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STATE OF WASHINGTON

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NO. 32729-5-II  
Cowlitz Co. Cause NO. 04-1-00819-8

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

**KENNETH LEE KYLLO,**

Appellant.

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**BRIEF OF RESPONDENT AND RESPONSE  
TO STATEMENT OF ADDITIONAL  
GROUNDS FOR REVIEW**

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## **A. ASSIGNMENTS OF ERROR**

### **Answers to Assignments of Error**

1. The trial court did not violate Kylo's right to a speedy trial.
2. Kylo's right to a speedy trial was not violated by any alleged governmental misconduct or trial court error.
3. The trial court properly gave the aggressor instruction.
4. Kylo received effective representation of counsel.
5. Factual determinations pertaining to the existence of Kylo's prior convictions were not required to be made by the jury; therefore, the trial court properly made these factual determinations and sentenced Kylo to life in prison without the possibility of release without violating his sixth amendment right to a jury trial or his right to due process.
6. The sentencing court properly considered the testimony of witnesses when determining whether Kylo was a persistent offender.
7. Evidence at sentencing was sufficient to prove the existence of Kylo's prior conviction for assault in the second degree.

### **Issues Pertaining to Assignments of Error**

1. When a defendant is being held on other charges, is his right to a speedy trial on an unrelated charge calculated on a 60- or 90-day clock? (Assignment of Error 1.)
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16. Is the signature of a defendant on a prior judgment and sentence required in order for the State to prove that the defendant was the same person named in the prior judgment and sentence? (Assignment of Error 7.)
17. Are visible fingerprints of a defendant required on a prior judgment and sentence in order for the State to prove that the defendant was the same person named in the prior judgment and sentence? (Assignment of Error 7.)

## **B. STATEMENT OF THE CASE**

On June 12, 2004, Robert Mickens and the appellant Kenneth Lee Kylo got into a physical fight while both men were in custody in the Cowlitz County jail. 13RP<sup>1</sup> 1-395. During the fight, Kylo bit Mickens' ear and ripped the ear off with his teeth. *Id.* Doctors were unable to permanently reattach Mickens' ear. 13RP 240-43. On June 16, 2004, the

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<sup>1</sup> "13RP" refers to Verbatim Report of Proceedings on October 26-27, 2004.

State filed an information charging Kylo with assault in the second degree alleging that Kylo had intentionally assaulted Mickens and had recklessly inflicted substantial bodily harm on Mickens. CP 3.

Kylo was represented by a number of attorneys, the history of which is discussed *infra* at Section (C)(1).

At Kylo's trial, Corrections Officer Connie Fauver testified that after the assault, Mickens told her that he had been attacked, that he had hugged his attacker to avoid being struck by the attacker's fists, and that the attacker then bit his ear. 13RP 103. Defense counsel elicited from Fauver that Mickens and Kylo had been involved in prior "confrontations" and that Kylo had tried to shoot Mickens "off his porch." 13RP 104.

Corrections Officer Trevor Eades testified that Mickens told him "Kylo was picking on the other people in the area, the older people, and that he got in his face, but he didn't throw a punch, anything like that; but that he got too close and Kylo bit his ear." 13RP 111-12. Eades testified that he examined Mickens' hands for any injuries that might have occurred by punching someone and did not see any such injuries. 13RP 111.

Deputy Tom Hudson testified that Mickens told him that Mickens verbally confronted Kylo about rumors that Kylo had told another inmate that Mickens was untrustworthy. 13RP 119. Mickens said they argued, and the argument became heated. *Id.* Mickens stated that he “started towards the call box... to call for the jail staff.” *Id.* Kylo placed himself between Mickens and the call box and got into a “fighting stance.” *Id.* Mickens backed off and told Kylo to calm down. *Id.* Mickens told Hudson he again tried to get around Kylo to get the call box. 13RP 120. Kylo came up, grabbed Mickens, got him in a bear hug and held Mickens while hitting him in the head. 13RP 120. Mickens stated he was unable to get loose but was able to also place Kylo in a bear hug. *Id.* While the men had each other in a bear hug, Kylo bit Mickens’ ear. 13RP 120-21. Mickens began hitting Kylo in the head and “crotch, trying to get [Kylo] to break his hold on his ear.” 13RP 121. As Mickens told Hudson, Mickens finally pulled away, but as he did so his ear remained in Kylo’s teeth and was ripped away from Mickens’ head. 13RP 121.

Cellmate Kenny Stevens testified that he was sleeping when the fight between Kylo and Mickens landed on top of him; in other words, he did not see it start. 13RP 147. He then testified that he saw Mickens

throw the first punch, grazing Kylo's chin. 13RP 149. Kylo and Mickens then punched each other and "Kylo just lashed out and bit [Mickens]". 13RP 153.

Deputy Joe Connors testified that Kylo told him that Mickens first kicked him, "buckled him to the ground" and then hit him. 13RP 279. Connors did not observe any injuries to Kylo. *Id.* Kylo then claimed that he wrapped his arms around Mickens and told him to stop. 13RP 280. Kylo also told Connors he did not know how Mickens' ear was injured. *Id.*

A couple weeks after the incident, Kylo asked to speak with an officer. 13RP 285. Kylo made a sworn, written statement regarding the incident and gave it to Deputy Ryan Plank. 13RP 288-89; Ex. 14. In that statement, Kylo claimed that Mickens had become upset with him because Kylo was misquoting bible scriptures. Ex. 14. Kylo claimed they argued and that Mickens spit on him. *Id.* Kylo claimed they continued to argue until Mickens attacked him. *Id.* Kylo stated that Mickens kicked him in the knee, bringing him to the ground, and then kicked him in the head. *Id.* Kylo stated he got back up and Mickens "rushed" him, pushing him up against the wall. *Id.* Kylo then claimed

that Mickens hit him “in the crotch,” and stomped on his foot, and “racked his foot down [Kyllo’s] shin.” *Id.* Kyllo claimed that Mickens then bit Kyllo’s shoulder. *Id.* Kyllo continued to maintain that he did not know how Mickens’ ear was injured. *Id.*

At trial, Kyllo testified that Mickens was angry over Kyllo’s misquoting of the bible and that Mickens began taunting him. 13RP 320. Kyllo testified that Mickens then “came up within a few feet” of him. 13RP 323. Kyllo testified he told Mickens he did not want to fight and that Mickens then did “some kind of kick”, buckling Kyllo’s knee. *Id.* Kyllo testified Mickens either kned him or kicked him in the head and then Kyllo got up. *Id.* Kyllo testified that he “never once” struck Mickens. *Id.* He stated that Mickens was kicking and punching him. *Id.* He then claimed Mickens was saying, “I’ll kill you.” 13RP 324. Kyllo then testified that Mickens “charged” him, throwing punches. 13RP 325-26. He testified that at this point Mickens had him against the wall and was still threatening to kill him. 13RP 326. He claimed that Mickens was attempting to bite Kyllo and was head-butting him. 13RP 327. Kyllo then admitted that he bit Mickens’ ear but claimed that he was not aware of it at the time. *Id.*

Jim Desmarais, a nurse at the jail, testified that he conducted two physical examinations of Kylo on the date of the incident. 13RP 263. In the first examination, during the morning, Desmarais noticed only a small amount of swelling and some bruising on Kylo right knee. *Id.* He specifically observed that Kylo had no bruising to his face. *Id.* Desmarais observed no other bruising at that time. 13RP 264. He conducted the second examination of Kylo later that evening. *Id.* At that time, Kylo showed Desmarais a bite mark on his left arm. *Id.* Kylo's skin was not broken, and Kylo claimed that the bite mark came from Mickens. *Id.* Desmarais testified that the indentations of the bite mark were unusual in that he would not expect them to still be present 12 hours after the incident. 13RP 265-66. In fact, Desmarais would expect such marks to remain present for only about an hour after such an incident. *Id.* During the latter examination on the date of the incident, Kylo also had a 1/8-inch superficial abrasion to his back. 13RP 266. Desmarais testified that given the angle and location of the bite mark, it was possible for a person to inflict such a wound on himself. *Id.* Kylo told Desmarais that Kylo had not noticed the bite marks prior to the first examination and wanted to be sure someone took photos of it.

Desmarais testified that he again examined Kylo four days later. 13RP 267. Kylo then showed Desmarais new bruises on his right leg. 13RP 267-68. Based upon his training and experience, Desmarais estimated that these bruises were likely inflicted within the past six to twelve hours, in contrast to the previous bruising he had observed on Kylo's knee which had already yellowed and was fading. *Id.*

At trial, Mickens testified that he and Kylo had known each other for more than 20 years. 13RP 179. On the date of the assault, the two of them were being housed in the same unit of the jail. 13RP 180. Just prior to the assault, Mickens learned that Kylo had been saying things behind Mickens' back and that Kylo told the other inmates "he was going to wait and get me." 13RP 180-81. Mickens was in the bunkroom, and Kylo was in the day room. 13RP 193. Mickens verbally confronted Kylo about these issues and told Kylo they were no longer friends. 13RP 192. Kylo stated he was going to beat up whoever had said those things to Mickens, and Mickens told Kylo that Kylo was not going to beat anyone up. 13RP 193. Mickens remained in the bunkroom and called Kylo names. 13RP 193-94. Mickens testified that at that point

Kyllo "didn't look for a fight. I'm not going to lie and say he did."  
13RP 194.

Mickens testified that Kyllo then threatened him, and they continued to argue back and forth for about 20 minutes. 13RP 195, 198. Each of them challenged the other to come into the other's room. *Id.* Believing that Kyllo was just trying to make the other cellmates think Kyllo was tough, Mickens then walked into the day room where Kyllo was and said, "If you want to go let's go" and then turned his head to the others in the day room and said, "See, you guys, he's just a bully." 13RP 195-96. Mickens told everyone it was over and then went to bed. 13RP 198. Kyllo continued to pace back and forth in the day room, and Mickens got up and said they were going to deal with this now. *Id.* Mickens went into the day room and stood "toe-to-toe" with Kyllo, who said nothing. *Id.* Mickens said, "If we're going to get it, let's get it." *Id.* Kyllo began calling Mickens names. 13RP 199. Mickens testified that at the time he was just trying to prove that Kyllo was not going to do anything. 13RP 200. Mickens was being released the next day and wanted to show the others in the cell that Kyllo was all words. 13RP 200-01.

Mickens turned to the others in the cell and said, “see, he ain’t going to do nothing.” 13RP 202. Kylo then came at Mickens throwing punches.” 13RP 202-03. Mickens “was backing and going over the table, bending over off the table backwards, because [Kylo] was throwing punches. 13RP 203. Mickens was unclear whether any of those punches hit him, testifying that maybe one did. *Id.* After, Mickens went over the table, Kylo backed off, and Mickens went for the call box to alert the jail staff. 13RP 204-05. However, Kylo was in the way with his back facing the wall, and the two collided. 13RP 205-06. Mickens realized that Kylo was not going to move so Mickens began walking toward Kylo with his head down throwing punches at Kylo, but none of the punches landed. 13RP 206. Kylo grabbed on to Mickens and “tried to put [Mickens’] head in his chest area”. 13RP 211. At that point, Mickens “wanted a fist fight, and [Kylo] wanted to hold [him].” *Id.*

Mickens testified that when Kylo was holding him, Mickens' arms were down to his side. 13RP 211-12. Mickens attempted to pull away but was unable to so he tried in vain to throw punches. 13RP 212. Kylo screamed, “Stop,” and bit Mickens’ ear. *Id.* Mickens was then able to

pull away from Kylo. When he did, Kylo, in Mickens' words, "slowly ripped off my ear." *Id.*

Kylo requested and was granted a self-defense instruction. CP 33 (Jury Instruction 11). The trial court also gave an aggressor instruction. CP 33 (Jury Instruction 14). The jury found Kylo guilty as charged of assault in the second degree. CP 42. At sentencing, the State sought to have Kylo sentenced as a persistent offender. 14RP<sup>2</sup> 3-32; 15RP<sup>3</sup> 3-6; 16RP<sup>4</sup> 3-4; 17RP<sup>5</sup> 3-25. The State called several witnesses including fingerprint expert Ed Reeves and the Honorable Steven Warning. Reeves compared Kylo's fingerprints to those on the judgment and sentence from his prior indecent liberties conviction in Cowlitz County Superior Court cause #94-1-00561-5 and found that they were made by the same person. 14RP 16; Ex 5. A judgment and sentence from Kylo's prior assault in the second degree conviction in Cowlitz County Superior Court cause #88-1-00024-4 was admitted, and Warning testified that he represented

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<sup>2</sup> "14RP" refers to Verbatim Report of Proceedings on November 16, 2004.

<sup>3</sup> "15RP" refers to Verbatim Report of Proceedings on December 1, 2004.

<sup>4</sup> "16RP" refers to Verbatim Report of Proceedings on December 9, 2004.

<sup>5</sup> "17RP" refers to Verbatim Report of Proceedings on December 16, 2004.

Kyllo in that case and that Kyllo was the same Kenneth Kyllo named in the judgment. 17RP 4-5; Ex. 3. The trial court found that the State had proven by a preponderance of the evidence that Kyllo was a persistent offender and sentenced Kyllo to life in prison without the possibility of early release. CP 42; 17RP 17, 22. Kyllo filed a timely notice of appeal. CP 44.

### C. ARGUMENT

#### 1. THE TRIAL COURT DID NOT VIOLATE KYLLO'S RIGHT TO A SPEEDY TRIAL.

##### a. Time for trial

CrR 3.3 requires that the trial court ensure that a defendant be brought to trial within certain speedy trial time limits.<sup>6</sup> Appendix A. A trial court's application of the speedy trial rules is reviewed de novo. *State v. Kindsvogel*, 149 Wn.2d 477, 480, 69 P.3d 870 (2003). A defendant who is "detained in jail" shall be brought to trial within the longer of 60 days after his commencement date or within 30 days after any excluded period. CrR 3.3(b)(1). A person is "detained in jail" when he

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<sup>6</sup> There is also a right to a speedy trial guaranteed under the Sixth Amendment of the United States Constitution and under Article I of the Washington State Constitution. However, Kyllo is not arguing that his constitutional speedy trial rights were violated.

is held in the custody of a correctional facility pursuant to a pending charge. CrR 3.3(a)(3)(v). However, “[s]uch detention excludes any period in which a defendant is... being held in custody on an unrelated charge... or is serving a sentence of confinement.” *Id.* As such, a defendant being held on other charges is considered not to be “detained in jail” for the purposes of the speedy trial rules. Such a defendant must be brought to trial within 90 days after his commencement date or within 30 days after any excluded period. CrR 3.3(b)(2).

The rationale for the rule is particularly relevant to Kylo’s situation:

[A] defendant detained both for current *and* unrelated charges is not prejudiced or deprived of liberty by a longer detention ... on the current charges because he would not, due to the unrelated charges, be free in any event. This reasoning is persuasive when considered in light of the basic purpose of the speedy trial rule which is to ensure that an unconvicted individual who is ineligible to obtain a pretrial release is subject to minimum pretrial confinement. However, absent some potential deprivation resulting from the detention for current charges, this purpose is not served, and there is no reason to expedite the case within a shorter time period.

*State v. Bernhard*, 45 Wn.App. 590, 594, 726 P.2d 991 (1986) (emphasis in the original) (citing *State v. Royster*, 43 Wn.App. 613, 617, 719 P.2d 149 (1986) (construing a similar provision in JuCR 7.8(b))).

It is undisputed that the assault occurred while Kylo and Mickens were in custody at the Cowlitz County jail. Kylo was being held on a number of pending charges including Cowlitz County cause #03-1-01563-3, #03-1-01840-3 and #04-1-00711-6. RP<sup>7</sup> 3-4; 2RP<sup>8</sup> 5-6; 11RP<sup>9</sup> 11-13; CP 15, 19. As such, the court initially was required to bring him to trial within 90 days of his original commencement date, the date of his arraignment, June 17. RP 2-4; CrR 3.3(c)(1). In other words, his time for trial was to run out on September 15.<sup>10</sup> Kylo's trial was first scheduled for August 11. RP 3-4. The first trial date was within both the 60- and 90-day time constraints.

**b. Disqualification of counsel**

The disqualification of counsel resets a defendant's commencement date. CrR 3.3(c)(2)(vii). Lisa Tabbut was removed from the case on July 20, the scheduled pre-trial hearing date. 3RP<sup>11</sup> 3-4.

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<sup>7</sup> "RP" refers to Verbatim Report of Proceedings on June 17, 2004.

<sup>8</sup> "2RP" refers to Verbatim Report of Proceedings on July 15, 2004.

<sup>9</sup> "11RP" refers to Verbatim Report of Proceedings on September 29, 2004.

<sup>10</sup> Even if this court finds that Kylo was "detained in jail" thus requiring that he be brought to trial within 60 days of his arraignment (or by August 16), the remainder of the State's argument still applies.

<sup>11</sup> "3RP" refers to Verbatim Report of Proceedings on July 20, 2004.

Therefore, Kylo's time for trial was extended an additional 90 days to October 18.<sup>12</sup> On the same date Tabbut was removed, the court assigned Kylo's case to the Cowlitz Assigned Counsel group and attorney Ian Northrip was appointed.<sup>13</sup> Northrip was removed at his first appearance on the case for a similar conflict on July 22. 4RP<sup>14</sup> 3-4. This disqualification of counsel extended time for trial to October 20.<sup>15</sup> On the same day it removed Northrip, the court appointed the Cowlitz County Defenders group. 4RP 3-4. The court set the case over to the following Tuesday (July 27) so that Kylo's new attorney could be present.<sup>16</sup> Kylo does not assign error to these disqualifications. Brief of Appellant 19.

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<sup>12</sup> However, if this court finds that Kylo was "detained in jail", his time for trial would have only been extended 60 days to September 18.

<sup>13</sup> The appointment of Cowlitz Assigned Counsel occurred after Tabbut was disqualified and after Tabbut explained to the court that many lawyers in the county would have the same conflict she had. The court stated, "All right. I'll appoint Cowlitz Assigned Counsel, either Mr. Northrip or Mr. Furman, to represent Mr. Kylo... it will be one of those two individuals." 3RP 3-4.

<sup>14</sup> "4RP refers to Verbatim Report of Proceedings on July 22, 2004.

<sup>15</sup> However, if this court finds that Kylo was "detained in jail", his time for trial would have only been extended to September 20.

<sup>16</sup> There is no transcript of the proceedings on July 27. Counsel for Kylo on appeal told writer that the transcriber from whom she requested the transcripts (see Appellant's Statement of Arrangements) stated there was no audio record of any proceeding on that date. The clerk's minutes from that date simply state "Mick Frye [sic] to be appointed".

On August 3, Frey appeared in court with Kylo. Frey addressed the court:

Your Honor, I'm just receiving word from the court that Mr. Kylo is in need of representation. My schedule is such that I will not be able to begin representing him until October 3<sup>rd</sup>, so I'm asking Mr. Kylo if he would agree to waive his right to a speedy trial, and have the commencement date put on as October 3<sup>rd</sup>, 2004.... Your Honor, Mr. Kylo has now informed me that he does not want to sign a Waiver for that long of time. I just spoke with him briefly, up in custody, and told him it was his right, not mine, and the only thing I could do to represent him in this case – to do a good job – would be to have the commencement period start on October 3<sup>rd</sup>. This is a very important case [inaudible].

5RP<sup>17</sup> 3-4. The court ruled that Frey would not be representing Kylo since Kylo would not enter a waiver that would allow Frey to adequately represent him. 5RP 4. The State clearly recognized the need to settle the attorney issue quickly, as it objected to the court setting the case over an additional two weeks for the court to find Kylo an attorney. 5RP 4. The court found “good cause” to continue all of Kylo’s matters. *Id.* Kylo’s original trial date, August 11, then passed. The issue of striking the trial was never addressed on the record.

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<sup>17</sup> “5RP” refers to Verbatim Report of Proceedings on August 3, 2004.

Frey's disqualification again reset Kylo's commencement date. Kylo's time for trial then ran on either October 4<sup>18</sup> (if Kylo was considered "detained in jail") or November 1 (if Kylo was considered not to be "detained in jail"). Kylo argues that this disqualification was improper. However, it is evident from the record that Frey believed he could not properly represent Kylo without more time to prepare for the case. Frey's withdrawal in this case is mandatory under the Rules of Professional Conduct: "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests...." RPC 1.7(b). Furthermore, a lawyer "shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." RPC 1.1. Frey admitted to the court that he needed additional time to prepare for the case and went so far as to discuss the issue of speedy trial with Kylo at their only meeting. Frey would not have been able to begin working on the case until October 3. In

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<sup>18</sup> 60 days from August 3, 2004, fell on a Saturday. As such, the time for trial would not have expired until the following Monday, October 4.

contrast, Kylo's case actually went to trial just three weeks after that date – October 25.

Frey's disqualification allowed for three things: (1) for Kylo to receive effective assistance of counsel, (2) for Kylo to receive a speedy trial, and (3) for Frey to comply with the ethical requirement of the Rules of Professional Conduct. The trial court properly allowed Frey to withdraw from the case on August 3.

**c. Objection to trial date**

On August 16, the date that his initial time for trial would have expired if calculated on a 60-day clock, Kylo himself filed a handwritten "Defendant's Objection to Violation of Right to Speedy Trial and Motion to Dismiss." CP 8. There was no trial date set at that time, presumably due to the fact that Frey had been removed from the case and a new attorney had yet to be appointed. The court rules dictate the procedure for instances when a party objects to a trial date:

A party who objects to the date set on the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial date within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

CrR 3.3(d)(3). Kylo failed to note the motion for a hearing as required by the rule. Because he did not comply with the rule by failing to note the motion for a prompt hearing, Kylo lost the right to object to a trial date set outside the speedy trial requirements. Timely objections are required so that, if possible, the trial court will have an opportunity to fix the error and still satisfy the speedy trial requirements. *State v. Greenwood*, 120 Wn.2d 585, 606, 845 P.2d 971 (1993). Had Kylo promptly noted the motion for a hearing as required by the rule, the court would have had the opportunity to correct any error by, at a minimum, applying the cure period under CrR 3.3(g).

Additionally, there is nothing in the record showing that Kylo served his motion on the state. His failure to do so is similar to that of the appellant in the case of *City of Kennewick v. Vandergriff*, 109 Wn.2d 99, 743 P.2d 811 (1987). Vandergriff's attorney objected to her trial date by sending a letter to the court clerk stating that the attorney was objecting to

the trial date “[p]ursuant to JCr 3.08(f)(1)”<sup>19</sup> because the attorney believed “the 90 days will run out on May 6, 1985.” *Vandergriff*, 109 Wn.2d at 100. Vandergriff’s attorney did not send a copy of the letter to the prosecutor’s office or note the motion on a judge’s docket. *Id.* The clerk filed the letter without taking any action on it. *Id.* On the date of the trial, the attorney moved to dismiss the case, and the trial court granted the motion. *Vandergriff*, 109 Wn.2d at 101. The City of Kennewick appealed.

At issue in *Vandergriff* was whether the attorney’s letter to the court clerk constituted a valid motion within the meaning of the former JCrC 3.08(f)(2), a rule that was substantially similar to CrR 3.3 on the issue of waiver of any objection. The supreme court held that the letter itself was sufficiently explicit to constitute a motion even though it was in letter form. *Vandergriff*, 109 Wn.2d at 102. However, the supreme court

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<sup>19</sup> JCrR was rescinded in 1987 and was replaced by CrRLJ. Former JCrR 3.08 contained the following language that is substantially similar to that of the current CrR 3.3(d)(2):

[a] party who objects to the date set on the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice [of the new trial date] is mailed or otherwise given, move that the court set a trial date within those time limits.

Like CrR 3.3(d)(2), failure to make such a motion was a waiver of the provisions of this speedy trial rule. Former JCrR 3.08(f)(2).

held that the motion was invalidated because it was not served upon the prosecutor. *Id.*

The *Vandergriff* court based its holding on the fact that the former JCrR provided that “[r]easonable notice shall be given to the opposing party or attorney of record of all motions and applications other than those ex parte.” *Id.* Furthermore, the court refused to accept *Vandergriff*’s contention that her attorney’s motion could be granted ex parte. *Id.* It noted the court rule did not “list which motions may be granted ex parte” but that “generally a party is entitled to notice if the motion will affect its substantial rights.” *Id.* (citing *In re Marriage of Wherley*, 34 Wn.App. 344, 347-48, 661 P.2d 155 (1983); *State ex rel McLeod v. Brown*, 278 S.C. 281, 294 S.E.2d 781 (1982)). In the context of *Kyllo*’s case, CrR 8.4 states that CR 5 shall govern service and filing of written motions (except those heard ex parte) in criminal cases. CR 5 states that every written motion other than one which may be heard ex parte shall be served upon each of the parties. The *Vandergriff* court held that a dismissal based upon a speedy trial rule violation “obviously does affect the substantial rights of the prosecution. The possibility that a case might be dismissed

mandates that the prosecution be served with the original motion.”  
*Vandergriff*, 109 Wn.2d at 103.

*Vandergriff's* failure to serve the prosecution with her objection violated the court rule requiring that all parties be served; therefore, she did not make a proper motion and was deemed to have waived her rights under the speedy trial rule. *Id.* Kylo also failed to serve the prosecutor with his objection and likewise should be deemed to have waived any objection to any violation of the speedy trial rule.

**d. Continued failure to object to subsequent trial dates**

On August 17, Kuhn filed a notice of appearance and appeared with Kylo in court. 6RP<sup>20</sup> 3-6. The court reset Kylo's trial to September 27, a date within the allowable time for trial after Frey's disqualification (under both a 60- and 90-day clock). *Id.* There was no objection to the trial date by either Kylo himself or Kuhn, his attorney. *Id.* It should be noted that the State verbally objected to that date because the deputy prosecuting attorney assigned to the case was unavailable on that trial date. 6RP 6. The court responded, "I understand you have a

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<sup>20</sup> "6RP" refers to Verbatim Report of Proceedings on August 17, 2004.

number of conflicts, but we – we do have to allow the Defense enough time to prepare.” *Id.*

Even if Kylo still claims that this September 27 trial date was set outside the allowable time for trial, he was still required under the rule to (1) file a motion within 10 days, (2) note the motion for a hearing, and (3) give notice to the prosecutor. He did not. If this was in fact a date outside the allowable time for trial and this court finds Kylo lost his right to object to the date under the rule, September 27 “shall be treated as the last allowable date for trial...” CrR 3.3(d)(4). A later trial date will only be timely if (1) a new commencement date is set, (2) there is a subsequent excluded period, or (3) the court elects to apply a cure period. CrR 3.3(d)(4), (g).

On September 23, the State moved for a continuance of the trial date based on the unavailability of one of its material witnesses, Kenny Stevens. 9RP<sup>21</sup> 4-6. Kylo’s attorney stated that he too had subpoenaed this witness, referring to him as a “critical witness in this case, the man who will tell the jury that my client didn’t commit any crime.” 9RP 6. Although Kylo’s attorney claimed that this put Kylo in a “Hobson’s

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<sup>21</sup> “9RP” refers to Verbatim Report of Proceedings on September 24, 2004.

choice” by forcing him to decide between calling this critical witness for the defense’s case and exercising his right to a speedy trial, he finally said that Kylo “can’t proceed without him...” *Id.* He then said, “So, I suppose the court can find some kind of compelling basis to ... suspend the rule a couple days.” 9RP 6-7. The trial court found “good cause for a continuance, based upon the unavailability of the witness critical to both sides in the case, through no fault of either side.” 9RP 7. The court reset the trial date to October 4. 9RP 17.

Again, even if Kylo’s prior trial date was outside the permissible time for trial, a subsequent trial date could be properly set if there is a subsequent excluded period. CrR 3.3(d)(4). So long as the motion to continue is made before the time for trial has expired, any delay due to a continuance granted by the court shall be excluded in computing time for trial if such continuance is required in the administration of justice and if the defendant will not be prejudiced in the presentation of his defense. CrR 3.3(e)(3), (f)(2). Here, we have what can be considered either (1) a motion for a continuance agreed to by the defense or (2) a joint motion of the parties for a continuance. Regardless, in finding that the unavailable

witness was critical to the defense case, the trial court necessarily found that the presentation of Kylo's defense would not be prejudiced by the delay. As such, the delay caused by the continuance was an excluded period, and the new allowable time for trial did not expire until 30 days after the end of that excluded period – November 3. Again, Kylo's trial actually began on October 25.

Neither Kylo nor his attorney ever objected to this trial date. In fact, as stated above, it could be argued that this was actually a joint motion of the parties for a continuance. A defense request for a continuance, accompanied by a statement of good cause on the record, is recognized as an implicit and effective waiver of right under the speedy trial rule. *State v. Thomas*, 95 Wn.App. 730, 738, 976 P.2d 1264 (1999). *See also State v. Valdobinos*, 122 Wn.2d 270, 858 P.2d 199 (1993) (waiver of right to speedy trial may be implied from defendant's request for continuance).

Kylo may argue he did not consent to his attorney's implicit waiver of his right to a speedy trial. However, a defendant cannot contest his attorney's waiver of his procedural speedy trial right, even if made

without his consent. *State v. Franulovich*, 18 Wn.App. 290, 293, 567 P.2d 264 (1977). *See also State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984) (holding that the court may grant defense counsel's motion for a continuance over defendant's objection if necessary "in the administration of justice" for pretrial preparation).

On September 24, Kylo's attorney asked for a continuance of the trial date because of a conflict with an out-of-county case. 10RP<sup>22</sup> 3. The court asked Kylo, "are you agreeable to a date prior to October 27<sup>th</sup> for this trial?" *Id.* Kylo replied, "Yes." *Id.* The court noted the waiver through that date, granted the continuance and reset the trial to October 25, the date on which Kylo's trial in fact started. 10RP 3-5. Here, Kylo's attorney requested the continuance, and Kylo himself agreed to that specific date. There were no subsequent speedy trial

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<sup>22</sup> "10RP" refers to Verbatim Report of Proceedings on September 24, 2004.

objections to this trial date.<sup>23</sup> As such, Kylo waived all speedy trial objections.

Finally, if this court finds that the trial court erred when disqualifying Frey from the case, the rules do not address the specific circumstances of this case (when a trial court properly follows the letter of the speedy trial rule by extending the time for trial based on new commencement dates and excluded periods but where the court's decisions regarding the basis for those new commencement dates and excluded periods were in error or were an abuse of discretion). Therefore, dismissal should only be granted if Kylo's constitutional right to a speedy trial was violated, as stated in the speedy trial rule:

The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR 4.1, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

CrR 3.3(4).

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<sup>23</sup> On September 24, when the court was attempting to reset the trial on a date prior to October 27, it eliminated all dates other than October 18 and October 25. The prosecutor had a conflict with another trial on October 18, and defense counsel had a conflict with a deposition on October 25. The court selected October 25 as the trial date. Kylo's attorney objected; however, it is clear from the context of the objection that the objection was based on the conflict with the deposition rather than on any speedy trial issue. 10RP 4-5.

The Sixth Amendment of the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..." Article I, Section 22 of the Washington State Constitution states in pertinent part that "[i]n all criminal prosecutions the accused shall have the right to ... have a speedy public trial..." Trial within 60 or 90 days is not a constitutional mandate. *State v. Terrovona*, 105 Wn.2d 632, 651, 716 P.2d 295 (1986); *Campbell*, 103 Wn.2d at 15. There is "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). In considering whether there was a violation of the constitutional right to a speedy trial, courts consider many factors including the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *Id.* Here, the State and the court continually attempted to get Kyлло's case to trial in an expeditious manner; the trial commenced a mere four months after the incident itself, and absolutely no prejudice to Kyлло has been shown. As such, Kyлло's conviction should be affirmed.

**2. KYLLO'S RIGHT TO A SPEEDY TRIAL WAS NOT VIOLATED BY ANY ALLEGED GOVERNMENTAL MISCONDUCT OR TRIAL COURT ERROR.**

Kyllo claims that the trial court denied him his right to be present at a critical stage of the proceedings against him. Specifically, Kyllo claims that he was not given notice of a hearing in which Kenny Stevens, a witness for both Kyllo and the State, moved to be transported to the Shelton correction facility from the Cowlitz County jail while he awaited Kyllo's trial. However, the record reflects that he was given notice. At the September 2 pretrial hearing, defense counsel raised the issue regarding Stevens presence, stating, "I'm probably going to need an Order to Produce a witness, who I believe is in the county jail right now that's getting shipped, and we'll need to have him back." 7RP<sup>24</sup> 4. The State informed the court, "As of right now, there's no Order shipping him back. He was TRO'ed here for the purposes of preparing for this trial, and testifying at this trial," to which defense counsel replied, "Okay. Well, that accommodates us, then." 7RP 4-5. The court began, "As long as we're sure we're gonna keep him here 'til then so make sure Mr. Stevens is...." 7RP 5. The State interjected (with defense counsel present),

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<sup>24</sup> "7RP" refers to Verbatim Report of Proceedings on September 2, 2004.

“That matter is going to be addressed later today” and informed the court that counsel had been appointed to Mr. Stevens for that issue. *Id.* The court stated, “Okay, we’ll come back to that issue. I know Counsel’s position from this case on it.” *Id.* The record reflects that defense counsel was in fact given notice of the hearing addressing whether Stevens would be returned to prison. For whatever reason, Kylo and his attorney chose not to attend. It cannot be said that the trial court denied Kylo his right to be present at any stage of the proceedings.

Furthermore, the State does not agree that this hearing regarding whether a witness will be returned to prison pending trial is in fact a “critical stage of the proceeding.” The State agrees that, “when the right of confrontation is not at issue, the two questions that must be addressed in determining whether the hearing was a critical stage of the proceedings are: (1) whether the subject of the hearing related purely to a legal matter; (2) and if so, whether absence of the defendant nevertheless bore a reasonably substantial relation to the fullness of his or her opportunity to defend against the charge, or whether a fair and just hearing was thwarted

by his absence.” *State v. Berrysmith*, 87 Wn.App. 268, 273, 944 P.2d 397 (1997). The State agrees that the right to confrontation is not at issue and that the issue in the Stevens hearing was not a purely legal matter.

However, it is the State’s position that Kylo’s absence at the hearing bore no relation to the fullness of his opportunity to defend against the of assaulting Robert Mickens. Even assuming, as Kylo has argued, that Kylo’s absence from the hearing affected whether Kylo received a speedy trial (from a rule-based viewpoint rather than a constitutional one), his absence had absolutely no effect on his ability to defend himself against the assault charge. Although it is true that neither the State nor the defense was able to get Stevens back in time for the September 27 trial date, Stevens was present at trial October 25 and testified. Kylo’s absence from the hearing regarding Stevens’ transport did not affect Kylo’s ability to defend himself.

Kylo also argues that the State committed misconduct. First, he claims that the State had what was tantamount to ex parte contact with the court at the Stevens hearing. As noted above, defense counsel and Kylo were given notice of the hearing and did not appear. Second, Kylo argues that the State made no attempt until six days prior to the September

27 trial date to have Stevens transported from prison to the Cowlitz County jail.

The Stevens hearing took place on September 7. Kylo argues the State somehow committed misconduct by failing to file temporary removal paperwork in time for the Department of Corrections to return Stevens to the Cowlitz County jail. It should be noted that Stevens was returned to prison the week of September 13. 9RP 4. It was the State's belief that he would be returned to the Shelton prison. *Id.* By Monday, September 20, the State had already filed paperwork to get him back from Shelton. 9RP 4-5. The State informed the court that it was just informed that Stevens was in fact transported to the Coyote Ridge prison in eastern Washington and that the Department of Corrections would need additional time to return Stevens to Cowlitz County. *Id.* Although Kylo now speculates about facts that are not on the record such as "it hardly needs arguing that six days was not enough time for DOC to return Mr. Stevens", there is nothing to indicate that the State used anything short of due diligence in its efforts to get Stevens back in time for trial. The most glaring fault in Kylo's argument is the fact that Kylo does not address why the defense failed to obtain an order to remove Stevens from

whichever prison he was being housed at and to transport Stevens to the Cowlitz County jail for the purposes of testifying. RCW 5.56.090 allows for such an order to be issued by the court.<sup>25</sup> The State made its attempts to have Stevens returned to Cowlitz County in time for the September 27 trial date. However, the record does not reflect that the defense, which stated repeatedly that it had subpoenaed Stevens and that Stevens was a witness material to its case, made any effort to have Stevens returned to Cowlitz County for that trial date. As such, the State did not mismanage the case. Even if this court found that the State did mismanage the case on this basis, there can be no prejudice shown: the defense made the same failure and later joined in the motion to continue the trial because of Stevens' absence.

### **3. THE TRIAL COURT PROPERLY GAVE THE AGGRESSOR INSTRUCTION.**

The jury was instructed as follows:

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<sup>25</sup> RCW 10.52.040 and 5.56.010 state that witnesses may be compelled to attend and testify in open court if they have been subpoenaed.

RCW 5.56.090 states, "If the witness be a prisoner confined in a jail or prison within this state, an order for his examination in prison, upon deposition, or for his temporary removal and production before a court or officer, for the purpose of being orally examined, may be issued."

No person may, by any intentional act reasonable likely to provoke<sup>26</sup> a belligerent response, create a necessity for acting in self-defense and thereupon use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 33 (Jury Instruction 14); see II *Washington Pattern Jury Instructions; Criminal* 16.04 (2d ed. 1994). Kylo claims that there was insufficient evidence to support the trial court's decision to give this instruction. Jury instructions are sufficient if they permit each party to argue his theory of the case and properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999); *State v. Cyrus*, 66 Wn.App. 502, 508, 832 P.2d 142 (1992). However, there must be substantial evidence in support of the instruction given. *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986).

Aggressor instructions are appropriate in cases in which a defendant claims self-defense and there is evidence that the defendant's conduct or acts provoked or precipitated the incident for which self-

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<sup>26</sup> Kylo's brief misstates the instruction given by using the word "create" here rather than the word "provoke". Brief of Appellant 35.

defense is claimed. *State v. Heath*, 35 Wn.App. 269, 272-72, 666 P.2d 922 (1983); *Hughes*, 106 Wn.2d at 191-93; *State v. Kidd*, 57 Wn.App. 95, 100, 786 P.2d 847 (1990); *Cyrus*, 66 Wn.App. at 508-09. Where there is conflicting evidence as to whether the defendant's acts or the victim's acts precipitated the fight, the aggressor instruction is properly given and is in fact "particularly appropriate". *Cyrus*, 66 Wn.App. at 508-09; *Hughes*, 106 Wn.2d at 191-92; *State v. Davis*, 119 Wn.2d 657, 665-66, 835 P.2d 1039 (1992). If there is credible evidence from which the jury could reasonably have concluded that it was the defendant who by his acts provoked the fight, a trial court may properly give the aggressor instruction. *Hughes*, 106 Wn.2d at 192.

While it is true that the issue of who struck the first blow in a fight is not necessarily determinative of who was the aggressor, the evidence at trial was such that the jury heard conflicting versions of the events of that morning. Kylo claimed that Mickens threw the first punch, and Mickens claimed that Kylo did. There was a true conflict in the evidence regarding who was the aggressor. Again, in such a case, the aggressor instruction is "particularly appropriate". *Cyrus*, 66 Wn.App. at 508-09.

A case with somewhat similar facts is *Heath*, 35 Wn.App. 269. In that case, Heath and Earl Weagley were fighting. *Id.* at 270. Although there was conflicting testimony as to how the fight began, two witnesses agreed that Weagley struck the first blow. *Id.* The fight ended when Heath shot and killed Weagley. *Id.* The trial court in that case gave the jury the aggressor instruction. *Id.* at 271. Heath was convicted and assigned error to the giving of that instruction, arguing that there was insufficient evidence to do so. *Id.* The *Heath* court held that, “[a]lthough two witnesses testified Weagley struck the first blow, this is not determinative of who provoked the fight.” *Id.* The court held:

Here, there was testimony Heath blocked a doorway, refusing to let Weagley pass, and said some very coarse words before Weagley hit him. These words and actions may have precipitated the fight, making Heath the provoker. Since there was evidence Heath provoked the fight, the provoker/self-defense instruction was proper.

*Id.* at 271-72. Notable is the fact that the court states that there is evidence that Heath may have provoked the fight. In other words, if there

is substantial evidence of such, the factual determination is then left up to the jury.<sup>27</sup>

In Kylo's case, there was substantial evidence that Kylo was the aggressor. First, Mickens testified as such. Second, there was testimony from other witnesses corroborating Mickens' testimony. Corrections Officer Eades testified that Mickens had no injuries on his hands, which corroborates Mickens' testimony that none of his punches landed on Kylo. Nurse Desmarais testified that Kylo initially had no injuries other than some bruising and swelling to his knee. Furthermore, Desmarais testified that later that evening and days later Kylo came to him with additional injuries that appeared to be fresh and possibly self-inflicted, calling into question Kylo's version of events. Also calling into question Kylo's version of events was the fact that he gave inconsistent statements to the officers. While a jury might have found that Mickens was the aggressor, there was substantial evidence for a reasonable jury to find that Kylo was the aggressor. Such a reasonable jury could then find that

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<sup>27</sup> Kylo also argues that Mickens' words provoked the fight. However, our state supreme court has held that "words alone do not constitute sufficient provocation." *Riley*, 137 Wn.2d at 911. Even absent that holding, it would be the jury's duty to determine whether the particular words used in the particular circumstances described were sufficient to provoke violence.

Kyllo was not entitled to claim self-defense and that Kyllo was guilty of assault. As such, the trial court properly gave the aggressor instruction.

**4. KYLLO RECEIVED EFFECTIVE REPRESENTATION OF COUNSEL.**

Kyllo assigns error to his attorney's closing argument. According to Kyllo, he received ineffective assistance of counsel because his attorney argued to the jury that a person is only entitled to act in self-defense if he believes he is in danger of imminent death or grievous bodily injury. The State agrees with Kyllo's recitation of the basic standards applied when considering whether trial counsel was ineffective. See Brief of Appellant 41-42. However, it is evident from the record that the closing argument of counsel was proper and reflected Kyllo's theory of the case.

The trial court instructed the jury on the proper standard for self-defense: a person is entitled to act in self-defense when he reasonably believes he is about to be injured and when the force used is not more than is necessary. CP 33 (Jury Instruction 11); *see also* RCW 9A.16.020(3)<sup>28</sup>.

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<sup>28</sup> RCW 9A.16.020 states in pertinent part as follows: "The use, attempt, or offer to use force upon or toward the person of another is not lawful in the following cases: ... (3) Whenever used by a party about to be injured ... in preventing or attempting to prevent an offense against his or her person... in case the force is not more than is necessary."

The portions of defense counsel's argument that Kylo now points to were argument regarding whether the force used was more than necessary, rather than the level of anticipated harm required before one defends oneself. Because the resulting injury was that Kylo ripped off Mickens' ear, it was valid trial strategy to address at some point the issue of whether Kylo's use of force to defend himself was reasonable under the circumstances. Kylo repeatedly testified that he believed Mickens was going to kill him and that he was afraid for his life. Defense counsel's argument regarding Kylo's stated beliefs was highly relevant to the issue of the reasonableness of the force Kylo used and therefore was not deficient.

Even if this court were to find that trial counsel's argument was deficient, Kylo is also required to show that the deficiency prejudiced his defense. The jury is presumed to follow the court's instructions. *State v. Pastrana*, 94 Wn.App. 463, 480, 972 P.2d 557 (1999). The trial court instructed the jury on the proper standard for self-defense. Kylo cannot show that defense counsel's argument overrode the court's instructions to the jury and therefore cannot establish prejudice. As such, this argument is not a basis for reversing Kylo's conviction.

**5. FACTUAL DETERMINATIONS PERTAINING TO THE EXISTENCE OF KYLLO'S PRIOR CONVICTIONS WERE NOT REQUIRED TO BE MADE BY THE JURY; THEREFORE, THE TRIAL COURT PROPERLY MADE THESE FACTUAL DETERMINATIONS AND SENTENCED KYLLO TO LIFE IN PRISON WITHOUT THE POSSIBILITY OF RELEASE WITHOUT VIOLATING HIS SIXTH AMENDMENT RIGHT TO A JURY TRIAL OR HIS RIGHT TO DUE PROCESS.**

In this case, Kylo was convicted of assault in the second degree, a most serious offense, after having two previous convictions for most serious offenses. As such, the Persistent Offender Accountability Act (hereinafter "POAA") under which Kylo was sentenced required the court to sentence Kylo to life in prison without the possibility of parole, early release, or any form of alternative confinement or release, regardless of the standard range or statutory maximum sentence for his crime. Former RCW 9.94A.030, Laws of Washington 2001, c. 287, §4 (effective July 22, 2001); Former RCW 9.94A.120, Laws of Washington 2000, ch. 43, §1 (effective June 8, 2000), recodified as RCW 9.94A.505 by Laws of Washington 2001, ch. 10, §6; Appendix B. Kylo argues that under *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the trial court was required to submit the question of whether he was a persistent offender to the jury to be found beyond a reasonable doubt.

However, *Blakely* does not apply to sentencing under the POAA. *Blakely* specifically addresses RCW 9.94A.535, which legislates when a sentencing court can depart from the sentencing guidelines of the Sentencing Reform Act. The United States Supreme Court in *Blakely* held that Washington’s statutory procedures for imposing an exceptional sentence when based upon judicial fact-finding were invalid because the procedures violated the Sixth Amendment right to a jury trial. *Blakely*, 542 U.S. at 308. *Blakely* specifically excluded its application to prior convictions, noting that a jury must determine any fact, “other than the fact of a prior conviction,” that increases a sentence over the statutory maximum. *Id.* at 301.

*Blakely* followed *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), where the Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 490.. Even prior to the decision in *Blakely*, our state Supreme Court had declined to extend *Apprendi* to the POAA. *State v. Wheeler*, 145 Wn.2d 116, 124, 34 P.3d 799 (2001), *cert. denied*, 535 U.S. 996, 122

S.Ct. 1559, 152 L.Ed.2d 482, *cert. denied sub nom. Stanford v. Washington*, 535 U.S. 1037, 122 S.Ct. 1796, 152 L.Ed.2d 654 (2002); *State v. Smith*, 150 Wn.2d 135, 75 P.3d 934 (2003), *cert. denied*, 541 U.S. 909, 124 S.Ct. 1616, 158 L.Ed.2d 256 (2004). These cases rely on the United States Supreme Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) (fact of prior conviction is not an element of aggravated recidivist offense).

However, *Kyllo* argues that in *Apprendi*, the United States Supreme Court retreated from its earlier decision in *Almendarez-Torres*, which (according to *Kyllo*) calls into question our state Supreme Court's holdings in both *Wheeler* and *Smith* that the federal constitution does not require the fact of a prior conviction to be proved to a jury beyond a reasonable doubt. He argues that *Almendarez-Torres* does not answer the question of whether a jury must determine whether an offender is a "persistent offender" because *Blakely* and *Ring v. Arizona*<sup>29</sup> expanded *Apprendi* to require any fact that increases a punishment to be decided by a jury. However, this same argument relying on *Ring* was explicitly

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<sup>29</sup> *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (Arizona death penalty sentencing procedure allowing requisite aggravating factors to be found by judge rather than jury unconstitutional).

rejected by our state Supreme Court in *Smith*. In *Smith*, the court noted “the *Ring* court did not specifically overrule *Almendarez-Torres* or address the issue of prior convictions.” *Smith*, 150 Wn.2d at 142. The *Smith* court then reaffirmed its decision in *Wheeler* stating that:

...[in] *Almendarez-Torres*... the United States Supreme Court expressly held that prior convictions need not be proved to a jury. Because the Court has not specifically held otherwise since then, we hold that the federal constitution does not require that prior convictions be proved to a jury beyond a reasonable doubt.

*Smith*, 150 Wn.2d at 143.

What is baffling about *Kyllo*’s argument is that he fails to address two post-*Blakely* cases that have ruled on the POAA: this division’s decision in *State v. Ball*, 127 Wn.App. 956, 113 P.3d 520 (2005), and the decision of Division One in *State v. Rivers*, 130 Wn.App. 689, 128 P.3d 608 (2005), as modified on denial of reconsideration (2006). Michael Wayne Ball was convicted of four counts of child molestation. *Ball*, 127 Wn.App. at 957. He had two previous convictions for statutory rape in the first degree. *Id.* The sentencing court reviewed Ball’s previous convictions and found them to be strikes under the POAA, sentencing him to life in prison. *Id.* Ball appealed his sentence, arguing in part that under *Blakely* the trial court had to submit the question of whether he was

a persistent offender to the jury to be found beyond a reasonable doubt. *Ball*, 127 Wn.App. at 959. This court held that *Blakely* does not apply to sentencing under the POAA, citing the *Wheeler* decision that the POAA is constitutional, the sentence need not be submitted to the jury and it need not be proved beyond a reasonable doubt. *Id.* citing *Wheeler*, 145 Wn.2d at 120. The *Ball* court reiterated that the POAA is a sentencing statute rather than a sentence enhancement statute (the kind struck down by *Blakely*). *Ball*, 127 Wn.App. at 960.

Larry Rivers was also sentenced under the POAA. *Rivers*, 130 Wn.App. at 694. Rivers, like *Kyllo*, questioned the validity of *Almendarez-Torres* in light of *Blakely*. The *Rivers* court held that *Blakely* did not overrule *Almendarez-Torres*. *Rivers*, 130 Wn.App. at 695. Rather, the *Rivers* court stated, in reiterating the *Apprendi* rule, *Blakely* specifically excluded its application to prior convictions, noting that the juries must determine any fact, other than the fact of a prior conviction, that increases a sentence over the statutory maximum. *Rivers*, 130 Wn.App. at 695, citing *Blakely*, 542 U.S. 301. The *Rivers* court held that the POAA does not violate either the state or federal constitution. *Rivers*, 130 Wn.App. at 694-97.

Kyllo's life sentence should not be reversed on this basis. Factual determinations pertaining to the existence of Kyllo's prior convictions were not required to be made by the jury; therefore, the trial court properly made these factual determinations and sentenced Kyllo to life in prison without the possibility of release without violating his sixth amendment right to a jury trial or his right to due process.

**6. THE SENTENCING COURT PROPERLY CONSIDERED THE TESTIMONY OF WITNESSES WHEN DETERMINING WHETHER KYLLO WAS A PERSISTENT OFFENDER.**

Kyllo argues that it was improper for the sentencing court to consider the testimony of the Honorable Stephen Warning when determining whether Kyllo had previously been convicted of a 1988 assault in the second degree. Warning testified that he represented Kyllo in that case and that the Kenneth Kyllo named in the judgment was the same Kenneth Kyllo that was being sentenced for the current assault in the second degree. 17RP 4-5. Kyllo now argues that consideration of this testimony required the court to "make a credibility determination" regarding Warning's testimony. Brief of Appellant 51. Kyllo argues that this is an improper factual determination because it looks beyond the face of the 1988 judgment.

In support of this theory, *Kyllo* cites a recent case out of Division One, arguing that it condemns such reaching beyond the face of the judgment to determine whether an offender has a prior conviction. *State v. Jones*, 126 Wn.App. 136, 109 P.3d 755 (2005), *review granted* 155 Wn.2d 1017, 124 P.3d 659 (2005). Nowhere in the *Jones* opinion does the court state that it is improper to look beyond the face of a prior judgment to determine whether a defendant has a prior conviction. Likewise, nowhere in this opinion does the court suggest that it is improper for a sentencing court to weigh testimony or make credibility determinations regarding whether a defendant has a prior conviction. The issue in *Jones* was whether it is proper for a sentencing court to make a determination whether the State had proven by a preponderance of the evidence that a defendant was on community placement at the time of the offense for which he was being sentenced, thus adding a point to his offender score, or whether *Blakely* required this determination to be made by the jury with the requirement that the State prove such by a reasonable doubt. The State in that case argued that the issue of whether a defendant was on community placement for a past conviction was the equivalent of the fact of the conviction itself. The *Jones* disagreed with State and held

that, for the purposes of determining a defendant's offender score, "whether one convicted of a crime is on community placement at the time of the offense is a factual determination subject to the Sixth Amendment requirement that a jury make the determination beyond a reasonable doubt." *Jones*, 126 Wn.App. at 144.

Kyllo quotes the following portion of the *Jones* decision, claiming that the *Jones* court was in some way saying that a sentencing court cannot look outside the judgment to determine whether a defendant was on community custody (or by analogy, according to Kyllo's argument, whether a defendant had a prior conviction):

Mr. Jones' case illustrates the point we make here. At sentencing, both the State and the sentencing judge relied on DOC records, not the judgment and sentence for the prior offense, to determine whether he was on community placement at the time of his current offense.

Brief of Appellant 52 (quoting *Jones*, 126 Wn.App. at 145). However, Kyllo misreads this portion of the *Jones* opinion. The *Jones* court was not finding fault with the fact-finder's use of the DOC documents (in other words, evidence other than the judgment) to determine whether the defendant was on community custody. Rather, the *Jones* court used this fact to illustrate its point that whether a defendant is on community

placement cannot be determined from the fact of the prior conviction alone as there are too many variables involved.<sup>30</sup> *Jones*, 126 Wn.App. at 143-44. This case lends absolutely no support to Kylo's argument that his sentencing court could not consider the testimony of witnesses when determining whether he had a prior conviction for assault in the second degree.<sup>31</sup>

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<sup>30</sup> The *Jones* court gives the following example:

... [A] defendant may receive credit for preconviction incarceration, the length of which may not be specified in the judgment and sentence. The defendant may receive additional credit for preconviction incarceration if the local detention facility awarded him good conduct time. And even if both of these determinations are in the relevant judgment and sentence, there is no possible way for the sentence to reflect whether the defendant will eventually become entitled to "[e]arned release time" under RCW 9.94A.728, which may be as much as 50 percent of the sentence imposed. Moreover, under RCW 9.94A.728(2)(d), the DOC may deny release to community custody status for some offenses even if a defendant has obtained "earned release" if the DOC does not approve of the defendant's living arrangements. Thus, the fact of the prior conviction does not establish when community placement actually begins.

*Jones*, 126 Wn.App. at 143 (footnote omitted).

<sup>31</sup> During his discussion of the *Jones* case, Kylo notes that "... since the *Jones* decision was announced, the Supreme Court has ruled that recidivism findings are for a jury rather than a judge", citing *State v. Hughes*, 154, Wn.2d 118, 141, 110 P.3d 192 (2005). A careful reading of the *Hughes* case reveals that our state Supreme Court specifically held that the aggravating factor based on the defendant's "rapid recidivism" was an issue that must be proved to a jury beyond a reasonable doubt under *Blakely* since it is an issue involving more than a defendant's prior conviction (in *Hughes'* case, it involved the fact that the defendant's new offense was three months after release from custody for a prior similar crime and the fact that he committed the exact same offense against the exact same victim). *Id.* It is unclear how this case lends any insight into the issues in Kylo's argument.

In support of his argument that a sentencing court may not consider the testimony of witnesses when determining whether a defendant has a prior conviction, the final case Kylo relies on is *State v. Thorne*, 129 Wn.2d 736, 921 P.2d 514 (1996). In *Thorne*, among many other issues was whether a jury rather than a judge was required to find that a defendant is a persistent offender. Kylo argues that this decision indicates that all that a sentencing court is authorized to consider under such circumstances is the judgment. It does not. While this decision does discuss the fact that certified copies of judgments are “highly reliable evidence”, it does not mandate that a sentencing court consider only this evidence when determining whether a prior conviction exists. *Thorne*, 129 Wn.2d at 783.

*Thorne* actually is significant for two reasons. First, it is a pre-*Blakely* and pre-*Apprendi* case, making it clear that even before these two cases, our state Supreme Court was of the belief that it is constitutional for a sentencing judge to make the sentencing determination (by a preponderance of the evidence) that a defendant has certain prior convictions. *Thorne*, 129 Wn.2d at 783. *Thorne* succinctly states that, as a practical matter, “the only two questions of fact relevant to sentencing

under the persistent offender section of the SRA are whether certain kinds of prior convictions exist and whether the defendant was the subject of those convictions”; these are “not the kinds of fact for which a jury trial would add to the safeguards available to a defendant.” *Id.*

The second reason that *Thorne* is significant is that it notes, as Kylo points out, that “[p]rior convictions are proved by certified copies of the judgment and sentence, and identity (if contested) can be proved by fingerprints.” *Id.* (citation omitted) (emphasis added). What Kylo fails to recognize is that even when the State has usable fingerprints from the judgment of a prior conviction, a witness is required to compare those fingerprints to those of the defendant and to testify at sentencing to his expert opinion regarding whether the two sets of fingerprints are from the same person. That also necessarily means that the sentencing court must weigh the testimony and make a credibility determination – the same procedure that Kylo now argues the sentencing court improperly used by considering Warning’s testimony that he had represented Kylo in the 1988 assault case and that Kylo was the same Kenneth Kylo who was convicted of that assault.

There is no authority to support Kylo's contention that the sentencing court improperly considered the testimony of Kylo's former attorney. As such, his life sentence should not be reversed on this basis.

**7. EVIDENCE AT SENTENCING WAS SUFFICIENT TO PROVE THE EXISTENCE OF KYLLO'S PRIOR CONVICTION FOR ASSAULT IN THE SECOND DEGREE.**

Kylo argues that there was insufficient evidence at sentencing for the court to find by a preponderance of the evidence that Kylo had previously been convicted of assault in the second degree. First, Kylo claims that the judgment and sentence from his prior assault in the second degree conviction is missing a page. Ex. 3. Because the judgment and sentence has been designated as an exhibit in this appeal, it was not available for the State to re-examine prior to filing this response. However, the State assumes that the certification of the clerk that the document is a true and correct copy of the original is accurate. Absent proof to the contrary, the State asks this court to disregard Kylo's speculation regarding a missing page.

Second, Kylo argues that the judgment and sentence is deficient because it lacks Kylo's signature and because the fingerprints are not visible. Kylo cites no authority in support of his argument that there was

insufficient evidence at sentencing for the court to find by a preponderance of the evidence that Kylo had previously been convicted of assault in the second degree. Assignments of error need not be considered on appeal where no authority is cited to support them. *State v. Stepp*, 18 Wn.App. 304, 312, 569 P.2d 1169 (1977).

At sentencing, the State bears the burden of proving by a preponderance of the evidence that two applicable prior convictions exist when seeking a POAA sentence. RCW 9.94A.530(2)<sup>32</sup>; *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002); *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). The sentencing court's decision whether to consider a prior conviction a strike for the purposes of the POAA is reviewed de novo. *State v. Carpenter*, 117 Wn.App. 673, 679, 72 P.3d 784 (2003). Kylo claims that the judgment and sentence for his prior assault in the second degree conviction is inadequate to show that he was the person named in that judgment and sentence; thus, he is challenging the State's proof of his identity. Dispositive of this issue is *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986). There, the

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<sup>32</sup> RCW 9.94A.530(2) reads in pertinent part as follows: "The facts shall be deemed proved at the [sentencing] hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537."

supreme court was faced with a similar argument. The court held that where the State is required to prove a prior conviction, identity of names is sufficient proof in the absence of rebuttal by the defendant declaring under oath that he is not the same person named in the prior proceeding. *Ammons*, 105 Wn.2d at 189-90. Here, the State's fingerprint expert, Ed Reeves, testified at sentencing that he was unable to evaluate the fingerprints from the assault in the second degree judgment and sentence because of the quality of the fingerprints; therefore, he was unable to establish from those fingerprints whether Kylo was the person named in the prior judgment and sentence. 14RP 10-11. However, Kylo did not present any statement on oath that he was not the person named in the judgment and sentence. Therefore, the State sufficiently proved Kylo's identity as the person named in the judgment and sentence for the prior conviction for assault in the second degree.

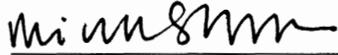
#### IV. CONCLUSION

Kylo was not denied a speedy trial, the trial court properly instructed the jury and Kylo was properly sentenced as a persistent offender. For the reasons stated above, Kylo's conviction and life sentence should be affirmed.

Respectfully submitted this 4<sup>th</sup> day of April, 2006.

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By:



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## APPENDIX A

### CrR 3.3 TIME FOR TRIAL

#### (a) General Provisions.

(1) *Responsibility of Court.* It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime.

(2) *Precedence Over Civil Cases.* Criminal trials shall take precedence over civil trials.

(3) *Definitions.* For purposes of this rule:

(i) "Pending charge" means the charge for which the allowable time for trial is being computed.

(ii) "Related charge" means a charge based on the same conduct as the pending charge that is ultimately filed in the superior court.

(iii) "Appearance" means the defendant's physical presence in the adult division of the superior court where the pending charge was filed. Such presence constitutes appearance only if (A) the prosecutor was notified of the presence and (B) the presence is contemporaneously noted on the record under the cause number of the pending charge.

(iv) "Arraignment" means the date determined under CrR 4.1(b).

(v) "Detained in jail" means held in the custody of a correctional facility pursuant to the pending charge. Such detention excludes any period in which a defendant is on electronic home monitoring, is being held in custody on an unrelated charge or hold, or is serving a sentence of confinement.

(4) *Construction.* The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR

4.1, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

(5) *Related Charges*. The computation of the allowable time for trial of a pending charge shall apply equally to all related charges.

(6) *Reporting of Dismissals and Untimely Trials*. The court shall report to the Administrative Office of the Courts, on a form determined by that office, any case in which

- (i) the court dismissed a charge on a determination pursuant to section (h) that the charge had not been brought to trial within the time limit required by this rule, or
- (ii) the time limits would have been violated absent the cure period authorized by section (g).

**(b) Time for Trial.**

(1) *Defendant Detained in Jail*. A defendant who is detained in jail shall be brought to trial within the longer of

- (i) 60 days after the commencement date specified in this rule, or
- (ii) the time specified under subsection (b)(5).

(2) *Defendant Not Detained in Jail*. A defendant who is not detained in jail shall be brought to trial within the longer of

- (i) 90 days after the commencement date specified in this rule, or
- (ii) the time specified in subsection (b)(5).

(3) *Release of Defendant*. If a defendant is released from jail before the 60- day time limit has expired, the limit shall be extended to 90 days.

(4) *Return to Custody Following Release*. If a defendant not detained in jail at the time the trial date was set is subsequently returned to custody on the same or related charge, the 90-day limit shall continue

to apply. If the defendant is detained in jail when trial is reset following a new commencement date, the 60-day limit shall apply.

(5) *Allowable Time After Excluded Period.* If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.

**(c) Commencement Date.**

(1) *Initial Commencement Date.* The initial commencement date shall be the date of arraignment as determined under CrR 4.1.

(2) *Resetting of Commencement Date.* On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.

(i) *Waiver.* The filing of a written waiver of the defendant's rights under this rule signed by the defendant. The new commencement date shall be the date specified in the waiver, which shall not be earlier than the date on which the waiver was filed. If no date is specified, the commencement date shall be the date of the trial contemporaneously or subsequently set by the court.

(ii) *Failure to Appear.* The failure of the defendant to appear for any proceeding at which the defendant's presence was required. The new commencement date shall be the date of the defendant's next appearance.

(iii) *New Trial.* The entry of an order granting a mistrial or new trial or allowing the defendant to withdraw a plea of guilty. The new commencement date shall be the date the order is entered.

(iv) *Appellate Review or Stay.* The acceptance of review or grant of a stay by an appellate court. The new commencement date shall be the date of the defendant's appearance that next follows the receipt by the clerk of the superior court of the mandate or written order terminating review or stay.

(v) Collateral Proceeding. The entry of an order granting a new trial pursuant to a personal restraint petition, a habeas corpus proceeding, or a motion to vacate judgment. The new commencement date shall be the date of the defendant's appearance that next follows either the expiration of the time to appeal such order or the receipt by the clerk of the superior court of notice of action terminating the collateral proceeding, whichever comes later.

(vi) Change of Venue. The entry of an order granting a change of venue. The new commencement date shall be the date of the order.

(vii) Disqualification of Counsel. The disqualification of the defense attorney or prosecuting attorney. The new commencement date shall be the date of the disqualification.

**(d) Trial Settings and Notice--Objections--Loss of Right to Object.**

(1) *Initial Setting of Trial Date.* The court shall, within 15 days of the defendant's actual arraignment in superior court or at the pre-trial hearing, set a date for trial which is within the time limits prescribed by this rule and notify counsel for each party of the date set. If a defendant is not represented by counsel, the notice shall be given to the defendant and may be mailed to the defendant's last known address. The notice shall set forth the proper date of the defendant's arraignment and the date set for trial.

(2) *Resetting of Trial Date.* When the court determines that the trial date should be reset for any reason, including but not limited to the applicability of a new commencement date pursuant to subsection (c)(2) or a period of exclusion pursuant to section (e), the court shall set a new date for trial which is within the time limits prescribed and notify each counsel or party of the date set.

(3) *Objection to Trial Setting.* A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule

must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

(4) *Loss of Right to Object.* If a trial date is set outside the time allowed by this rule, but the defendant lost the right to object to that date pursuant to subsection (d)(3), that date shall be treated as the last allowable date for trial, subject to section (g). A later trial date shall be timely only if the commencement date is reset pursuant to subsection (c)(2) or there is a subsequent excluded period pursuant to section (e) and subsection (b)(5).

**(e) Excluded Periods.** The following periods shall be excluded in computing the time for trial:

(1) *Competency Proceedings.* All proceedings relating to the competency of a defendant to stand trial on the pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters a written order finding the defendant to be competent.

(2) *Proceedings on Unrelated Charges.* Arraignment, pre-trial proceedings, trial, and sentencing on an unrelated charge.

(3) *Continuances.* Delay granted by the court pursuant to section (f).

(4) *Period between Dismissal and Refiling.* The time between the dismissal of a charge and the refiling of the same or related charge.

(5) *Disposition of Related Charge.* The period between the commencement of trial or the entry of a plea of guilty on one charge and the defendant's arraignment in superior court on a related charge.

(6) *Defendant Subject to Foreign or Federal Custody or Conditions.* The time during which a defendant is detained in jail or prison outside the state of Washington or in a federal jail or prison and the time during which a defendant is subjected to conditions of release not imposed by a court of the State of Washington.

(7) *Juvenile Proceedings.* All proceedings in juvenile court.

(8) *Unavoidable or Unforeseen Circumstances.* Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties. This exclusion also applies to the cure period of section (g).

(9) *Disqualification of Judge.* A five-day period of time commencing with the disqualification of the judge to whom the case is assigned for trial.

**(f) Continuances.** Continuances or other delays may be granted as follows:

(1) *Written Agreement.* Upon written agreement of the parties, which must be signed by the defendant or all defendants, the court may continue the trial date to a specified date.

(2) *Motion by the Court or a Party.* On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

**(g) Cure Period.** The court may continue the case beyond the limits specified in section (b) on motion of the court or a party made within five days after the time for trial has expired. Such a continuance

may be granted only once in the case upon a finding on the record or in writing that the defendant will not be substantially prejudiced in the presentation of his or her defense. The period of delay shall be for no more than 14 days for a defendant detained in jail, or 28 days for a defendant not detained in jail, from the date that the continuance is granted. The court may direct the parties to remain in attendance or be on-call for trial assignment during the cure period.

**(h) Dismissal With Prejudice.** A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice. The State shall provide notice of dismissal to the victim and at the court's discretion shall allow the victim to address the court regarding the impact of the crime. No case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution.

## APPENDIX B

The voters of the State of Washington approved Initiative Measure no. 593, the Persistent Offender Accountability Act, on November 2, 1993. Laws of Washington 1994, ch. 1, §3. The POAA mandated that a persistent offender be sentenced to life without the possibility of release. Former RCW 9.94A.120, Laws of Washington 1994, ch. 1, §3, Recodified as RCW 9.94A.505 by Laws of Washington 2001, ch. 10, §6. During the first incarnation of the POAA, a “persistent offender” was defined, in the most basic terms, as someone who has been convicted in this state of a most serious offense and who has previously been convicted of two or more serious offenses. Former RCW 9.94A.030(25), Laws of Washington 1994, ch. 1, §3. In other words, the law mandated what has come to be commonly known as a “three strikes” sentencing procedure. Since the POAA was approved, included among the crimes listed as a “most serious offense” has been the crime of assault in the second degree. See Former RCW 9.94A.030(21), Laws of Washington 1994, ch.1, §3; Former RCW 9.94A.030(27), Laws of Washington 2001, c. 287, §4; and RCW 9.94A.030(28).

The POAA that was in effect at that time Kylo committed his crime was former RCW 9.94A.030, Laws of Washington 2001, c. 287, §4 (effective July 22, 2001), and former RCW 9.94A.120, Laws of Washington 2000, ch. 43, §1 (effective June 8, 2000), recodified as RCW 9.94A.505 by Laws of Washington 2001, ch. 10, §6. By this time, the POAA had expanded its definition of a “persistent offender” to include offenders convicted of certain sex offenses, requiring that a sentencing court impose a sentence of life without the possibility of parole, early release, or any form of alternative confinement, on the basis of only one such prior conviction (in other words, a “two strikes” sentencing procedure). The “three strikes” provision remained in effect.

Former RCW 9.94A.120, Laws of Washington 2000, ch. 43, §1 (effective June 8, 2000) (the law in effect at the time Kylo committed this assault in the second degree), recodified as RCW 9.94A.505 by LAWS OF 2001, ch. 10, §6, read in pertinent part as follows:

When a person is convicted of a felony, the court shall impose punishment as provided in this section.

(1) Except as authorized in subsections (2), (4), (5), (6), and (8) of this section, the court shall impose a sentence within the sentence range for the offense.

(2) The court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(3) Whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard range shall be a determinate sentence.

(4) A persistent offender shall be sentenced to a term of total confinement for life without the possibility of parole or, when authorized by RCW 10.95.030 for the crime of aggravated murder in the first degree, sentenced to death, notwithstanding the maximum sentence under any other law. An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years. An offender convicted of the crime of assault in the first degree or assault of a child in the first degree where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years. An offender convicted of the crime of rape in the first degree shall be sentenced to a term of total confinement not less than five years. The foregoing minimum terms of total confinement are mandatory and shall not be varied or modified as provided in subsection (2) of this section. In addition, all offenders subject to the provisions of this subsection shall not be eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release as defined under RCW 9.94A.150 (1), (2), (3), (6), (8), or (9), or any other form of authorized leave of absence from the correctional facility

while not in the direct custody of a corrections officer or officers during such minimum terms of total confinement except: (a) In the case of an offender in need of emergency medical treatment; (b) for the purpose of commitment to an inpatient treatment facility in the case of an offender convicted of the crime of rape in the first degree; or (c) for an extraordinary medical placement when authorized under RCW 9.94A.150(4).

....

Former RCW 9.94A.030(31), Laws of Washington 2001, c. 287, §4 (in effect at the time Kylo committed this assault in the second degree), read as follows:

"Persistent offender" is an offender who:

(a)(i) Has been convicted in this state of any felony considered a most serious offense; and

(ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.360 [later recodified as RCW 9.94A.525]; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted; or

(b)(i) Has been convicted of: (A) Rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; (B) murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, or burglary in the first degree, with a

finding of sexual motivation; or (C) an attempt to commit any crime listed in this subsection (31)(b)(i); and

(ii) Has, before the commission of the offense under (b)(i) of this subsection, been convicted as an offender on at least one occasion, whether in this state or elsewhere, of an offense listed in (b)(i) of this subsection or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in (b)(i) of this subsection. A conviction for rape of a child in the first degree constitutes a conviction under (b)(i) of this subsection only when the offender was sixteen years of age or older when the offender committed the offense. A conviction for rape of a child in the second degree constitutes a conviction under (b)(i) of this subsection only when the offender was eighteen years of age or older when the offender committed the offense.

The current POAA remains nearly identical to the law in effect at the time of Kylo's most recent crime. See RCW 9.94A.030(28) and (32) and RCW 9.94A.570.

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, )  
)  
Respondent, )  
v. ) NO. 32729-5  
) 04-1-00819-8  
KENNETH LEE KYLLO, ) AFFIDAVIT OF MAILING  
)  
Appellant. )

AUDREY J. GILLIAM, being first duly sworn, on oath deposes and says: That on April 4, 2006, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the following

ANNE CRUSER  
ATTORNEY AT LAW  
P. O. BOX 1670  
KALAMA, WA 98625

KENNETH KYLLO # 294467  
WASHINGTON STATE REFORMATORY A-402  
P. O. BOX 777  
MONROE, WA 98272

CLERK, COURT OF APPEALS  
950 BROADWAY, SUITE 300  
TACOMA, WA 98402

each envelope containing a copy of the following documents:

- 1. BRIEF OF RESPONDENT AND RESPONSE TO STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW
- 2. MOTION TO FILE OVER-LENGTH BRIEF
- 3. SUPPLEMENTAL DESIGNATION OF EXHIBITS
- 4. Affidavit of Mailing.

Audrey J. Gilliam  
BY \_\_\_\_\_  
STATE OF WASHINGTON  
06 APR - 7 PM 12:46  
COURT OF APPEALS  
TACOMA, WA  
Fredrick Moore  
Notary Public in and for the State  
of Washington residing in Cowlitz  
Co. My commission expires: 020910