

NO. 35693-7-II

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

STATE OF WASHINGTON

Respondent,

v.

STEVEN E. PINK,

Appellant.

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY SP DEPUTY

ON APPEAL FROM THE
SUPERIOR COURT OF GRAYS HARBOR COUNTY

Before the Honorable David Foscue, Judge

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by imposing consecutive sentences for the Appellant's 1999 convictions.
2. The counts of conspiracy to commit first degree murder and first degree assault are the same criminal conduct.
3. The imposition of consecutive sentences on the counts violated Pink's Sixth Amendment right to proof beyond a reasonable doubt.
4. The trial court's reliance upon a 1983 Oregon conviction for second degree robbery to increase the Appellant's offender score was impermissible because the Oregon robbery statute lacks three elements of Washington's second-degree robbery statute. The Oregon statute lacks the element of a completed crime, ownership, and the taking from the person or presence of a victim.
5. The trial court violated the Appellant's constitutional rights to trial by jury and due process of law when it imposed a sentence that was increased based upon the Appellant's Oregon conviction, where the comparability of the conviction was not proved to a jury beyond a reasonable doubt.
6. The trial court violated the Appellant's Sixth Amendment right to a jury trial when it found that he was community custody at the time of the offense and increased his standard range without submitting the issue

to the jury.

7. The trial court violated the Appellant's Fourteenth Amendment right to due process when it increased his offender score based on a factual finding without requiring the State to prove that fact beyond a reasonable doubt.

8. The trial court erred in sentencing the Appellant based on an offender score of 8.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the court erred in imposing an exceptional sentence in violation of *Blakely v. Washington*¹ by sentencing the Appellant to consecutive sentences for his 1999 convictions? Assignment of Error No. 1.

2. Should this Court conclude that the offenses were the "same criminal conduct" where the crimes meet the same victim, intent, time and place requirements of the "same criminal conduct rule"? Assignments of Error No. 2 and 3.

3. Increasing a defendant's punishment based on facts found by a judge, not a jury, violates the Sixth Amendment right to a jury trial and the Fourteenth Amendment right to proof beyond a reasonable doubt. Did the trial court's finding that the offense were not the "same criminal conduct," which triggered the imposition of consecutive sentences, violate the

Appellant's right to a jury trial and due process of law? Assignments of Error No. 2 and 3.

4. Was the Appellant's 1983 Oregon conviction for second degree robbery comparable to second degree robbery in Washington, given that the Oregon statute lacks the elements of the completed crime, ownership, and a taking from the person or presence of the victim—all elements required by the Washington statute? Assignment of Error No. 4.

5. The constitutional rights to a jury trial and due process of law guarantee a defendant the right to a jury trial on every element of the charged crime. Under *Blakely v. Washington*, when a sentencing court imposes an exceptional sentence, each factor other than a jury verdict must be found by a jury beyond a reasonable doubt. Here, the State did not prove to a jury beyond a reasonable doubt that the Oregon conviction was comparable to Washington's robbery statutes. Did the trial court violate the Appellant's rights to a jury trial and due process by increasing the Appellant's sentence based upon a finding made by trial court judge that the Oregon offense was comparable to Washington's first degree robbery statute? Assignments of Error No. 5.

6. The Sixth Amendment guarantees a defendant the right to a jury trial on every element of the charged crime. Facts that increase the

¹ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Appellant's sentence beyond that for the crime of conviction must also be found by the jury beyond a reasonable doubt. Did the trial court violate the Appellant's right to a jury trial when it used the assertion that he was on community custody at the time of the charged crime to increase his sentence, without that fact being presented and found by a jury beyond a reasonable doubt? Assignments of Error No. 6, 7, and 8.

7. The Fourteenth Amendment Due Process Clause requires the State to prove every element of the charged crime beyond a reasonable doubt. Facts that increase the Appellant's sentence beyond the jury's verdict are the equivalent of elements and must be proved beyond a reasonable doubt by the State. Did the trial court violate the Appellant's right to due process when it sentenced the Appellant above that found by the jury based on the court's finding that the Appellant was on community custody at the time of the offense? Assignments of Error No. 6, 7, and 8.

C. STATEMENT OF THE CASE

1. Procedural history:

In 1999, a jury convicted Steven Pink of conspiracy to commit first degree murder, contrary to RCW 9A.28.040 (count 1), and first degree assault, contrary to RCW 9A.36.011 (count 2). The jury also found that Pink or an accomplice was armed with a deadly weapon at the time of the offenses.

State v. Pink, 2003 Wn. App. LEXIS 2128 at 6. Clerk's Papers [CP] at 26-39. On October 25, 1999, the trial court imposed a 600 month exceptional sentence for count 1, and 147 months for count 2, to be served consecutively, for a total of 747 months. *Id.* CP at 16-21. In support of the exceptional sentence, the trial court found that the conspiracy to kill Thomas Perrine, a community corrections officer [CCO], was directly related to his official CCO duties, and the placement of the bomb used in the attempt endangered Perrine and other members of his family in their zone of privacy. *Id.* CP at 11-15. On November 8, 1999, Pink appealed his conviction and sentence on the basis that the trial court erred in admitting the testimony of Michelle Lash, in violation of the marital privilege statute, and that the court erred in considering Pink's 1983 Oregon conviction of second degree robbery, which added two points to his offender score. CP at 30. The case was remanded to the trial court to determine whether the facts implicated the marital privilege and whether the court erred by considering Pink's second degree robbery conviction in Oregon. CP at 30. On remand, the trial court found that Pink's prior Oregon conviction for second degree robbery was comparable to Washington's first degree robbery statute, and that it had therefore properly included Pink's Oregon robbery conviction in his offender score. CP at 30. The trial court also found that Pink married Lash in order "to provide himself

with an alibi” and that there was “no basis to assert marital privilege and that the marriage between Pink and Lash was void *ab initio*.” CP at 30.

Pink filed a *pro se* motion for new trial, which was denied by the trial court. CP at 30. Pink appealed that ruling, and this Court considered several issues raised by Pink, including Pink’s motion to suppress evidence obtained from his car, his argument that the trial court erred in finding that he was not entitled to assert marital privilege regarding Lash’s testimony, and that he was entitled to a jury instruction on the lesser included offense of second degree assault. CP at 26-39.

Pink also argued that that the court should have imposed concurrent sentences on his convictions of first degree assault and conspiracy to commit first degree murder because they encompassed the same criminal conduct.

This Court found that that the record

shows that Pink completed the crime of conspiracy to commit first degree murder before the assault because he took substantial steps to commit the crime by obtaining a rifle, purchasing explosives, delivering the explosives to Davis, and showing him how to make a bomb. None of these actions occurred at Perrine’s residence, which was the location of the assault. And the assault occurred at a different time from the conspiracy. The trial court did not abuse its discretion in declining to view the two convictions as the same criminal conduct and in imposing consecutive sentences.

State v. Pink, 2003 Wn. App. LEXIS 2128 at 18-19. CP at 35-36.

Pink also argued that under *Blakely v. Washington*, his case must be reversed and remanded for imposition of a standard range sentence. This Court agreed that *Blakely* applied and vacated his exceptional sentence and remanded the matter to the trial court. *State v. Pink*, 2003 Wn. App. LEXIS 2128 at 19-20. CP at 38-39.

The State petitioned for review to the Supreme Court, and on August 24, 2005, the Supreme Court granted review and remanded the case for further consideration following *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005) and *Blakely v. Washington*. The Court of Appeals vacated Pink's exceptional sentence on November 15, 2005, and noted that on remand, the State may seek to empanel a jury to hear aggravating factors. CP at 24-25.

2. **Resentencing:**

The case came on for resentencing before Grays Harbor County Superior Court Judge David Foscue on November 30 and December 1, 2006. Report of Proceedings [RP] at 5-29. The court heard argument on the issue of whether the status of a defendant on community custody at the time of the commission of an offense is a question of fact that must be found by a jury, whether the deadly weapon enhancements may be imposed consecutively, whether the two counts constitute the same criminal conduct, and whether Pink's second degree robbery conviction in Oregon is comparable to the first

degree robbery statute in Washington.

The State argued that the issue of the Oregon conviction for second degree robbery had been previously addressed by the Court of Appeals, which found that “the ongoing conviction was comparable to Washington—to a violent offense under Washington law for robbery.” RP at 6-7. The State also argued that the issue of same criminal conduct was previously presented to the court, and that the court found that the charges were not the same criminal conduct. RP at 8. The State argued that Pink’s offender score was properly calculated at 8, and that the sentence and enhancements should be served consecutively to one another. RP at 8.

Defense counsel argued that the court should follow the then-current ruling of Division 1 in *State v. Jones*, 126 Wn. App 136, 107 P.3d 755 (2005) and find that community placement status is a question of fact that must be decided by a jury.² RP at 11. Defense counsel also argued that the Oregon conviction was not comparable to first degree robbery in Washington, that the deadly weapon enhancements should not be served concurrently, and that the offenses constitute the same criminal conduct. RP at 13-20. Defense counsel

²On December 28, 2006, the Supreme Court subsequently reversed Division 1 in *State v. Jones*, 159 Wn.2d 231, 149 P.3d 636 (2006), finding that Jones was not entitled to have a jury---rather than the sentencing court---determine whether he was under community placement at the time of the commission of his offense.

argued that the sentences should be served concurrently, and that the enhancements should be served concurrently, resulting in a single 24 month enhancement being added to the standard range sentence. RP at 22. The State reiterated that the issue of concurrent and consecutive sentences was previously addressed by the Court of Appeals and that this Court found that the offenses are not the same criminal conduct. RP at 23.

Judge Foscue found that community placement was not an issue of fact to be determined by a jury. RP at 28. The court imposed a sentence of 393.75 months for count 1 and 147 months for count 2. CP at 65-70. The court ordered that the sentences and enhancements be served consecutively, for a total of 540.75 months. The court entered an Amended Judgment and Sentence on December 1, 2006. CP at 65-70.

Timely notice of appeal was filed on December 7, 2006. CP at 71-72. Pink also filed a Notice of Intent to Appeal Sentence on December 13, 2006. CP at 73-74. This appeal follows.

D. ARGUMENT

1. **THE TRIAL COURT ERRED FINDING THAT THE OFFENSES WERE NOT THE SAME CRIMINAL CONDUCT AND ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE WHICH VIOLATED *BLAKELY V. WASHINGTON* BY SENTENCING PINK TO CONSECUTIVE SENTENCES, INSTEAD OF**

**CONCURRENT SENTENCES FOR HIS 1999
CONVICTIONS.**

Constitutional questions and issues of statutory construction are reviewed de novo. *City of Redmond v. Moore*, 151 Wn.2d 664, 91 P.3d 875 (2004).

RCW 9.94A.535, provides in pertinent part as follows:

(2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

RCW 9.94A.589, regarding consecutive or concurrent sentences, provides in pertinent part as follows:

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses

encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the United States Supreme Court held that other than the fact of a prior conviction any fact that increased the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

In *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 169 L. Ed.

2d 403 (2004), the United States Supreme Court held that the statutory maximum referenced in *Apprendi*, was the maximum sentence a judge could impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. The statutory maximum was not the maximum sentence a judge could impose after finding additional facts, but the maximum a judge could impose without any additional findings.

The Washington State Supreme Court held in *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005), that under Washington law, the court may not consider criminal history per se in issuing an exceptional sentence as prior convictions were used to compute presumptive sentences. Therefore, prior convictions alone could never be enough to warrant an exceptional sentence under Washington law. *Hughes*, 154 Wn.2d 118 at 135.

The *Hughes* court held the court's ability to use as a factor for justifying an exceptional sentence, a criminal defendant's high offender score due to multiple current offenses which would result in a presumptive sentence that was clearly too lenient in that it would allow the defendant to go unpunished for one or more of the offenses, was dependent upon whether there was extraordinary serious harm or culpability resulting from the multiple offenses that would not otherwise be accounted for in determining the presumptive sentencing range. Thus, the court found would require a

finding, which the defendant had a Sixth Amendment right, to have a jury find beyond a reasonable doubt. *Hughes*, at 137-140.

In *State v. Jacobs*, 154 Wn.2d 596, 115 P.3d 281 (2005), the Washington Supreme Court addressed whether the sentencing court properly added two consecutive sentence enhancements to the standard range sentence. The court in *Jacobs* found that although sentencing courts generally enjoyed discretion in tailoring sentences, for the most part that discretion did not extend to deciding whether to apply sentences concurrently or consecutively.

Further, the court in *Jacobs* found that where a defendant was sentenced for two or more current offenses, the legislature had specified that if those offenses stemmed from the same criminal conduct, the sentences shall be served concurrently. Consecutive sentences could only be imposed as an exceptional sentence under RCW 9.94A.535. Sentences for two or more serious violent offenses must be applied consecutively to each other under RCW 9.94A.589(1)(b). *Jacobs*, 154 Wn.2d at 602-603.

In *In re Pers. Restraint of VanDelft*, 158 Wn.2d 731, 147 P.3d 573 (2006), the Washington State Supreme Court addressed the issue of whether the defendant's Sixth Amendment right to a jury trial was violated by the imposition of consecutive sentencing for the conviction of second degree

kidnapping with sexual motivation based on facts as found by the court and not reflected in a jury verdict. *Pers. Restraint of VanDelft*, 158 Wn.2d at 733.

The defendant in *VanDelft* argued that the imposition of an exceptional consecutive sentence under RCW 9.94A.589(1)(a) violated the principles set forth in *Blakely*. According to the defendant's argument, RCW 9.94A.589 determined whether multiple felony convictions were sentenced concurrent or consecutively. The Court found that under RCW 9.94A.589(1)(b), sentences for separate and distinct serious violence offenses shall be served consecutively to each other and concurrently with sentences for other felonies imposed under RCW 9.94A.589(1)(a). *Pers. Restraint of VanDelft, supra*, at 738.

The Court found in *VanDelft* that felonies that were not serious violent offenses shall be served concurrently under RCW 9.94A.589(1)(a). Consecutive sentences for (1)(a) crimes may be imposed only under the exceptional sentence provisions of RCW 9.94A.535. *VanDelft, supra*, at 738-39. The Court in *VanDelft* opined that it had previously held in *State v. Cubias*, 155 Wn.2d 549, 120 P.3d 929 (2005), that in both *Blakely* and *Apprendi*, the United States Supreme Court was directing its attention to the sentence on a single count of a multi-count charge. *Cubias*, 155 Wn.2d at 553. The Court noted that because the *Apprendi* court contemplated only

whether the sentence for a single count exceeded the statutory maximum, *Apprendi* did not have any application to consecutive sentences. The *VanDelft* Court also stated that they similarly reasoned in *Cubias* that *Blakely* was not concerned with consecutive sentences. The Court further went on to state that in *Cubias*, it had emphasized that the defendant did not have entitlement under (1)(b) to serve concurrent sentences for multiple serious violent offenses. *VanDelft*, 158 Wn.2d 731 at 741.

In *Cubias*, the Court concluded that a trial court's imposition of the consecutive sentence under (1)(b) did not increase the penalty for any single underlying offense beyond the statutory maximum provided and therefore did not run afoul of *Apprendi* and *Blakely*. *Cubias*, 155 Wn.2d at 556. The defendant in *VanDelft* argued that the *Cubias* rule should not apply to charges under RCW 9.94A.589(1)(a) because the statute presumes sentences would be served concurrently and the presumption could be overcome only by a finding of an aggravating factor under RCW 9.94A.535. Under RCW 9.94A.589 the court found there was an operative distinction between (1)(a) and (1)(b) in that under (1)(a) a defendant did enjoy a statutory presumption of concurrent sentencing, but under (1)(b) a defendant did not. *VanDelft*, 158 Wn.2d at 741-42. The court concluded in *VanDelft* that given (1)(a)'s presumption of concurrent offenses and the exceptional nature of a

consecutive sentence imposed for a non-serious violent felony the rule announced in *Cubias, supra*, applied only to consecutive sentences imposed under (1)(b). The court held that because (1)(a) required the trial court to look to the exceptional sentencing scheme in RCW 9.94A.535 in order to impose a consecutive sentence for a non-serious violent felony, *Blakely* and *Hughes* squarely applied to the consecutive sentencing decisions under (1)(a). *VanDelft*, 158 Wn.2d at 742-43.

Not all federal constitutional errors require reversal, some may have been harmless in their effect on the trial. *Sullivan v. Louisiana*, 508 U.S. 275, 278-279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Some constitutional errors, however, will always invalidate the conviction and are considered structural errors. *Id.*

The Washington State Supreme Court in *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005), held that the harmless error analysis did not apply to a violation of defendant's Sixth Amendment right to have a jury determine upon proof beyond a reasonable doubt, the facts supporting a sentence above the standard sentencing range. Such error constituted structural error that can never be harmless. *Hughes* 154 Wn.2d at 142-48.

Here, Pink argued that counts 1 and count 2 do not constitute separate and distinct criminal conduct and therefore the court incorrectly sentenced

him, and that sentencing should have been under RCW 9.94A.589(1)(a). The State argued that the Court of Appeals previously addressed this issue and had found that the counts that are the same criminal conduct. This Court noted that the trial court declined to find same criminal conduct and had noted that “the conspiracy to commit murder in the first degree was completed months before the bomb was placed” and that the conspiracy “took place in a totally different time frame than the assault.” CP at 32. The trial court also stated, however, that the conspiracy “took place over time,” but that it “was a completed offense, even if there had never been an assault.” CP at 32. The trial court also found that intents between the two offenses were different. CP at 32. Pink’s counsel submitted in his Sentencing Memorandum that “any proven involvement of Mr. Pink clearly occurred at the same time and place i.e. only during the conspiracy” and that his co-defendant was responsible for planting the explosive device. CP at 64. Counsel argued that the intent also the same and did not change from one crime to the next. CP at 64. Pink argued that the two offenses constitute the same criminal conduct inasmuch as this Court’s previous analysis of the issue was based on the finding that the conspiracy and assault occurred at different places and times. RP at 25. Washington law defines same criminal conduct as two or more crimes that (1) require the same criminal intent, (2) are

committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a). All three prongs must be met; the absence of any one of them prevents a finding of same criminal conduct. *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). If the court determines that convictions of two or more serious violent offenses do not encompass the same criminal conduct, the sentences should run consecutively. RCW 9.94A.589(1)(a), (b).

In this case, in applying the analysis of *Blakely*, *Hughes*, and *VanDelft*, the sentencing court committed structural error in sentencing Pink to an exceptional consecutive sentence for the 1999 convictions. Pink did not agree or stipulate to the exceptional sentence or to the facts which were used to justify the exceptional sentence. Based upon the structural constitutional error, and violation of Sixth Amendment, Pink requests that his sentence be vacated and returned to that sentencing court for proper sentencing.

3. **PINK'S CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND DUE PROCESS OF LAW WERE VIOLATED WHEN THE TRIAL COURT RULED THAT HIS CRIMES WERE NOT THE SAME CRIMINAL CONDUCT, WARRANTING THE IMPOSITION OF CONCURRENT SENTENCES.**

The court did not reverse its previous ruling that Pink's crimes were not the same criminal conduct, warranting the imposition of consecutive

sentences pursuant to RCW 9.94A.589(1)(b). CP at 35-37. Pink contends that this constitutes a factual finding made in violation of his Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process of law. Pink further contends the error was prejudicial, requiring reversal of the sentence obtained and remand for imposition of concurrent sentences.

c. **The Ruling Violated Pink's Sixth Amendment Right to a Jury Trial and Fourteenth Amendment Right to Proof Beyond a Reasonable Doubt.**

It is axiomatic that an accused person has the right to a jury trial and may only be convicted upon proof beyond a reasonable doubt of every element of the crime. U.S. Const. amend. 6; 14. A fact that “increase[s] the prescribed range of penalties to which a criminal defendant is exposed” constitutes an element of the substantive crime that must be proved beyond a reasonable doubt to the trier of fact. *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005).

The SRA presumes sentences for multiple offenses “shall be served concurrently.” RCW 9.94A.589(1)(a). This presumption of concurrent

sentences may only be overcome by a judicial finding that the offenses arose from “separate and distinct criminal conduct.”³ RCW 9.94A.589(1)(b). In *State v. Cubias*, 155 Wn.2d 549, 120 P.3d 929 (2005), a 5-4 majority of the Washington Supreme Court held the “separate a distinct” finding does not implicate *Blakely* concerns. *Id.* at 553. In *Cubias*, the defendant was convicted of three counts of attempted murder against three separate victims. The Court held, without reference to *Hughes*, that a trial court’s imposition of consecutive sentences under RCW 9.94A.589(1)(b) does not implicate *Blakely* because it does not increase the penalty for any single underlying offense beyond the statutory maximum provided for that offense. *Cubias*, 155 Wn.2d at 556.

The dissent countered that in finding no violation of Cubias’s Sixth and Fourteenth Amendment rights, the majority had unjustifiably expanded upon dicta in *Apprendi* and *Blakely*. *Cubias*, 155 Wn.2d at 561 (Madsen, J., dissenting)(“There is *no* principled basis to distinguish between exceptional individual sentences and exceptional consecutive sentences; in each case the decision to depart from the presumptive sentence is based on a factual determination made by a judge.”(emphasis in original). The dissenters

³ The statute also permits the trial court to impose consecutive sentences as an “exceptional “ sentence. 9.94A.589(1)(a).

concluded, however, that although the sentencing court's factual finding violated Cubias' right to a jury trial, the Sixth Amendment violation was harmless because the jury's verdict reflected that the crimes were committed against separate victims, and thus the sentencing court was permitted to conclude the crimes were "separate and distinct" as a matter of law. *Cubias*, 155 Wn.2d at 562; *see Orange, supra*, 152 Wn.2d at 821 (holding offenses arise from separate and distinct criminal conduct when they involve separate victims).

In *Cubias*, the court also relied on a number of decisions from other jurisdictions holding that consecutive sentences do not implicate Sixth Amendment concerns. *See*, 155 Wn.2d at 555-56 (and citations therein). However, the Court failed to consider the statutory schema that permitted consecutive sentences to be imposed in these other jurisdictions and did not evaluate the mandatory triggering effect of the judicial finding on the sentence to be imposed under the SRA.

When a trial judge uses his or her discretion to sentence within a prescribed range, Sixth Amendment concerns are not implicated and the defendant does not have the right to a jury determination of facts necessary to increase his sentence. *United States v. Booker*, 543 U.S. 220, 233, 125 S. Ct 738, 160 L. Ed. 2d 621 (2005). The SRA, however, is not a discretionary

sentencing scheme. Instead, RCW 9.94A.589(1)(b), if the court finds that serious violent crimes are “separate and distinct,” the court *must* depart from the presumptive concurrent sentences and impose consecutive sentences. RCW 9.94A.589(1)(b). In this instance, consecutive sentences are mandatory. The “separate and distinct” factual finding thus served as the functional equivalent of an element of a criminal offense.

Unlike the facts presented in *Cubias*, where the “separate and distinct” finding is made although the victim of the two serious violent offenses is the same, the finding is not reflected in the jury’s verdict for the offenses and instead depends on additional judicial fact-finding. The additional judicial fact-finding triggers the mandatory imposition of a consecutive sentence and increases the maximum punishment that would have been available absent the finding. This Court should conclude that in this instance, the ruling violates a criminal defendant’s Sixth and Fourteenth Amendment rights to a jury and proof beyond a reasonable doubt.

d. **The “Separate and Distinct” Finding Here Was Not Harmless.**

The State may claim that in finding the counts were not the “same criminal conduct,” the sentencing court necessarily determined the crimes

were “separate and distinct.” Such a claim runs counter to settled principles of statutory construction.

In enacting RCW 9.94A.589, formerly RCW 9.94A.400,⁴ the Legislature did not define either the terms “same criminal conduct” or “separate and distinct.” In 1987, subsection (1)(a) was amended by Laws of 1987, §5, chapter 456, to include a definition of “same criminal conduct.” The Legislature has never amended subsection (1)(b) to provide a definition of “separate and distinct.” Various decisions have opined that serious violent offenses which are not the “same criminal conduct” are necessarily “separate and distinct.” *See, e.g. State v. Channon*, 105 Wn.App. 869, 877, 20 P.3d 476 (2001); *State v. Brown*, 100 Wn.App. 104, 111-15, 995 P.2d 1278 (2000), *reversed in part on other grounds, State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002).

In *Brown*, this court noted the statutory antecedent to RCW 9.94A.400 afforded only two alternatives in sentencing multiple crimes – the imposition of consecutive or concurrent sentences at the court’s discretion on offenses arising from a single act or omission, and the imposition of consecutive sentences “in all other cases.” *Brown*, 100 Wn.App. at 113-14

⁴In recodifying RCW 9.94A.400 to RCW 9.94A.589, the Legislature did not alter the language of the pertinent provision.

(discussing RCW 9.92.080(2) and (3)(1983)). Division One decided RCW 9.94A.400 was intended to replace the prior scheme and therefore concluded that where a defendant's crimes are not the "same criminal conduct," they are necessarily "separate and distinct." *See Brown*, 100 Wn.App. at 114 ("in passing the Sentencing Reform Act of 1981, the Legislature did not further define "separate and distinct" criminal conduct, nor did it provide any other indication that it intended to create a new set of offenses that fail to meet the definition of "same criminal conduct." Yet are not "separate and distinct.").

The conclusion that the Legislature did not provide "any other indication" if its intent to create a new set of offenses that are neither the "same criminal conduct" nor "separate and distinct" is not entirely accurate, however. The Legislature specifically deleted the strident directive, "in all other cases" when it enacted the SRA. According to common rules of statutory construction, the Legislature's omission or deletion of statutory language is construed as denoting an express intent that the directive not be applied. *See, State v. Swanson*, 116 Wn. App. 67, 76, 65 P.3d 343 (2003). The presence of a requirement in one statute and its omission in another related statute indicates a difference in legislative intent. *Public Utility District No. 1 of Pend Oreille County v. State Dep't of Ecology*, 146 Wn.2d 778,797, 51 P.3d 744 (2002).

Moreover, this Court's construction of the provision in *Brown* is contrary to the "plain meaning" rule of statutory construction. This rule requires that where a statute's meaning is plain on its face, the court must give effect to that plain meaning. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001).

Under the "plain meaning" rule, examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found, is appropriate as part of the determination whether a plain meaning can be ascertained.

State Dep't of Ecology, v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 10, 43 P.3d 4 (2002). Under the "plain meaning" rule, while Pink's conviction for conspiracy to commit murder may be viewed as "separate" from the assault, the two offenses intertwined and, although they were not charged this way by the State, the assault arguably was committed in furtherance of the conspiracy.

This distinction triggers another rule of statutory construction. Statutes must be read so all of the words used by the Legislature are given effect; no part must be rendered redundant or superfluous. *Bellevue v. Lorang*, 140 Wn.2d 19, 25, 992 P.2d 496 (2000). This Court's reading of the statute in *Brown* renders the express language used by the Legislature superfluous or redundant.

In sum, had the Legislature intended consecutive sentences be imposed in “all other cases: where crimes are not found to encompass the “same criminal conduct,” it would have retained statutory language making this intent clear. Instead, the Legislature deleted this language and used a specific term, “separate and distinct,” to denote when sentences must be served consecutively. The State’s convictions in this case do not reasonably satisfy the legislative mandate that crimes be “separate and distinct” in order for consecutive sentences to be imposed. For this reason, Pink requests this court reject any claim that the *Blakely* error was harmless. The remedy is reversal and remand for imposition of concurrent sentences.

4. **OREGON’S SECOND-DEGREE ROBBERY STATUTE LACKS THE ELEMENTS OF A COMPLETED TAKING, OWNERSHIP, AND TAKING FROM THE PERSON OF ANOTHER, THAT ARE CONTAINED IN WASHINGTON’S FIRST-DEGREE ROBBERY STATUTE.**

Pink was convicted of second degree robbery in Oregon in 1983. On review, this Court remanded the issue to the trial court to determine whether the Washington and Oregon statutes were comparable. As noted *supra*, Pink raised the argument again during resentencing on November 30 and December 1, 2006. RP at 13. The State argued that issue had previously been addressed by the trial court and that Judge Foscoe found that the elements of

the Oregon offense were comparable. RP at 14.

Judge Foscue did not directly rule on the issue, but appears to consider it previously settled issue. The judge noted that “[t]his matter is just before me for resentencing as a result of the decision in *Blakely*. Most of the other matters have already been resolved in this case, or in other cases.” RP at 28.

Because the issue was argued at resentencing, Pink assigns error to the calculation of his offender points and submits that, without consideration of his other arguments contained in this brief, his offender score for count 1 should be reduced.

When dealing with out-of-state or foreign convictions, Washington courts ask whether the out-of-state conviction is “comparable” to one of the Washington convictions. To determine if the foreign conviction is comparable to a Washington offense, the court must compare the elements of the out-of-state offense with the elements of a comparable Washington offense. *State v. Morley*, 134 Wn.2d 588, 605, 952 P.2d 167 (1998). If the elements of the out-of-state offense are the same as those of the comparable Washington crime, then the foreign conviction is comparable. *Morley* 134 Wn.2d at 605.

If the out-of-state offense is missing any element required to prove the

Washington counterpart of the offense, then the foreign conviction is not comparable to its purported Washington counterpart. *Id.*, 134 Wn.2d at 606; *Russell*, 104 Wn. App. at 441.

In *In re the Personal Restraint of Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005), the Washington Supreme Court ruled that the comparability analysis is based, first and foremost, on a side-by-side comparison of the elements of the Washington and out-of-state crimes. Any comparison of the facts allegedly underlying the conviction is at best “problematic,” according to that Court, given the practical consideration that a person who pled guilty to a prior foreign offense did not necessarily have any incentive to litigate the specifics of the allegations that the State of Washington now sought to use against him. *Id.*, 154 Wn.2d 255.

The proper analysis, therefore, is to compare the elements of second-degree robbery in Oregon with the elements of first-degree robbery in Washington, to see if the former is comparable to the latter.

Pink was convicted of second-degree robbery in Oregon in violation of ORS 164.405. That statute provides, “(1) A person commits the crime of robbery in the second degree if the person violates ORS 164.395 and the person: (a) Represents by word or conduct that the person is armed with what purports to be a dangerous or deadly weapon; or (b) Is aided by another

person actually present.”

The referenced ORS 164.395 provides – or rather provided, at the time of Pink’s prior Oregon conviction:

- (1) A person commits the crime of robbery in the third degree *if in the course of committing or attempting to commit theft* the person uses or threatens the immediate use of physical force *upon another* person with the intent of:
 - (a) Preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking;
 - or
 - (c) Compelling the owner of such property *or another person* to deliver the property or to engage in other conduct which might aid in the commission of the theft.

(Emphasis added.) As the emphasized portions show, in the order in which they appear, this robbery statute does not require proof of a completed crime; does not require proof of a completed crime; does not required proof of taking from the person or presence of another (that force can be used, instead, on anyone); and does not require proof of another’s ownership.

This third-degree robbery statute, by its prohibition of theft, incorporates by reference the elements of Oregon’s theft statute, ORS 164.015. That statute sets forth a variety of ways of committing theft, including several that do not involve a taking from or in the presence of the victim, such as simply taking lost or mislaid property, withholding property, and obtaining property by deception; it also lacks the element of taking the

property from the actual owner:

A person commits theft when, with intent to deprive another of property or to appropriate property to the person or to a third person, the person:

- (1) Takes, appropriates, obtains or withholds such property from an owner thereof; or
- (2) Commits theft of property lost, mislaid or delivered by mistake as provided in ORS 164.065; or
- (3) Commits theft by extortion as provided in ORS 164.075;
- (4) Commits theft by deception as provided in ORS 164.085;
- (5) Commits theft by receiving as provided in ORS 164.095.

In Washington, first-degree robbery is defined in RCW 9A.56.190 and RCW 9A.56.200. The first statute, RCW 9A.56.190, defines robbery:

A person commits robbery when he unlawfully takes personal property *from the person of another or in his presence against his will* by the use or threatened use of immediate force, violence, or fear of injury *to that person or his property or the person or property of anyone*. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery when it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

(Emphasis added.) The second statute, RCW 9A.56.200, provides that a

person is guilty of first degree robbery, as defined above, if he or she

(a) In the commission of a robbery or of immediate flight therefrom, he or she:

(i) Is armed with a deadly weapon; or

(ii) Displays what appears to be a firearm or other deadly weapon; or

(iii) Inflicts bodily injury; or

(b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.

Both the Oregon and Washington statutes require that force or threats of force be used, but there are three other portions of the Oregon statute that are narrower than the corresponding Washington statute. First, Oregon's statutory definition of robbery requires that a person, while "in the course of committing or *attempting* to commit theft," use force or threats of force, etc. ORS 164.395 (emphasis added). Washington's robbery statute requires an actual taking not just an attempt. Second, Oregon's second-degree robbery statute *lacks the element of a taking from the person or the presence of another*. It criminalizes as second-degree robbery all sorts of takings, incorporating by reference all of the different sorts of theft listed in ORS 164.015. That theft statute criminalizes takings of lost or mislaid property; of "property delivered by mistake"; and even of property taken "by deception."

ORS 164.015(2), (4). Such takings are not necessarily from the person or presence of the victim; more likely than not, those sorts of takings occur some distance away from the victim.

Oregon's robbery statute, which incorporates the elements of this Oregon theft statute, does not provide the missing elements. Under ORS 164.405, second-degree robbery includes *either* the element that the defendant purported to be armed, *or* the element that he was aided by another person. Aiding can certainly occur outside the presence of the victim in a theft by deception, or theft of lost or mislaid property, etc., situation; use of a weapon can, too. Under ORS 164.405's cross-referenced OR 164.395, second-degree robbery also requires "immediate use of physical force." But such physical force can be used on any person, or in the statute's words, "another person." It does not have to be the victim. Thus, neither of these statutes supplies the missing elements that the theft statute lacks.

Related to this second problem is the third problem, that is, the ownership element. The Washington robbery statute requires proof of taking from the owner, that is, from someone with an ownership or possessor interest in the property. *State v. Bunting*, 115 Wn. App. 135, 143 & nn. 17-18, 61 P.3d 375 (2003) (cited with approval in *In re Personal Restraint of Lavery*, 154 Wn.2d 249). This element is not contained in the Oregon

statute.

Hence, the elements of the prior Oregon conviction are not “comparable” to the elements of Washington’s second-degree robbery statute. Since the elements of the Oregon statute are broader than the elements of the Washington statute, the two statutes are not comparable. *But see State v. McIntyre*, 112 Wn. App. 478, 482, 49 P.3d 151 (2002) in which Division II rejected an argument similar to this one. In that case, this court analyzed the element of a taking from the person or presence *of the victim* – and concluded that under both Washington and Oregon law, the force could be used either to obtain or retain the property, so the force *against the victim* did not have to be contemporaneous with the taking. All of the examples used in the *McIntyre* opinion involved taking or retaining property from the person or presence *of the victim*; all of the analysis in that opinion assumed that the element in both statutes was use of force *against the victim*. The *McIntyre* court therefore rejected the defendant/appellant’s argument that the Oregon statute lacked the element of taking from the person or presence that the Washington statute contained.

In the case at bar, however, Pink is focusing on the fact that the Washington statute requires proof of a taking (or retaining) from the person or presence *of the victim*, or, in Washington’s statutory language, “takes

personal property from the person of another or in his presence . . . “ The Oregon statute does not require proof of a taking from the person or presence of the victim at all – the theft can be done at a distance, by deception, by retaining lost or mislaid property, or by extortion, and in Oregon the force required can be against anyone – in Oregon’s statutory language, “upon another person,” without limitation. The *McIntyre* court thus rejected an argument that attempted to distinguish the Oregon and Washington second-degree robbery statutes on the basis of *when* the force was used. It did not address the argument that Pink makes – the argument that the Washington statute narrowly limits the recipient of the use of force to the victim of the taking while the Oregon statute does not – at all.

Pink submits that the trial court incorrectly considered his 1983 second degree robbery conviction and that his offender should be reduced accordingly.

4. **PINK HAD A SIXTH AMENDMENT RIGHT TO HAVE A JURY DETERMINE COMPARABILITY OF THE PRIOR OREGON CONVICTION BEYOND A REASONABLE DOUBT.**

The Sixth Amendment guarantees a criminal defendant the right to “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *Apprendi v. New Jersey*,

530 U.S. 466, 476-77, 120 S. ct. 2348, 147 L. E. 2d 435 (quoting *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995)). The Court has narrowly accepted the “fact” or a prior conviction from the facts that must be submitted to the jury. *Apprendi*, 530 U.S. at 488; *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). But beyond such a fact, a court’s ability to impose a sentence is limited to the maximum for that offense reflected in the jury verdict alone. *Blakely v. Washington*, 542 U.S. 296, 304, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *State v. Hughes*, 154 Wn.2d 118, 110 P.2d 192 (2005).

The narrow construction accorded the “fact of prior conviction” exception to *Apprendi* and *Blakely* precludes trial courts from engaging in the fact finding necessary to determine whether an out of state conviction is comparable to a Washington offense. Further, if the State wishes to elevate the offender score based on such facts, a criminal defendant has the right to have a jury determine those facts beyond a reasonable doubt. Finally, this constitutional right cannot be waived through counsel’s merely acquiescence to the State’s calculation of the offender score. As the trial court elevated Pink’s statutory maximum punishment based on the Oregon offenses that, as argued *supra*, was not comparable to a crime in Washington, and Pink did not

waive his right to have a jury determine these facts, the sentence must be reversed.

a. **The “fact of prior conviction” exception to *Apprendi* and *Blakely* does not include facts underlying the comparability of offenses.**

Decisions following *Apprendi* and *Blakely* have delimited the narrow bounds of the “fact of prior conviction” exception to the Sixth Amendment right to a jury trial. In *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254, 16 L. Ed. 2d 205 (2005), the Court made clear that the exception does not include facts “about” a prior conviction if those facts are “too far removed from the conclusive significance of a prior judicial record.” 125 S. Ct. at 1262. Similarly, the Washington Supreme Court ruled that the *Apprendi* “prior conviction” exception does not apply when the out-of-state crime is not legally identical to the Washington offense. *Lavery*, 154 Wn.2d at 256-57.

In this case, no jury has determined whether Pink’s 1983 Oregon conviction was factually comparable to Washington offenses. As argued *supra*, the offenses were not legally comparable, and the State did not prove their factual comparability. To the extent that the factual question of comparability under the SRA permits the court to delve into fact-finding, the statutory procedure violates the Sixth Amendment right to jury trial. *Blakely*,

124 S. Ct. at 2538. As the Washington Supreme Court has held, there is no harmless *Blakely* error. *Hughes*, 154 Wn.2d at 148. Because the court would have had to engage in analysis that goes beyond the mere fact of the prior conviction and involves a factual determination that was not proved to a jury beyond a reasonable doubt, this Court should vacate the sentence and remand for resentencing without the out-of-state conviction. *Lavery*, at 262.

5. **BY FINDING PINK WAS ON COMMUNITY CUSTODY AND IMPOSING AN INCREASED SENTENCE BASED UPON THAT FINDING, THE TRIAL COURT VIOLATED PINK'S RIGHT TO A JURY TRIAL AND RIGHT TO DUE PROCESS.**

Pink acknowledges the ruling of *State v. Jones*, 159 Wn.2d 231, 149 P.3d 636 (2006), in which the Supreme Court concluded that “because community custody is directly related to and follows from the fact of a prior conviction and that the attendant factual determinations involve nothing more than a review of the nature of the defendant's criminal history and the defendant's offender characteristics, such a determination is properly made by the sentencing judge.” *Jones*, 159 Wn.2d at 234. Pink assigns error and presents argument on this issue in order to preserve it in the event of reversal of *Jones* in the future.

The State calculated Pink's offender score as an 8, which included

one point for its contention that Mr. Jones was on community custody at the time of his offense. Pink challenged the additional point that he was on community custody at the time of his offense.

c. **A defendant has a constitutionally protected right to a jury determination of every element of the charged crime.**

The Sixth Amendment guarantees a criminal defendant the right to a jury trial. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). This right includes the right to “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *Id.*, quoting *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). Tied closely to the Sixth Amendment right to a jury trial is the Due Process Clause of the Fourteenth Amendment’s requirement that the State must prove every element beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). If the State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 482-83, *see also id.*, at 501 (Thomas J., concurring) (“[I]f the legislature defines some core crime and then provides for increasing punishment of that crime upon a finding of some

aggravating fact[.]. . . the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.”).

Whether the State calls the fact which increases the sentence a “sentencing factor” and not an element is of no moment. “*Apprendi* repeatedly instructs that in that context that the characterization of a fact or circumstance as an ‘element’ or a ‘sentencing factor’ is not determinative of the question ‘who decides,’ judge or jury.” *Ring v. Arizona*, 536 U.S. 584, 604, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). The relevant inquiry is not of form but of effect; when the fact increases the sentence beyond that which the jury verdict authorized, it must be found by the jury beyond a reasonable doubt. *Id.*

- d. **The fact of being on community custody at the time of the commission of the charged offense is an element and must be found by the jury beyond a reasonable doubt.**

RCW 9.94A.525(17) provides that one point must be added to the offender’s score if the offender was on community placement when the present offense was committed. “Community placement” is defined as

that period during which the offender is subject to the conditions of community custody and/or postrelease

supervision, which begins either upon completion of the term of confinement (postrelease supervision) or at such time as the offender is transferred to community custody in lieu of earned release. Community placement may consist of entirely community custody, entirely postrelease supervision, or a combination of the two.

RCW 9.94A.030(7). Thus, community custody is part of community placement.

The State argued that evidence was presented at trial that Pink was on community custody at the time he committed the current offense. RP at 6. The fact of being on community placement at the time of the current offense clearly aggravated the presumptive sentence for Pink's crime. The trial court's sentence violated Pink's right to a jury trial and due process since the court never presented the issue of whether Pink was on community placement at the time he committed the current offense to the jury. *Apprendi*, 530 U.S. at 494. The court was required to obtain a jury finding beyond a reasonable doubt of this fact before imposing the greater sentence. *Id.*

c. **Pink's sentence must be reversed and remanded for resentencing.**

The remedy for a court's imposition of a sentence which exceeds the jury verdict is reversal of the sentence and remand for resentencing to a term authorized by the jury's verdict. *Apprendi*, 530 U.S. at 496-97. Had the State wished to sentence Pink to an enhanced sentence for being on

community placement at the time of the offense, it was required to submit that fact before a jury to prove beyond a reasonable doubt. Its failure bars it from seeking the additional sentence. Pink's sentence must be reversed and remanded for resentencing. Again, Pink notes that this argument is contradicted by *Jones*, but presents it in the event of further review of that case.

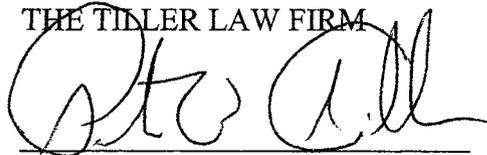
E. CONCLUSION

For the foregoing reasons, Pink requests this Court vacate his exceptional sentence and remand this matter for resentencing.

DATED: August 6, 2007.

Respectfully submitted,

THE TILLER LAW FIRM

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PETER B. TILLER-WSBA 20835
Of Attorneys for Steven Pink

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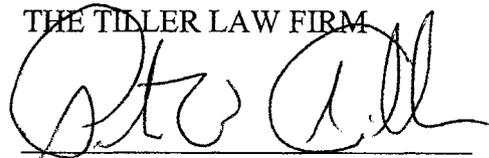
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Of Attorneys for Steven Pink

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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

STEVEN E. PINK,

Appellant.

COURT OF APPEALS NO.
35693-7-II

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies of were mailed to Steven E. Pink, Appellant, and Gerald R. Fuller, Grays Harbor County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on August 6, 2007, at the Centralia, Washington post office addressed as follows:

CERTIFICATE OF
MAILING

THE TILLER LAW FIRM
ATTORNEYS AT LAW
ROCK & PINE - P.O. BOX 58
CENTRALIA, WASHINGTON 98531
TELEPHONE (360) 736-9301
FACSIMILE (360) 736-5828

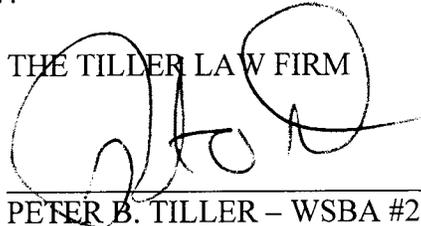
Mr. Gerald R. Fuller
Deputy Prosecuting Attorney
Grays Harbor County Prosecutor's Office
102 Broadway Ave. W., Room 102
Montesano, WA 98563-3621

Mr. David Ponzoha
Clerk of the Court
WA State Court of Appeals
950 Broadway, Ste. 300
Tacoma, WA 98402-4454

Mr. Steven E. Pink
DOC #277511, 5-D-22
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362

DATED: August 6, 2007.

THE TILLER LAW FIRM



PETER B. TILLER – WSBA #20835
Attorney for Appellant

CERTIFICATE OF
MAILING

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THE TILLER LAW FIRM
ATTORNEYS AT LAW
ROCK & PINE – P.O. BOX 58
CENTRALIA, WASHINGTON 98531
TELEPHONE (360) 736-9301
FACSIMILE (360) 736-5828