

66928-1

66928-1

NO. 66928-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

CATHERINE ASHENBERNER,

Appellant.

COURT OF APPEALS  
DIVISION I  
2011 NOV -4 PM 5:22

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HOLLIS R. HILL  
THE HONORABLE DOUGLAS McBROOM

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

A superior court has the authority to enforce the conditions of the sentence imposed. Here, the sentencing court ordered Ashenberner to pay restitution of \$169,679.31. Because Ashenberner did not pay restitution (despite her employment under different names and different social security numbers), the court modified its order of judgment and sentence to include a requirement that Ashenberner report her income to the county clerk. When Ashenberner willfully violated this condition, did the superior court have the authority to impose a sanction?

**B. STATEMENT OF THE CASE**

**1. THE THEFT CHARGES, GUILTY PLEA AND SENTENCE.**

In 2000, the defendant, Catherine Marie Ashenberner, worked as a bookkeeper for two mortgage companies – Western Federal Mortgage (Western Federal) and Seattle Federal Mortgage (Seattle Federal). CP 8. Initially, Martin Meehan owned both companies. CP 8. After Meehan sold the Seattle branch to Clay Barnes, Barnes changed the name from Western Federal to Seattle Federal. CP 8. Ashenberner had worked for Western Federal

since 1997. CP 8. So, after Barnes bought Seattle Federal, he continued to employ Ashenberner as his bookkeeper.

Ashenberner's duties at both offices included balancing the financial books and paying the bills. CP 8. Ashenberner, however, had no authority to sign checks. CP 8.

On July 7, 2000, Barnes discovered that Ashenberner had forged a check for \$1,200 payable to herself. CP 8, 36. Barnes confronted Ashenberner, who admitted to the theft and forgery but offered to pay Barnes restitution. CP 36. Barnes immediately terminated Ashenberner's employment and then notified Meehan, who started an investigation into Western Federal's bank accounts. CP 8-9, 36. Later that same day, Meehan discovered a forged check and terminated Ashenberner's employment. CP 9.

After Barnes and Meehan completed their bank account audits, Barnes discovered another forged check for \$800 payable to Ashenberner. CP 36. Meehan and his wife discovered 53 stolen and forged checks, each payable to Ashenberner or a third party on Ashenberner's behalf. CP 9-35. Between July 1999 and July 2000, Ashenberner had stolen \$2,000 from Seattle Federal and \$167,679.31 from Western Federal. CP 33-35, 48.

The State charged Ashenberner with seven counts of first degree theft for crimes committed between May 27, 1999 and June 23, 2000. CP 1-6. Ashenberner pleaded guilty as charged.<sup>1</sup> CP 37-47; 7/26/01 RP. The Honorable Douglas McBroom imposed a standard range sentence, which did not require supervision, and ordered Ashenberner to pay the agreed restitution of \$2,000 to Seattle Federal and \$167,679.31 to Western Federal. CP 40-41, 48-49, 93-103; 9/21/01 RP 8, 14-16.

Ashenberner confessed at sentencing that she had used the stolen money to take "nice vacations" and to "buy things for people." 9/21/01 RP 13. As a result of Ashenberner's thefts, Meehan violated his agreement with the Department of Financial Institutions, he had to sell his car to infuse capital into Western Federal and his health suffered. 9/21/01 RP 3-4.

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<sup>1</sup> Ashenberner was also charged with - and pleaded guilty to - one count of perjury. CP 1, 37-46. The charge stemmed from a 1998 forgery conviction. As part of the Department of Correction's (DOC) pre-sentence report in the instant case, Ashenberner submitted an "affidavit of employment," in which she swore under penalty of perjury that she was no longer employed at Western Federal when, in fact, she was still employed there. CP 31-32. The perjury conviction is not pertinent to the issue on appeal.

## 2. DOC SUPERVISION.

Although the trial court did not order Community Placement at sentencing, the Judgment and Sentence provides:

**Defendant shall remain under the Court's jurisdiction and the supervision of the Department of Corrections for up to ten years from the date of sentence or release from confinement to assure payment of financial obligations.**

CP 95 (emphasis in original). On September 16, 2003, almost two years after the trial court imposed sentence, the DOC sent notice, pursuant to Senate Bill 5990, that it had terminated Ashenberner's supervision.<sup>2</sup> CP 119-21. The notice stated that, as of January 1, 2004, the DOC would no longer send financial billing statements to Ashenberner, but that it would provide Ashenberner's contact information to the Office of the Administrator for the Courts and the County Clerk of jurisdiction for billing. CP 120; 6/16/09 RP 3-4. As of the jurisdictional transfer, with accrued interest and minus \$113.42 in payments, Ashenberner owed \$209,363.01 in restitution. CP 120.

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<sup>2</sup> See LAWS OF 2003, CH. 379, §§ 14(4)(B), 16(4), 17, effective 10/1/03.

**3. REVIEW HEARINGS, SENTENCE MODIFICATIONS, NOTICES OF VIOLATIONS AND SANCTIONS.**

At sentencing, Judge McBroom told Ashenberner that if she failed to make restitution payments, as instructed to by the DOC, he would impose the “maximum penalty” for her non-compliance.

9/21/01 RP 20-22. Judge McBroom, who was retiring from the bench, assured Ashenberner that, “I am sure my successor will do the same.” 9/21/01 RP 22.

a. June 10, 2004 Hearing.

On June 10, 2004, Judge McBroom held a hearing to review the conditions of Ashenberner's sentence. CP 124; see also CP 122-23 (noting Ashenberner's possible violations of the conditions of her sentence). At the hearing, Judge McBroom modified Ashenberner's sentence.<sup>3</sup> CP 109-10. Specifically, the court required Ashenberner to provide all information requested by the Clerk's Office, including her use of the money stolen from Seattle Federal and Western Federal.<sup>4</sup>

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<sup>3</sup> The clerk's minutes from the June 10<sup>th</sup> hearing state that an order reflecting Judge McBroom's modifications would be presented at a later date. CP 124. That order was presented and signed on 8/25/04. CP 109-10, 125.

<sup>4</sup> See RCW 9.94A.760(7)(b).

b. March 24, 2009 Notice Of Violation.

On March 24, 2009, Prudence Brownell, a Legal Financial Obligation Officer with the King County Department of Judicial Administration, notified Judge McBroom that Ashenberner had violated her payment schedule. The report stated:

The Court ordered Ms. Ashenberner to pay restitution of \$169,679.31 and the crime victim fee of \$500.00. Further, DOC set a minimum monthly payment schedule of \$753.42. Recent efforts by personnel with the King Co. Court Clerk's office to locate employment information or other assets has been futile. Ms. Ashenberner claims she has been unemployed. However, a review of quarterly wage reporting to Employment Security<sup>5</sup> from the third quarter 2005 thru fourth quarter 2008, shows that Ms. Ashenberner is working using three different social security numbers. A summary is attached. The victims, WESTERN FEDERAL MORTGAGE and SEATTLE FEDERAL MORTGAGE[,] are in a precarious financial situation due to this theft. With accrued interest of \$151,253.18 the current [legal financial obligation] balance is \$320,889.07.

CP 128-29. Ms. Brownell urged the court to issue a summons and to schedule a hearing.<sup>6</sup> CP 129. Senior Deputy Prosecutor Ivan Orton sent Ashenberner a notice of sentence modification hearing

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<sup>5</sup> The Washington State Employment Security Department keeps records of wages paid by employers in Washington State. 6/16/09 RP 8-9.

<sup>6</sup> See former RCW 9.94A.200, recodified as § 9.94A.634 by LAWS OF 2001, CH. 10, § 6, subsequently recodified as § 9.94B.040 by LAWS OF 2008, CH. 231, § 56.

and motion to show cause. CP 126-27. The hearing was scheduled for May 12, 2009. CP 126.

c. June 16, 2009 Modification Hearing.

The modification hearing was held before the Honorable Hollis Hill<sup>7</sup> on June 16, 2009. CP 132; 6/16/09 RP. At the hearing, the State said that it was not seeking any sanction. Rather, the State sought a modification of only Ashenberner's restitution payment schedule, with all other previously imposed sentence conditions to remain in effect.<sup>8</sup> 6/16/09 RP 6, 10. The State also wanted the court to require that Ashenberner provide pay stubs or other evidence of income to the clerk's office monthly. 6/16/09 RP 15.

Ashenberner did not object; rather, she affirmatively assented to the modifications. 6/16/09 RP 14-17.

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<sup>7</sup> After Judge McBroom retired, Judge Hill assumed responsibility for Judge McBroom's cases.

<sup>8</sup> Ashenberner told the court that she was unaware that she was required to report her employment to Orton or another Fraud Division designee. 6/16/09 RP 15. Yet, Ashenberner signed the August 25, 2004 order that imposed the 48-hour notification requirement. CP 109-10.

d. March 17, 2011 Sentence Condition Violation Hearing And Sanctions Imposed.

At a hearing on March 17, 2011, the State alleged multiple violations of Ashenberner's modified sentence.<sup>9</sup> The primary allegations were that Ashenberner failed to make restitution payments and failed to provide proof of income, as ordered on June 16, 2009.<sup>10</sup> 3/17/11 RP 3-4, 11; CP 111-12. As proof of the violations, the State called Prudence Brownell, an employee of the clerk's office whose responsibilities include the collections and monitoring of legal financial obligations. 3/17/11 RP 24-25. Brunell had begun monitoring Ashenberner's legal financial obligations in 2004. 3/17/11 RP 43.

Brownell said that Ashenberner had refused to provide her financial information. 3/17/11 RP 26-27, 32-35. In addition, Brownell had documentation from the Washington State Employment Security Department that showed Ashenberner had worked for multiple companies under different names and social security numbers. 3/17/11 RP 27-30, 38-39; Ex. 3.

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<sup>9</sup> This hearing was originally scheduled for December 28, 2010, but was continued a number of times. 3/17/11 RP 3; see also CP 133.

<sup>10</sup> The State also alleged that Ashenberner had failed to notify an employer of her convictions and failed to notify the State of her employment. 3/17/11 RP 4, 49-51. However, the court found that the State failed to prove those violations. 3/17/11 RP 53.

In June 2010, Brownell sent a letter to Ashenberner. Brownell requested financial information, including pay stubs. 3/17/11 RP 32. On June 30, 2010, Ashenberner went to Brownell's office for a review hearing. 3/17/11 RP 33. Ashenberner failed to disclose her previous - or then current - employment; rather, Ashenberner showed proof that she was receiving unemployment benefits and food stamps. 3/17/11 RP 33-35; Exs. 2, 3. Brownell thus filed a Notice of Violation, which triggered the Sentence Condition Violation Hearing. 3/17/11 RP 35, 48.

The court found that Ashenberner had willfully failed to pay her legal financial obligations. 3/17/11 RP 52, 61; CP 113-14. The court also found that Ashenberner failed to provide the clerk's office with proof of income, as ordered on June 16, 2009. 3/17/11 RP 53-54; Exs. 2, 3; CP 111-14. The court addressed Ashenberner,

Ms. Ashenberner, whatever happens to you, you've brought on yourself. You've shown disdain for the Court. You've shown disdain for all the people who have tried to work with you – please listen to me. We've tried to work with you. I can't imagine the amount of money that the County has spent trying to assist the victim of your crime in recovering restitution. You've lied to the clerk's office, you've lied to the Court through the documents that I've seen here about your barely surviving when you were working and earning money and not even paying \$10 a month or something to the Court.

So, I think 120 days in confinement is appropriate in this case.

3/17/11 RP 59; CP 113-14.

Ashenberner appeals the 3/17/11 order.<sup>11</sup> CP 115-17.

**C. ARGUMENT**

**THE SUPERIOR COURTS RETAIN AUTHORITY TO ENFORCE THE SENTENCES IMPOSED.**

Ashenberner argues that the trial court lacked the power to order her to provide pay stubs and employment records to the clerk's office and to punish her for noncompliance with this requirement. Ashenberner is mistaken. The superior court has the authority to modify its order of judgment and sentence and impose further punishment for noncompliance therewith. This claim fails.

As a preliminary matter, Ashenberner waived appellate review of the court's June 16, 2009 modification order that required her to provide pay stubs or other proof of income to the clerk's office. See 6/16/09 RP 14-17. Ashenberner did not simply fail to

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<sup>11</sup> The court found two separate violations and imposed 60 days for each violation. 3/17/11 RP 54-55. Ashenberner has not appealed the court's finding of a willful non-payment of her legal financial obligations.

object to the conditions of the modified judgment and sentence, she affirmatively agreed to the modifications. However, if the Court chooses to review Ashenberner's claim, it fails on the merits.

The authority to impose restitution is not an inherent power of the court, but is derived from statutes. State v. Eilts, 94 Wn.2d 489, 495, 617 P.2d 993 (1980). The interpretation of a statute is a question of law that is reviewed de novo. Berrocal v. Fernandez, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). The primary goal of statutory construction is to ascertain and give effect to the legislature's intent and purpose. State v. Williams, 158 Wn.2d 904, 908, 148 P.3d 993 (2006). The first step in interpreting a statute is to examine its plain language. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Plain meaning "is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." State v. Engel, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009).

Former RCW 9.94A.142(1)<sup>12</sup> (in effect at the time of sentencing) directs the trial court to impose restitution at a sentencing hearing. The court may modify the terms and conditions of the restitution order. Former RCW 9.94A.142(1) provides in part:

The portion of the sentence concerning restitution may be modified as to amount, *terms, and conditions* during any period of time the offender remains under the court's jurisdiction, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum sentence for the crime.<sup>13</sup>

(emphasis added); see also State v. Gamble, 146 Wn. App. 813, 820, 192 P.3d 399 (2008) (quoting State v. Johnson, 54 Wn. App. 489, 491, 774 P.2d 526 (1989) (holding that "in the absence of statutory language indicating otherwise, a sentencing court has jurisdiction to enforce the requirements of a sentence imposed until those requirements are met and/or a certificate of discharge is provided to the offender upon completion of his or her sentence.")).

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<sup>12</sup> Recodified as § 9.94A.753 by LAWS OF 2001, CH. 10, § 6, reenacted and amended by LAWS OF 2003, CH. 379, § 16 (effective 10/1/03).

<sup>13</sup> Id.

In September 2001 - when Ashenberner was sentenced - the DOC supervised payment of legal financial obligations, irrespective of whether the sentencing court imposed community placement. Former RCW 9.94A.120(13), (15); see also CP 95. Effective October 1, 2003, the county clerk's office assumed the responsibility for monitoring legal financial obligations. RCW 9.94A.760(7)(b)<sup>14</sup> (LAWS OF 2003, CH. 379, § 14) (effective 10/1/03); see also RCW 9.94A.775 (authorizing the county clerk to monitor payment of an unsupervised offender's legal financial obligations) and LAWS OF 2003, CH. 379, § 24 (applying the provisions of LAWS OF 2003, CH. 379, §§ 13 – 27 to all offenders currently subject to sentences with unsatisfied legal obligations).

In order to collect the monthly payment amount set by the DOC, the county clerk can require the offender under oath, to truthfully respond to all questions concerning earning capabilities and the location and nature of all property or financial assets. RCW

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<sup>14</sup> Under RCW 9.94A.145(12) (in effect when Ashenberner was sentenced), the DOC "may" arrange for the collection of unpaid legal obligations through the county clerk. The LAWS OF 2003, CH. 379, § 14 reads the DOC "shall" arrange for the collections of unpaid legal obligations through the county clerk. See also RCW 9.94A.753, reenacted and amended by LAWS OF 2003, CH. 379, § 16 (effective 10/1/03), which states that the county clerk is authorized to collect unpaid restitution at *any time* the offender remains under the court's jurisdiction for purposes of her legal financial obligation.

9.94A.760(7)(b).<sup>15</sup> In addition, an offender is required to bring any and all documents requested by the county clerk. Id.

“If an offender violates *any condition or requirement* of a sentence, the court may modify its order of judgment and sentence and impose further punishment in accordance with this section.”

RCW 9.94A.200<sup>16</sup> (italics added); see also Gamble, 146 Wn. App.

at 818 (holding that the plain language of former RCW

9.94A.634(1)<sup>17</sup> “demonstrates that the superior courts retain

authority—and thus jurisdiction—to enforce the conditions of the

sentences that they impose.”); State v. Acrey, 135 Wn. App. 938,

945, 146 P.3d 1215 (2006) (finding no ambiguity in the phrase “as

part of any sentence: “‘Any’ means ‘one, no matter what one: Every

. . . without restriction or limitation of choice,’” (alteration in original)

(quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97

(3d ed.1993)).

If an offender fails to comply with any condition or requirement, the court, upon the motion of the State, “shall require the offender to show cause why the offender should not be

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<sup>15</sup> LAWS OF 2003, CH. 379, § 14 (effective 10/1/03).

<sup>16</sup> Recodified as § 9.94A.634 by LAWS OF 2001, CH. 10, § 6, subsequently recodified as § 9.94B.040 by LAWS OF 2008, CH. 231, § 56.

<sup>17</sup> Recodified as § 9.94B.040 by LAWS OF 2008, CH. 231, § 56.

punished for the noncompliance.” Former RCW 9.94A.200(3)(b).<sup>18</sup>

If the State proves noncompliance by a preponderance of the evidence, the court may modify its order of judgment and sentence and impose penalties as provided in RCW 9.94A.200(3)(c).<sup>19</sup>

The parties followed that procedure in this case. After the clerk’s office notified the court and the State that Ashenberner had failed to pay restitution or provide employment records, the State filed a motion to show cause why Ashenberner should not be punished for her noncompliance. CP 134-35; 3/17/11 RP 3, 11, 16-17. At the violation hearing, the court found that the State had proved by a preponderance of the evidence that Ashenberner failed to make restitution payments and report her income to the clerk’s office, per the June 16, 2009 modification order. CP 113-14; 3/17/11 RP 24-61; Exs. 2, 3. Because the court found that the violations were willful, the court imposed 60 days of confinement for each violation. CP 113-14; 3/17/11 RP 52-61. The modified conditions of Ashenberner’s sentence and the sanction imposed for

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<sup>18</sup> Recodified as § 9.94A.634 by LAWS OF 2001, CH. 10, § 6, subsequently recodified as § 9.94B.040 by LAWS OF 2008, CH. 231, § 56.

<sup>19</sup> Recodified as § 9.94A.634 by LAWS OF 2001, CH. 10, § 6, subsequently recodified as § 9.94B.040 by LAWS OF 2008, CH. 231, § 56.

her noncompliance were lawful. Former RCW 9.94A.200<sup>20</sup>; Gamble, 146 Wn. App. at 818.

Ashenberner contends that the sentencing court only had the authority to sanction her for nonpayment of her legal financial obligations. Br. of Appellant at 8. Ashenberner concedes that the 2003 amendment to RCW 9.94A.760(7)(b), created a reporting requirement for all offenders currently subject to sentences with legal financial obligations.<sup>21</sup> Br. of Appellant at 7, citing LAWS OF 2003, CH. 379, § 24. However, Ashenberner claims that RCW 9.94A.760(10), which provides:

The requirement that the offender pay a monthly sum towards a legal financial obligation constitutes a condition or requirement of a sentence and the offender is subject to the penalties for noncompliance as provided in RCW 9.94B.040, 9.94A.737, or RCW 9.94A.740[,]

subjects an offender to sanctions only for violating the legal financial obligation payment schedule. Ashenberner asserts that under the principle of statutory construction —“Expressio unis est exclusio alterius” — when the legislature lists various items in a

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<sup>20</sup> Recodified as § 9.94A.634 by LAWS OF 2001, CH. 10, § 6, subsequently recodified as § 9.94B.040 by LAWS OF 2008, CH. 231, § 56.

<sup>21</sup> RCW 9.94A.760(7)(b) provides in part, “The offender shall bring all documents requested by the county clerk in order to prepare the collection schedule.” LAWS OF 2003, CH. 379, § 14 (effective 10/1/03).

statute but omits others, there is a presumption that the legislature intended to omit other items. Thus, Ashenberner contends that the omission of the reporting requirement in RCW 9.94A.760(10), must mean that the legislature did not intend to permit sanctions for a violation of a reporting condition.

This interpretation is incorrect. As this Court noted in Gamble, the plain language of former RCW 9.94A.634(1)<sup>22</sup> “demonstrates that the superior courts retain authority—and thus jurisdiction—to enforce the conditions of the sentences that they impose.” Gamble, 146 Wn. App. at 818. Because the statute is unambiguous, there is no need to interpret the statute. Id.

Ashenberner’s argument also fails because she neglects related provisions and the statutory scheme as a whole. See Engel, 166 Wn.2d at 578. Ashenberner relies on only chapter 9.94A.760 RCW to support her claim that nothing but nonpayment of legal financial obligations subjects an offender to penalties. But RCW 9.94A.760 addresses only “legal financial obligations.”

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<sup>22</sup> Former § 9.94A.200, current RCW 9.94B.040 (LAWS OF 2008, CH. 231, § 56).

RCW 9.94B.040<sup>23</sup> addresses “Noncompliance with condition or requirement of sentence.” The reporting requirement is a condition or requirement of Ashenberner’s sentence. CP 111-12. Given Ashenberner’s history of working under different names and different social security numbers, the reporting requirement is a necessary condition to monitor Ashenberner’s employment and thus her ability to pay restitution, as ordered by the court. 6/16/09 RP 13-18; 3/17/11 RP 25-49, 54, 59; Exs. 2, 3; CP 111-12. During the March 17, 2011 hearing, the court imposed 120 days of confinement for Ashenberner’s failure to pay restitution and report her income to the clerk. The court said that Ashenberner had not “paid any attention to the *requirements* of [her] sentence.” 3/17/11 RP 59. Because the reporting requirement is separate from Ashenberner’s obligation to pay her legal financial obligations, RCW 9.94B.040, not § 9.94A.760, provides the sentencing court with the authority to impose sanctions for any violation. Ashenberner’s claim accordingly fails.<sup>24</sup>

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<sup>23</sup> Formerly § 9.94A.200 and formerly § 9.94A.634.

<sup>24</sup> Ashenberner’s claim is moot because the Court can not grant her any relief vis-à-vis the March 17, 2011 sanction. And any possible future sanction is not ripe. See Spokane Research & Defense Fund, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005) (stating a case is moot if the court cannot grant effective relief).

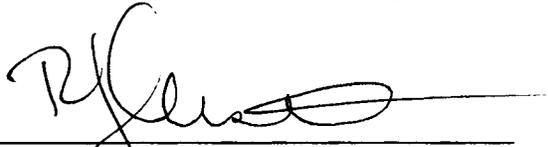
**D. CONCLUSION**

For the reasons stated above, the State asks this Court to affirm the trial court's March 17, 2011 order.

DATED this 4 day of November, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of Brief of Respondent, in STATE V. ASHENBERNER, Cause No. 66928-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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