/memo to suppress warrant); Supp. CP \_\_ (Sub. no 186, order to suppress evidence).

addition, Thomas represented himself for the most part during a hearing to suppress both an out-of-court identification and his own statements. 2/12/04RP 5-38, 51-68; Supp. CP \_\_\_ (Sub. no 172, motion to suppress evidence).

After seven months of self-representation, in June 2004, just before voir dire, Mr. Thomas stated that he no longer wished to represent himself, but that he would like standby counsel appointed for trial. 6/1/04RP 83-85. The trial court advised Mr. Thomas to "sleep on it." Id. The next day, Thomas confirmed that he wanted trial counsel, which the court then appointed. 6/2/04RP 87-89; Supp. CP \_\_\_ (Sub. no 242, order for withdrawal of attorney/substitution).

In August 2004 (two months post-conviction), Mr. Thomas re-asserted his right to self-representation. CP 508. The court ordered the Office of Public Defense to appoint another attorney as standby counsel for purposes of litigating Thomas's post-conviction motions. Id.

On September 30, 2004, Thomas withdrew his pro se status and asked the court to appoint counsel to represent him. 9/30/04RP; CP 902. In the meantime, Thomas had filed myriad pleadings, including motions: (1) for a new trial, (2) challenging the

constitutionality of the kidnapping charges, and (3) to dismiss the deadly weapon enhancements (and to reconsider the order denying dismissal thereof).<sup>6</sup>

Also, while his appeal was pending, Thomas filed numerous pro se motions with the trial court, seeking relief on a variety of different bases.<sup>7</sup>

Finally, post-appeal, after the State had conceded that Mr. Thomas was entitled to resentencing because some of his convictions involved the same criminal conduct, Thomas unequivocally re-asserted his right to self-representation.<sup>8</sup> CP 309-11. He filed a pro se notice of appearance and a declaration in which he stated that he was "unequivocally asserting his State and Federal Right to self-representation," and "unequivocally asserting his right to proceed Pro Se." CP 301-02, 310. Thomas argued that the erroneous denial of his motion to proceed Pro Se would require dismissal without any showing of prejudice. CP 310.

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<sup>6</sup> CP 436-73; Supp. CP \_\_ (Sub. no 310A, motion and memo challenging constitutionality); Supp. CP \_\_ (Sub. no 310B, motion for reconsideration).

<sup>7</sup> See CP 512-17 (motion to terminate financial obligations), 518-24 (motion for reconsideration of appeal bond), 525-901 (post-trial motion for relief from judgment).

<sup>8</sup> See State v. Thomas, 2007 WL 2084187, at 15.

In addition, Thomas submitted a memorandum of law contesting the imposition of multiple firearm enhancements. CP 315-59 (plus attachments).

On August 19, 2008, at the initial resentencing hearing, and after the trial court had reviewed Mr. Thomas's pleadings, the court inquired of Thomas, "[H]ow do you wish to proceed at this time?" Thomas responded, "As requested, pro se, sir." 8/19/08RP 2. The court stated:

I have found previously that Mr. Thomas is competent to represent himself. I reviewed the pleadings that he has submitted. They are extensive in this matter. I think that probably Mr. Thomas is more uniquely qualified to represent himself than the vast majority of people who request that they be able to proceed pro se, so I will find that Mr. Thomas understands the issues and is competent to proceed, but I will also ask Mr. Todd as standby counsel to be able to confer with him.

8/19/08RP 3.

After the State made its sentencing recommendation, Mr. Thomas argued that, because he had not previously been served with the State's presentence report, he was unprepared to adequately respond. Id. at 9-10. Thomas moved for a continuance, which the court granted. Id. at 14-16. Before the hearing adjourned, Thomas made a record of some of the legal

challenges to the resentencing to "preserve [the] issues for appellate purposes." Id. at 17-20.

On August 25, 2008, when the resentencing hearing resumed, Thomas continued to represent himself. The court said that Mr. Thomas had previously decided that he was "capable and competent to represent himself." 8/25/08RP 12. The court noted that Mr. Thomas had previously represented himself on and off for a number of hearings and in a number of different court proceedings. Id.

b. Argument.

A criminal defendant has a constitutional right to waive assistance of counsel and to represent himself at trial. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). This Court reviews a trial court's ruling on a request to proceed pro se for an abuse of discretion. State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). "The burden of proof is on the defendant asserting that his right to counsel was not competently and intelligently waived." State v. Hahn, 106 Wn.2d 885, 901, 726 P.2d 25 (1986).

There is no formula for determining a waiver's validity. State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). The preferred method is for the trial court to conduct a colloquy with the defendant on the record detailing at a minimum the seriousness of the charge, the possible maximum penalty involved, and the existence of technical, procedural rules governing the presentation of the defense. City of Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984).

If there is no colloquy, the record must indicate that the defendant appreciated the danger of proceeding without counsel. State v. Nordstrom, 89 Wn. App. 737, 742, 950 P.2d 946 (1997). "This standard is met by a showing that the defendant knew and understood (1) the seriousness of the charges against him, (2) the possible maximum penalty, and (3) that presenting a defense requires the observance of technical rules and is not just a matter of 'telling one's story.'" Id. In Nordstrom, although there was no colloquy, the Court found that the reading of the charges at arraignment, coupled with a trial judge's comment at a continuance hearing that the defendant faced "fairly serious" charges sufficiently advised him of the seriousness of the charges. 89 Wn. App. at 742-43.

Where the defendant has already been through one trial in the matter, a colloquy may not be necessary. For example, in State v. Strodbeck, 46 Wn. App. 26, 728 P.2d 622 (1986), after the defendant's first trial ended in a mistrial, he represented himself in the second trial. Though there was no colloquy on the record, the Court rejected the claim on appeal that the defendant did not properly waive his right to counsel:

Although not given a lecture by the trial court upon the perils and vicissitudes of representing one's self, Strodbeck was afforded an even better opportunity to learn about trial practice as specifically applied to his case during the first trial. As the principal, he witnessed firsthand a full, totally realistic demonstration and application of what to expect, what the problems of presenting his defense were and precisely how to do it. The trial gave him a sound basis from which to make a judgment as to self-representation, far better than verbal advice from the bench, no matter how well conceived and delivered.

46 Wn. App. at 29. See also State v. Conlin, 49 Wn. App. 593, 595-96, 744 P.2d 1094 (1987) ("[t]he knowledge required to waive counsel may be gained from participation in an earlier trial on the same matter").

Here, Thomas claims that the trial court erred in granting his motion to proceed pro se at the resentencing because the colloquy failed to properly advise him of the legal issues, the maximum

penalty that he faced, or the risks and dangers of self-representation. Br. of Appellant at 7. These claims are utterly without merit. Given the history of this case, the trial court was not required to go through another colloquy before granting Thomas's motion to proceed pro se. The record clearly established that Thomas knew and understood the legal issues, the possible maximum penalty, and the risks and dangers of self-representation.

Thomas had been through an entire trial and appeal on the charges. When Thomas requested to proceed pro se before the first trial, he was advised of the nature of the charges and possible penalties. 11/14/03RP 2, 9. At his original sentencing in June of 2005, Thomas was informed of the standard range for the seven charges and the maximum penalty. CP 12-22. At the resentencing in October 2005 (after the Department of Corrections notified the sentencing court of an error), Thomas was again informed of the standard range for the seven charges and the maximum penalty for each, as well as notified of the statutory requirement that all firearm enhancements "shall run consecutively to all other sentencing provisions." CP 376, 378-86. Before trial began, the motions and

trial courts had received numerous pro se motions from Thomas.<sup>9</sup> Since the conclusion of the trial, the trial court received scores of additional motions.<sup>10</sup>

Moreover, after successfully appealing the issue of whether some of the charges involved the same criminal conduct, Thomas unequivocally asserted his right to self-representation. CP 301-02, 309-11. In the attachments to Thomas's declaration, Thomas included copies of his prior judgments and sentences (which included the standard range and maximum penalty for each of the seven charges). CP 364-72, 378-86. Thomas identified and briefed the legal issues pertinent to the resentencing. CP 178-255, 317-401. The trial court was in an excellent position to determine that Thomas had adequately waived his right to counsel.

Thomas's argument that this colloquy was inadequate because the court did not advise him of the legal issues, the

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<sup>9</sup> See, e.g., Supp. CP \_\_ (Sub. no 146, correspondence); Supp. CP \_\_ (Sub. no 172, motion to suppress evidence); Supp. CP \_\_ (Sub. no 177, motion to dismiss); Supp. CP \_\_ (Sub. no 178, motion to suppress); Supp. CP \_\_ (Sub. no 183, motion/memo to suppress warrant); Supp. CP \_\_ (Sub. no 241, attachment/exhibits and findings); Supp. CP \_\_ (Sub. no 245, memorandum in support of motion to exclude); see also Appendix A.

<sup>10</sup> See, e.g., CP 436-73, 474-92, 493-507; Supp. CP \_\_ (Sub. no 244, certificate of service); Supp. CP \_\_ (Sub. no 270, motion to dismiss); Supp. CP \_\_ (Sub. no 310A, motion and memo challenging constitutionality); Supp. CP \_\_ (Sub. no 310B, motion for reconsideration); Supp. CP \_\_ (Sub. no 310E, motion re ineffective counsel); Supp. CP \_\_ (Sub. no 310G, statement from def. re petition for writ of habeas); see also Appendix A.

maximum punishment, and the risks and dangers of self-representation is frivolous. Given the history of the case, there was no question that Thomas was aware of the standard sentence ranges and maximum possible punishment. Moreover, appellate counsel contends that the court failed to determine whether Thomas understood the legal issues regarding the resentencing, yet counsel's arguments on appeal are precisely the arguments that Thomas made pro se. Compare CP 317-56 (Thomas argues that the imposition of multiple firearm enhancements violates double jeopardy under a "unit of prosecution" analysis) with Br. of Appellant at 21-24 ("unit of prosecution" argument); and compare 8/19/08RP 17-18; CP 178-255 (Thomas contends that, because of the scrivener's error in the amended information, his firearm enhancements should be imposed concurrently) with Br. of Appellant at 26-31 (same).

Finally, Thomas had considerable experience representing himself earlier in this case. It was not a "brief foray" into self-representation as counsel on appeal contends. See Br. of Appellant at 13-14. Rather, it was seven months of pre-trial self-representation in which Thomas litigated most every aspect of his case, and prevailed on a suppression motion. Additionally,

Thomas represented himself post-trial, post-sentencing, and he filed a statement of additional grounds with this Court in which he raised several issues.<sup>11</sup> While prior experience alone is not sufficient to demonstrate an awareness of the risk of self-representation, it is nonetheless evidence of that fact. State v. Sinclair, 46 Wn. App. 433, 439 n. 1, 730 P.2d 742 (1986). Here, Thomas's prior experience, coupled with his unequivocal demands to go pro se and his knowledge of the case and the charges, supported the court's decision to allow him to represent himself.

Thomas has failed to show that the court erred in granting his request to represent himself at the resentencing. The court had presided over the trial in the matter and was well aware that Thomas was familiar with the nature of the charges against him and the associated penalties as well as the risks of self-representation. Additionally, the court knew from Thomas's pleadings that he understood the legal issues and that Thomas was not only "competent to proceed," but he was "more uniquely qualified to represent himself than the vast majority of people who request that they be able to proceed pro se." 8/19/08RP 3. Under these

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<sup>11</sup> See Thomas, 2007 WL 2084187, at \*20-30.

circumstances, it would have been error not to allow Thomas to represent himself.

**2. THE SENTENCING COURT PROPERLY IMPOSED CONSECUTIVE FIREARM ENHANCEMENTS ON THE CHARGES THAT INVOLVED THE “SAME CRIMINAL CONDUCT.”**

Thomas contends that the court erred when it imposed firearm enhancements on charges that the State conceded involved the same criminal conduct. Br. of Appellant at 17. This contention should be rejected because the law requires the imposition of consecutive firearm enhancements regardless of whether or not the underlying crimes involve the same criminal conduct.<sup>12</sup>

The State conceded in Thomas's first appeal that the trial court erred at sentencing when it concluded that the robbery and kidnapping of victim Farrell (Counts I and III) and the attempted robbery and kidnapping of victim Hohner (Counts V and VI) were separate and distinct; the crimes involved the same criminal conduct. Thomas, 2007 WL 2084187, at \*15. Although Counts I and III and Counts V and VI involved the same criminal conduct,

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<sup>12</sup> This issue is presently before the Washington Supreme Court. See State v. Mandanas, 139 Wn. App. 1017, 2007 WL 1739702 (2007) (unpublished), review granted, 163 Wn.2d 1021 (2008) (argued October 14, 2008).

and thus counted as one offense, see RCW 9.94A.589(1)(a),<sup>13</sup> the court was nevertheless required to impose consecutive firearm enhancements. RCW 9.94A.533(3)(e).<sup>14</sup> The trial court retains no discretion on mandatory firearm enhancements. State v. DeSantiago, 149 Wn.2d 402, 418, 68 P.3d 1065 (2003).

Regardless of whether some of the crimes constituted the same criminal conduct, firearm enhancements must be served consecutively, "[n]otwithstanding any other provision of law."

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<sup>13</sup> In relevant part, RCW 9.94A.589(1)(a) provides, "'Same criminal conduct,' as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim."

<sup>14</sup> RCW 9.94A.533 provides:

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement....

(e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter....

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony.

RCW 9.94A.533(3)(e); State v. Callihan, 120 Wn. App. 620, 622-23, 85 P.3d 979 (2004). In Callihan, the defendant argued with another man at a party. Callihan fired a gun at the man and then left. Callihan, at 621. The victim followed Callihan outside where a second confrontation occurred. Callihan forced the gun into the victim's mouth and then struck him in the head with the gun. Id. A jury convicted Callihan of two counts of second-degree assault and found that he used a firearm in each assault. Id. At sentencing, the trial court found that the assaults constituted the same criminal conduct. Id. at 622.<sup>15</sup> The court imposed two firearm enhancements and ran them consecutively. Id. The sole issue on appeal was whether the court erred by imposing multiple firearm enhancements on two crimes that, because they constituted the same criminal conduct, counted as one offense. Division 2 of this Court held that, under the plain language of former RCW 9.94A.310(e), all firearm enhancements "*shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements.*" Id. at 623 (emphasis in original).

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<sup>15</sup> The trial court ruled pursuant to former RCW 9.94A.400(1)(a) recodified at RCW 9.94A.589 by LAWS 2001, CH. 10, § 6. Although most of Title 9, Chapter 9.94A was recodified in 2001, the State has cited to the current statute for the reader's convenience. The statute cited herein has not changed substantively since the recodification.

Thus, case law and the statutes make clear that Thomas's firearm enhancements require consecutive sentences, even with a finding of same criminal conduct.

### **3. MULTIPLE FIREARM ENHANCEMENTS DO NOT VIOLATE DOUBLE JEOPARDY.**

Thomas claims that, under a unit of prosecution analysis, the imposition of multiple firearm enhancements violates double jeopardy. Thomas seemingly contends that the unit of prosecution is the single firearm used in each incident, irrespective of how many crimes were committed with the firearm in that same incident. See Br. of Appellant at 25-26.<sup>16</sup> This claim has no merit. The legislative intent to impose consecutive enhancements based on a single act

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<sup>16</sup> Thomas does not make clear precisely what he contends is the "unit." On the one hand, he contends that "Where a defendant is sentenced to a single count, under same criminal conduct analysis, the sentenced offense or unit of prosecution, must be considered to be the single firearm used in the offense." Br. of Appellant at 24. Thomas does not cite any authority for this proposition, and it appears to be duplicative of Thomas's previous argument. See Br. of Appellant at 17-21 (claiming that multiple firearm enhancements cannot be imposed where two offenses are the same criminal conduct). On the other hand, Thomas claims that a firearm enhancement cannot be imposed for "offenses that involve the same conduct and same firearm." Br. of Appellant at 25. Again, Thomas does not identify what is the "unit." Moreover, this appears to be the precise argument that was raised, and rejected, in Thomas's first appeal. See Thomas, 2007 WL 2084187, at \*6-7 (citing State v. Nguyen, 134 Wn. App. 863, 869, 871, 142 P.3d 1117 (2006) (holding that double jeopardy is not violated by weapon enhancements even if the use of the weapon is an element of the crime), review denied, 163 Wn.2d 1053 (2008); and cert. denied, 129 S. Ct. 644, 172 L. Ed. 2d 626 (2008)).

of possessing a weapon, where there are two or more offenses eligible for an enhancement, is clear.

At the outset, this Court should reject Thomas's argument based on the "law of the case" doctrine. See State v. Barberio, 121 Wn.2d 48, 846 P.2d 519 (1993); RAP 2.5(c). RAP 2.5(c)(1) provides:

If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

The rule does not revive automatically issues that were not raised in an earlier appeal; rather, an issue becomes appealable only if, upon remand, the trial court exercised its independent judgment, reviewed and ruled again on such issue. Barberio, 121 Wn.2d at 50. See also State v. Sauve, 100 Wn.2d 84, 666 P.2d 894 (1983) (Washington Supreme Court declined to consider on a second appeal issues that could have been raised in the first appeal but were not). Thus, RAP 2.5(c)(1) applies in a case only when the issue has been considered and decided anew on remand. Barberio, at 51 (citing State v. Sauve, 33 Wn. App. 181, 183 n.2, 652 P.2d 967 (1982)).

Under Barberio and RAP 2.5(c), Thomas is precluded from relitigating his double jeopardy argument. In the first appeal, this Court rejected Thomas's double jeopardy argument. See Thomas, 2007 WL 2084187, at \*6-7. Although Thomas has seemingly changed the legal theory underpinning his double jeopardy challenge, the issue could have been determined if it been presented to this Court. More importantly, the trial court made clear upon remand that it was not considering anew any double jeopardy challenge to the imposition of multiple firearm enhancements. The judge said that Thomas's motion was, in large part,

repetitive of what has already preceded today, both at this trial court and before the Court of Appeals, and I believe it has already been ruled upon in substance. I don't think that there's anything new here, and I don't think there's any new issues, so I will deny the motions that are contained in [Thomas's presentence motion and memorandum].

8/25/08RP 5; see also id. at 13-14 (court reiterated that it believed it had previously ruled on Thomas's argument and that it was not going to rule anew).

This issue could (and may) have been presented in the first appeal; therefore, this Court should deny review. See Barberio, 121 Wn.2d at 52. However, even if the Court considers Thomas's unit of prosecution argument, it fails on the merits.

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. Similarly, the Washington constitution provides that "No person shall . . . be twice put in jeopardy for the same offense." CONST., art. I, § 9. The state and federal prohibitions against double jeopardy are coextensive; the state provision does not provide broader double jeopardy protection than the federal constitution. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

Whether a defendant's double jeopardy rights have been violated is a question of law and should be reviewed *de novo*. State v. Frodert, 84 Wn. App. 20, 25, 924 P.2d 933 (1996), review denied, 131 Wn.2d 1017 (1997). When a defendant is charged with violating the same criminal statute multiple times, the proper inquiry is what "unit of prosecution" the legislature intended as the punishable act under the statute. State v. Adel, 136 Wn.2d 629, 633-34, 965 P.2d 1072 (1998). The first step in this inquiry is to analyze the criminal statute at issue. Adel, 136 Wn.2d at 635.

In 1995, the Legislature enacted, without amendment, Initiative 159, entitled "Hard Time for Armed Crime." LAWS OF 1995, CH. 129; In re Charles, 135 Wn.2d 239, 246, 955 P.2d 798 (1998)

(citing State v. Broadaway, 133 Wn.2d 118, 124, 942 P.2d 363 (1997)). The purpose of Initiative 159 was to "increase sentences for armed crime." In re Charles, at 246 (citing Broadaway, at 128). The new law thus increased the sentence enhancement for an offender found to have been armed with a firearm during the commission of the offense. In re Charles, at 246.

The legislature unambiguously intended to punish a defendant who uses a firearm during the commission of a crime irrespective of whether the use of that same firearm is an element of the crime (with some enumerated exceptions) and to punish the defendant multiple times when the defendant has committed more than one offense (during the same or a different incident), and he used a firearm during the commission of those offenses. See RCW 9.94A.533; State v. Husted, 118 Wn. App. 92, 95, 74 P.3d 672 (2003) (The "statute unambiguously shows legislative intent to impose two enhancements based on a single act of possessing a weapon, where there are two offenses eligible for an enhancement."). The statute mandates additional punishment for crimes committed with a firearm:

(3) The following additional times *shall be added* to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an

accomplice was armed with a firearm as defined in RCW 9.41.010. . . . If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement.

. . . .

(e) *Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory . . . and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. . . .*

(f) The firearm enhancements in this section *shall apply to all felony crimes* except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

RCW 9.94A.533(3) (emphasis supplied).

To the extent that a unit of prosecution analysis is applicable, the legislature has clearly defined the unit: punishment (an enhancement) applies to *all* firearms used during the commission of *all* crimes, unless the crime is specifically exempt by statute.

The second step in a unit of prosecution analysis involves analysis of the factual situation each case presents. State v. Varnell, 162 Wn.2d 165, 170 P.3d 24 (2007). The factual analysis

is necessary "because even where the legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one 'unit of prosecution' is present." Varnell, 162 Wn.2d at 168.

Thomas robbed (or at least attempted to rob) two jewelry stores. During the first robbery, Thomas forced the victim at gunpoint to lie on the ground, bound him with zip ties and threatened to kill him. Thomas, 2007 WL 2084187, at \*2. Thomas started to take jewelry, but the victim broke free and reached for a gun that was hidden from view. Id. Thomas fired multiple shots at the victim; Thomas then fled, leaving behind the jewelry. Id.

During the second robbery, Thomas held two employees at gunpoint, and ordered them into a back room and onto the floor. Id. He then handcuffed the employees together and fled with cash and jewelry, leaving the employees still bound together. Id.

A jury convicted Thomas of one count of attempted robbery in the first degree, three counts of kidnapping in the first degree, one count each of assault in the first degree, robbery in the first

degree, and unlawful possession of a firearm. CP 378, 384. Each of the eligible offenses carried a firearm enhancement.<sup>17</sup> CP 381.

Thus, the facts of this case clearly demonstrate separate units of prosecution. The legislature intended to "increase sentences for armed crime." In re Charles, 135 Wn.2d at 246. Thomas committed six offenses while armed with a firearm and the court imposed six firearm enhancements, each enhancement increased Thomas's sentence and thereby effectuated the legislature's stated intent. This Court should therefore affirm Thomas's six firearm enhancements.

**4. THOMAS WAS NOT PREJUDICED BY THE SCRIVENER'S ERROR IN THE AMENDED INFORMATION.**

Thomas claims that he was prejudiced by a scrivener's error in the Amended Information. Specifically, he contends that the citation to the old statute, Former RCW 9.94A.310, rather than the operative statute, RCW 9.94A.510, misled him into believing that the alleged firearm enhancements could run concurrently; thus, he

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<sup>17</sup> See RCW 9.94A.533(3)(f) (exempting the unlawful possession of a firearm charge from a firearm enhancement).

claims that he went to trial without knowing the possible sentence that he faced. Br. of Appellant at 26, 28, 31.

This claim is utterly without merit. Despite an error in a numerical statutory citation, Thomas knew that he faced a possible life sentence — whether the result of convictions on the underlying charges or the enhancements to the charges. Because Thomas cannot establish any prejudice from the scrivener's error, there is no basis for reversal of the firearm enhancements. His claim should be rejected.

Both the state and federal constitutions guarantee a criminal defendant the right to know the charge against him. U.S. CONST amend. VI; CONST. art. I, § 22 (amend.10). An information is constitutionally inadequate if it does not set forth all the essential elements of the crime. State v. Moavenzadeh, 135 Wn.2d 359, 362, 956 P.2d 1097 (1998). Sentencing enhancements, including firearm allegations, must be included in the information. State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008). An error in a numerical statutory citation is not reversible absent prejudice to the defendant. State v. Vangerpen, 125 Wn.2d 782, 787-88, 888 P.2d 1177 (1995); CrR 2.1(a)(1).

Scrivener's errors are clerical errors that result from mistake or inadvertence, especially in writing or copying something on the record. They are not errors of judicial reasoning or determination. See BLACK'S LAW DICTIONARY 582, 1375 (8<sup>th</sup> ed. 1999). CrR 7.8(a) provides that clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time of its own initiative or on the motion of any party. The remedy for a scrivener's error is to remand to the trial court for correction of the error. In re Personal Restraint of Mayer, 128 Wn. App. 694, 700, 117 P.3d 353 (2005).

The Amended Information in this case alleged in Counts I, III-VII that, during the commission of the crime specified in that count, Thomas was "armed with a handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.310(3)." CP 7-11. The controversy turns on the citation to Former RCW 9.94A.310(3) because Thomas committed his offenses in 2002, after the legislative recodification to RCW 9.94A.310. The operative statute at the times Thomas committed his offenses was RCW 9.94A.510. LAWS 2001, CH. 10, § 6.

The situation present here — a mere scrivener's error — is unlike the situations wherein the State had charged a deadly

weapon enhancement, but then, post-conviction, sought to impose a firearm enhancement. See, e.g., Recuenco, 163 Wn.2d at 442. Imposition of a firearm enhancement in such a situation is never harmless error, the court held in Recuenco, because the defendant was not notified that he had to defend against a firearm enhancement and because the jury's deadly weapon verdict did not authorize the firearm enhancement. Id.

The essence of Thomas's claim is that the mere incorrect citation itself is reversible error. Id. It is not. Vangerpen, 125 Wn.2d at 787-88. Here, despite the scrivener's error, Thomas was on notice that he would have to defend against firearm enhancements on each of the eligible charges. The error did not deprive Mr. Thomas of notice as to the crimes (or enhancements) charged, and there is no evidence he was in any way prejudiced by the error. The trial court found that, despite the error in the numerical statutory citation, Thomas knew all along that he faced multiple consecutive firearm enhancements. 8/25/08RP 19-21.

Thomas claims that he was under a misapprehension as to whether the enhancements had to be imposed consecutively, but cannot (and does not) establish any prejudice. He contends that the prejudice inhered in the fact that he "did not go to trial with an

understanding of the sentence he faced." Br. of Appellant at 31. That is incorrect; the court told him on more than one occasion he faced *life* in prison (irrespective of whether that time could be imposed as a result of convictions on the underlying charges or any enhancement to the charges). See 11/14/03RP 13, 18.

To support his claim, Thomas cites State v. Bisson, 156 Wn.2d 507, 130 P.3d 820 (2006), a case that is inapposite. In Bisson, the defendant pled guilty to five counts of first-degree robbery while armed with a deadly weapon (and three counts of second-degree robbery) without being clearly informed that the enhancements would be served consecutively. Bisson, at 509. The State conceded that Bisson's plea was involuntary because the plea paperwork lacked clarity; the Amended Information and the plea agreement incorrectly cited RCW 9.94A.310, the deadly weapon statute that predated the July 2001 recodification. Id. at 512-13. Although the substance of the statute had not changed, the legislature had amended RCW 9.94A.310 in 1998 in response to the Washington Supreme Court's decision in In re Post Sentencing Review of Charles, 135 Wn.2d 239, 955 P.2d 798 (1998), in which the court held that former RCW 9.94A.310(3)(e) (1995) did not unambiguously require weapon enhancements to

run consecutively to one another. Bisson, at 512. Defense counsel represented that before entering his guilty pleas, Bisson had researched the statute cited in error in the Amended Information (Former RCW 9.94A.310) and, based on case law interpreting that statute, concluded that weapon enhancements could run concurrently. Id. Because Bisson was misadvised about a direct consequence of his plea (the potential length of his sentence), the State agreed that Bisson's plea was involuntary.<sup>18</sup> Id. at 515-16.

In this case, there was no plea agreement; Thomas went to trial. He did so knowing that he faced a potential life sentence on six of the seven charges for which he ultimately was found guilty. By Thomas's own admission, it was not until he began to research the law — post-trial, post-verdict, post-appeal — that he discovered the Bisson case and then erroneously concluded that the scrivener's error entitled him to a remedy of reversal of the firearm enhancements. See CP 183 (Thomas discovered the "charging deficiency" when he researched case law and, during his research, "Mr. Thomas came across State v. Bisson." (citation omitted)). Thus, the fact that the enhancements had to run consecutively did

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<sup>18</sup> The issue for the supreme court was to what remedy was Bisson entitled — partial rescission or withdrawal of the plea agreement in its entirety. Bisson, at 516-17.

not inform Thomas's decision to go to trial or to plead, as it did the defendant in Bisson.

Further, Thomas's claim, that the scrivener's error impeded his ability to prepare a defense, is unsupported by the record. Here, the charging document gave Thomas notice of the accusations against him, and Thomas has not explained how the scrivener's error affected his ability to prepare an adequate defense. See State v. Kiorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991) (primary goal of the charging document is to give a defendant notice of the accusation (the essential facts and elements) against him so that he can prepare an adequate defense).

Finally, Thomas cites several Clerk's Papers as support for his assertion that he "decided to go to trial based on his understanding that he could face concurrent sentences, and he was not informed otherwise until he was convicted," but the record does not bear out Thomas's claims. See Br. of Appellant at 34 (citing CP 182, 193); see also Br. of Appellant at 30, 31 (same). The Clerk's Papers cited by Thomas address his alleged inability to prepare a defense and do not contend that the error in the numerical statutory citation influenced his decision to proceed to

trial. Contrary to Thomas's assertion, the record does not bear out his claim of prejudice. This Court should reject Thomas's claim.

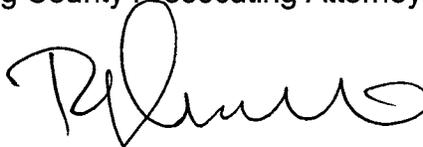
**D. CONCLUSION**

For the reasons stated above, the State respectfully asks this Court to affirm Thomas's sentence.

DATED this 24 day of June, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
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# APPENDIX A

<u>Sub Number</u> <sup>1</sup>	<u>Clerk's Papers</u>	<u>Document Title</u>
	402-13	Motion to dismiss
	414-22	Affidavit
146		Correspondence
172		Motion/Memo to suppress I.D.
	423-29	Motion for disclosure
177		Motion to dismiss charges
178		Motion to suppress Identification Evidence
183		Motion/Memo to suppress warrant
186		Order to suppress
	430-33	Affidavit (wants access to telephone transcripts)
	434-35	Affidavit (wants investigator meetings face to face)
241		Attachment/Exhibits and Findings
242		Order for withdrawal and substitution of counsel
244		Certificate of service (Defendant's motion to dismiss for failing to preserve evidence)
245		Memo in support of motion to exclude fingerprint evidence
	436-73	Motion for a new trial
269 <sup>2</sup>		Request to recall prosecution motion
270		Motion to dismiss kidnapping charges
	474-92	Motion to complete trial court record before sentencing
	493-507	Motion to ineffective assistance
	508	Order authorizing substitution of counsel (proceeding pro se)
	902	Order appointing attorney
310A		Motion (memo challenging constitutionality of kidnapping statute)
310B		Motion for reconsideration (of order denying dismissal of deadly weapon enhancement on counts 1-3)
310E		Motion for reconsideration (ineffective assistance of counsel)

<sup>1</sup> On June 19, 2009, the State filed a supplemental designation of clerk's papers to have these documents transmitted to the Court.

<sup>2</sup> On June 22, 2009, the State filed a supplemental designation of clerk's papers to transmit this document to the Court.

310F <sup>3</sup>		Defendant's reply to order denying motion to dismiss (pursuant to CrR 8.3 (b))
310G		Statement from defendant re: petition Writ of Habeas
310H <sup>4</sup>		Defendant's reply to post-trial written findings of fact and conclusions of law on CrR 3.5 motion to suppress defendant's statements
	509-11	Petition for Writ of Habeas Corpus
	512-17	Motion by defendant to terminate financial obligations
	518-24	Motion by defendant for reconsideration of appeal bond
	525-901	Defendant's post-trial motion from judgment

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<sup>3</sup> On June 22, 2009, the State filed a supplemental designation of clerk's papers to transmit this document to the Court.

<sup>4</sup> On June 22, 2009, the State filed a supplemental designation of clerk's papers to transmit this document to the Court.