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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

**NO. 36740-8-II**

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

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**ANDREW S. KENNEDY,**

**Appellant.**

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**BRIEF OF APPELLANT**

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PM 62308

**TABLE OF CONTENTS**

	Page
<b>A. SUMMARY OF CASE .....</b>	<b>1</b>
<b>B. ASSIGNMENTS OF ERROR.....</b>	<b>2</b>
<b>1. IT WAS ERROR FOR THE COURT TO ACCEPT ANDREW KENNEDY’S JURY WAIVER BECAUSE THE WAIVER WAS INCOMPLETE. ALTHOUGH THE STATE HAD FILED NOTICE OF ITS INTENT TO SEEK AN EXCEPTIONAL SENTENCE UPWARD AGAINST KENNEDY, KENNEDY WAS NOT ADVISED BY THE JURY WAIVER THAT HE WAS WAIVING HIS RIGHT TO REQUIRE A JURY TO FIND AGGRAVATING SENTENCING FACTORS.....</b>	<b>2</b>
<b>2. AS KENNEDY HAD NOT MADE A VALID WAIVER OF HIS JURY TRIAL RIGHTS, THE TRIAL COURT ERRED IN FINDING AGGRAVATING SENTENCING FACTORS.....</b>	<b>2</b>
<b>3. THE TRIAL COURT ERRED IN SENTENCING KENNEDY TO AN EXCEPTIONAL SENTENCE UPWARD.....</b>	<b>2</b>
<b>4. THE TRIAL COURT ERRED IN ENTERING ALL OF ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE BENCH TRIAL. ALL OF THE EVIDENCE PRESENTED WAS PRESENTED IN VIOLATION OF KENNEDY’S RIGHT TO A JURY TRIAL. ALL OF THE TRIAL COURT’S CONCLUSIONS OF LAW WERE MADE IN VIOLATION OF KENNEDY’S RIGHT TO A JURY TRIAL. ....</b>	<b>2</b>
<b>C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR .....</b>	<b>3</b>
<b>1. WHETHER ANDREW KENNEDY IS ENTITLED TO RESCIND HIS JURY WAIVER WHEN THE WAIVER WAS MADE IN VIOLATION OF HIS RIGHT TO A JURY TRIAL TO DETERMINE AGGRAVATING SENTENCING FACTORS?.....</b>	<b>3</b>

<b>D.</b>	<b>STATEMENT OF THE CASE .....</b>	<b>3</b>
	<b>(i) The Charges and the Notice of Intent to Seek an Exceptional Sentence. ....</b>	<b>3</b>
	<b>(ii) Jury Waiver.....</b>	<b>5</b>
	<b>(iii) Trial testimony. ....</b>	<b>5</b>
	<b>(iv) The Trial Court’s Findings.....</b>	<b>11</b>
	<b>(v) Sentencing.....</b>	<b>12</b>
<b>E.</b>	<b>ARGUMENT.....</b>	<b>12</b>
	<b>1. KENNEDY’S EXCEPTIONAL SENTENCE WAS INVALID. HE DID NOT WAIVE HIS RIGHT TO HAVE A JURY DETERMINE IF THERE WAS A FACTUAL BASIS FOR THE AGGRAVATING SENTENCING FACTORS.....</b>	<b>12</b>
	<b>(i) Under Blakely, Kennedy is entitled to a jury determination of aggravating sentencing facts.....</b>	<b>12</b>
	<b>(ii) Kennedy did not waive his right to have a jury determine aggravating sentencing factors.....</b>	<b>14</b>
	<b>(iii) The trial court had no legal authority to even accept Kennedy’s jury trial waiver.....</b>	<b>17</b>
<b>F.</b>	<b>CONCLUSION.....</b>	<b>18</b>

## TABLE OF AUTHORITIES

Page

### Cases

<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 435 (2000) .....	13, 14
<i>Bellevue v. Acrey</i> , 103 Wn.2d 203, 691 P.2d 957 (1984).....	16, 17
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S.Ct.2531, 159 L.Ed.2d 403 (2004) .....	ii, 1, 113
<i>Boykin v. Alabama</i> , 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969) .....	17
<i>Schneckloth v. Bustamonte</i> , 412 U.S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973).....	17
<i>State v. Giles</i> , 132 Wn. App. 738, 132 P.3d 1151 (2996), <i>review denied</i> , 160 Wn.2d 1006 (2007) .....	14
<i>State v. Hochhalter</i> , 131 Wn. App. 506, 126 P.3d 104 (2006).....	17

### Statutes

RCW 10.99.020 .....	4
RCW 10.01.060 .....	18
RCW 9.94A.535(3)(b) .....	4
RCW 9.94A.535(3)(n) .....	4
RCW 9.94A.535(3)(q) .....	4
RCW 9.94A.537 .....	18

RCW 9A.32.050(1)(b)..... 3  
RCW 9A.32.055..... 3

**Other Authorities**

Sentencing Reform Act of 1981 (SRA)..... 14  
Sixth Amendment to the United States Constitution..... 13

## A. SUMMARY OF CASE

By a State's omnibus application and an amended information, Andrew Kennedy received notice of the State's intent to seek an exceptional sentence against him in his homicide trial. CP 14-17, 73-75; 1RP<sup>1</sup> 57, 75-76. A week prior to his trial, the court accepted Kennedy's written and oral waiver of his right to have a jury decide the charges against him. But neither the written waiver nor the oral waiver waived Kennedy's right to have a jury determine the proposed aggravating sentencing factors.

The trial court found Kennedy guilty of both charges, second degree felony murder and homicide by abuse. The court also found that Kennedy committed two of the proposed aggravating sentencing factors: abuse of a position of trust and a particularly vulnerable victim. In violation of the holding in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct.2531, 159 L.Ed.2d 403 (2004), that any factor used to increase a defendant's penalty beyond the standard range must be proven to a jury unless that right is waived or the facts stipulated to, the trial court used the aggravating factors to add an additional 60 months over and above Kennedy's standard

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<sup>1</sup> There are numerous volumes of verbatim. To distinguish the volumes, the "RP" shall be followed by the respect volume number and the specific page reference.

range sentence. It was error for the trial court because it deprived Kennedy of his right to a jury.

**B. ASSIGNMENTS OF ERROR**

1. IT WAS ERROR FOR THE COURT TO ACCEPT ANDREW KENNEDY'S JURY WAIVER BECAUSE THE WAIVER WAS INCOMPLETE. ALTHOUGH THE STATE HAD FILED NOTICE OF ITS INTENT TO SEEK AN EXCEPTIONAL SENTENCE UPWARD AGAINST KENNEDY, KENNEDY WAS NOT ADVISED BY THE JURY WAIVER THAT HE WAS WAIVING HIS RIGHT TO REQUIRE A JURY TO FIND AGGRAVATING SENTENCING FACTORS.
2. AS KENNEDY HAD NOT MADE A VALID WAIVER OF HIS JURY TRIAL RIGHTS, THE TRIAL COURT ERRED IN FINDING AGGRAVATING SENTENCING FACTORS.
3. THE TRIAL COURT ERRED IN SENTENCING KENNEDY TO AN EXCEPTIONAL SENTENCE UPWARD.
4. THE TRIAL COURT ERRED IN ENTERING ALL OF ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE BENCH TRIAL. ALL OF THE EVIDENCE PRESENTED WAS PRESENTED IN VIOLATION OF KENNEDY'S RIGHT TO A JURY TRIAL. ALL OF THE TRIAL COURT'S CONCLUSIONS OF LAW WERE MADE IN VIOLATION OF KENNEDY'S RIGHT TO A JURY TRIAL.

**C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

- 1. WHETHER ANDREW KENNEDY IS ENTITLED TO RESCIND HIS JURY WAIVER WHEN THE WAIVER WAS MADE IN VIOLATION OF HIS RIGHT TO A JURY TRIAL TO DETERMINE AGGRAVATING SENTENCING FACTORS?**

**D. STATEMENT OF THE CASE**

**(i) The Charges and the Notice of Intent to Seek an Exceptional Sentence.**

Kennedy was tried on a second amended information for acts that occurred on August 1, 2004. RP4A 146; CP 413-15. The second amended information was filed without objection on the first day of trial. RP4A 146. The information charged Kennedy in count I with second degree felony murder.<sup>2</sup> CP 413-414. The information specifically alleged that while committing or attempting to commit a second degree assault on Kierny Severson he caused the death of Severson. CP 413-414. In count II, Kennedy was charged with homicide by abuse.<sup>3</sup> CP 414-15. The information specifically alleged that under circumstances manifesting extreme indifference to the life of a person under the age of 16, he caused the death of Kierny Severson after having previously engaged in a pattern or practice of assault or torture of Severson. CP 414-15. Both

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<sup>2</sup> 9A.32.050(1)(b)

<sup>3</sup> 9A.32.055

charges also alleged that this was a domestic violence offense.<sup>4</sup> And both charges alleged that the crimes were aggravated by the following factors: (1) Kennedy knew or should have known that Severson was particularly vulnerable or incapable of resistance due to extreme youth<sup>5</sup>; (2) Kennedy used his position of confidence or trust to facilitate the commissions of the crime<sup>6</sup>; and (3) Kennedy demonstrated or displayed an egregious lack of remorse<sup>7</sup>. CP 413-15. And further, because of these aggravating factors, Kennedy should have additional time beyond his standard range imposed against him. CP 414-15.

Kennedy originally received notice of the State's intent to seek an exceptional sentence under these factors through the Proposed State's Omnibus Application and Notice of Exceptional Sentence filed on February 22, 2006, and discussed in court on May 3, 2006. RP1 57; CP 14-17. The amended information filed and received in court on February 21, 2007, also listed the aggravating factors. CP 73-75; RP1 76.

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<sup>4</sup> 10.99.020

<sup>5</sup> RCW 9.94A.535(3)(b)

<sup>6</sup> RCW 9.94A.535(3)(n)

<sup>7</sup> RCW 9.94A.535(3)(q)

**(ii) Jury Waiver.**

In court on July 23, 2007, Kennedy filed a written waiver of his right to have a jury determine his guilt or innocence on the underlying facts of the case only. CP 412. The court discussed the jury waiver with Kennedy on the record. RP3 211-12. However, just like the written waiver, the discussion did not include any reference to Kennedy waiving his right to a jury determination of aggravating sentencing factors. RP3 211-212.

**(iii) Trial testimony.**

Kieryn Severson, born August 5, 2003, was the biological daughter of Andrew Kennedy's first cousin, Rebekah Severson. RP5A 293. When Miss Severson decided that she was unable to care for Kieryn as a single parent, she asked her cousin, Andrew Kennedy (hereafter generally "Kennedy"), to take custody of Kieryn. RP4A 154-163. Kennedy welcomed the opportunity to raise Kieryn. Id. In May 2004, Miss Severson brought Kieryn to Longview, Washington, and stayed for a short time at the Kennedy home while Kieryn got settled. RP4 B 260. June 2, Miss Severson signed a document intending to give Kennedy legal custody of Kieryn. RP4A 154. Miss Severson then returned to her home in Arkansas. RP4A 154-163.

Living at the Kennedy home at the time was Andrew Kennedy, his then-girlfriend, Tammy Malchert<sup>8</sup> (hereafter "Tammy"), and Kennedy's parent's, Patricia and Steven Kennedy. RP4B 259, 261. Kennedy's adult brother, Phillip Kennedy, also came and went from the home. RP10B 1125. Once he took custody of Kiernyn, Andrew Kennedy quit his security job to provide full-time care for Kiernyn. RP4A 154-63. Tammy worked full-time at a daycare. RP4A 154-63. Patricia Kennedy had a home-based business selling Avon products and she provided full-time care for Steven Kennedy who did not work as he had been disabled by a stroke. RP4B 264, 271-76.

Those people who knew Andrew Kennedy best described him as a loving, attentive, and devoted father to Kiernyn. RP10B 1130-81. Kiernyn was a healthy baby at birth. RP5A 300. But when Kiernyn came to Kennedy at nine months old, she had not yet started to walk and she did not talk. RP4A 153-163. While she was with the Kennedy family, she had started to pull herself up and around on furniture as well as say a few words. RP4A 153-163, RP4B 279.

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<sup>8</sup> The couple married in mid-July 2004. RP4A 150-51.

There were a few times when Kennedy would tell his mother that Kiernyn stopped breathing and that he had compressed her chest to get her to start breathing again. RP4B 268.

On June 15, Kiernyn was seen at a Longview clinic. She was diagnosed as having an ear infection. RP6 457-61. Other than the infection, the examining physician found that Kiernyn was a generally healthy child. RP6 458-61.

On July 11, Tammy and Kennedy took Kiernyn to St. Johns Medical Center emergency room. RP5A 356, 362. The examining doctor noticed that Kiernyn had a small recent superficial bruise on her forehead. RP5A 356-60. The doctor ordered a cat scan which turned out to be normal. RP 5A 362. Kiernyn did have a spiral fracture of one arm. RP5A 363. Kennedy told the doctor that he felt the child had injured her arm when she fell in her new crib and caught her arm on the railing. RP5A 357. While the doctor testified that the arm injury could happen in that fashion, he felt it was unlikely. RP5A 373.

Sometime in mid-July, family noted that Kiernyn had a long bruise on her unbroken arm. RP4A 167, 4B 267. There was speculation that this bruise happened when Kiernyn fell out of a chair while visiting at Tammy's sister's home. RP4A 167. Kiernyn also

had a fresh bruise on her head. RP4A 168. There was speculation that the bruise occurred when Kiernyn fell and hit her head on some metal stripping in the Kennedy home. Id.

On the evening of August 1, Kennedy took Kiernyn into his bedroom to put Kiernyn down for a nap. RP4A 171-75. He had been with Kiernyn in the bedroom for perhaps as long as a half hour when he called for Tammy and told her that Kiernyn wasn't breathing. RP4A 180. Kennedy called 911. RP4A 184. Medical aid responded in a matter of minutes and attempted without success to restart Kiernyn's breathing. RP4A 233. Kiernyn was taken by ambulance to St. John Medical Center. RP4A 239. A team of doctors attempted to revive Kiernyn. RP5B 442, RP8B 823. At last, they were able to get a weak pulse. RP8B 828. Kiernyn was life-flighted to Emmanuel Hospital in Portland. RP8A 830. When Kiernyn arrived there, she was essentially brain dead. RP5B 386. All efforts at resuscitating Kiernyn failed and she was pronounced dead on the afternoon of August 2. RP 7A 625.

Various of Kiernyn's treating medical team opined that the cause of Kiernyn's death was a non-accidental traumatic head injury that brought on cardiac arrest and severe brain swelling and a quick downward spiral. RP5B 390-91, RP8A 713, 831. It was

explained that a child with this significant of a brain injury would be immediately unconscious and would not survive for more than a few minutes without breathing assistance. RP5B 395, RP7A 589, RP8A 779. A cat scan taken at Emmanuel revealed that Kieryn had five subdural bleeds on her brain. RP7A 564-65. Kieryn also had extensive retinal hemorrhaging which can be caused by a severe blow to the head. RP7A 633-35. A post-death skeletal survey of Kieryn revealed that both of her tibias were fractured and had been so for approximately two to four weeks. RP8A 780-81, 783-84. Her leg injuries were not the type of injury that would typically be seen in non-walking infant and was suggestive of child abuse. RP8A 784- 87. Moreover, during the autopsy of Kieryn, the forensic pathologist discovered that Kieryn had a fresh bruise on the back of her head in addition to another week-old brain injury. RP9A 944. This later injury was not related to the events that ended Kieryn's life. RP9A 944.

Kennedy explained to the police and some of the medical personnel that he had been holding Kieryn when she suddenly started to flail and likely hit her head against his chest. RP4B 277, 5A 310, 329, 377. More than one doctor doubted, however, that an 11 month-old could have enough force to cause herself such an

extreme injury by flailing about. RP5B 399, RP8A 714-15. One doctor testified that the retinal hemorrhaging alone was most consistent with a side-impact car accident, a television falling on a child's head, or a fall from a second story window. RP7B 639.

Kennedy was formally charged on September 14, 2004, with causing the death of Kierny Severson. CP 1. On the evening of March 14, 2005, while the charges were pending, Kennedy was invited to the home of his sister-in-law, Diane Ruiz, for an evening of dessert and games. RP6 489. While there, Kennedy demonstrated how on August 1, 2004, he had held Kierny's legs and thrown her over his back and slammed her head onto his back. RP4A 202, 229. He told Tammy that his actions were not accidental but that he could not explain why he did it. RP4A 202.

That same evening, without explanation as to why, Kennedy asked for forgiveness from his brother-in-law Kyle Ruiz. RP6 491. He also told Kyle Ruiz that he hoped to help others some day to not do what he had done. RP6 494.

Kennedy gave more detail to Diana Ruiz. He told her that he had started having dark thoughts in high school. RP6 506. When he would look at Kierny he would want to hurt her even though she had done nothing to upset him. RP6 512. He also said that he

would make Kieryn stop breathing and wondered why he did so. RP6 512. And that when he went into Kieryn's room on August 1, he knew what he was going to do, that he had wanted to hurt Kieryn, and that he had intentionally hurt her. RP6 512-514. Kennedy asked for Diana Ruiz's forgiveness. RP6 514.

The same evening at the same family function, Kennedy told Kay Malchert, Tammy's mother, that he was responsible for Kieryn's death. RP7B 679. Tammy's friend, Christine McKinney, also heard Kennedy say that he held Kieryn by her legs and swung her over his shoulder and that Kieryn probably died because her head hit his back. RP8B 841.

After that evening Tammy talked to Kennedy further. Kennedy admitted slapping Kieryn's arm and causing the long bruise that others had seen. He also described being with Kieryn when her arm "popped." RP4A 205-06.

**(iv) The Trial Court's Findings.**

The trial court, Judge Stonier, chose to believe the evidence presented by the State and found Kennedy guilty as charged of both second degree felony murder and homicide by abuse. RP16 1634-42. The court's oral ruling was reduced to written findings of

fact and conclusions of law and are attached hereto as Appendix A.  
RP17 1672-78; CP 475-484.

**(v) Sentencing.**

Kennedy had no criminal history. The court dismissed the second degree murder to avoid a double jeopardy issue. RP16 1568-69; CP 452. Kennedy's standard range was 240-320 months. CP 438. The court found the aggravating factors that Kieryn was a particularly vulnerable victim and incapable of resistance due to her extreme youth and that Kennedy abused a position of trust to facilitate the commission of the crime. RP17 1668. Based on the aggravating factors, the court sentenced Kennedy to 380 months, 60 months over and above his standard range. RP17 1669; CP 454, 457.

**E. ARGUMENT**

- 1. KENNEDY'S EXCEPTIONAL SENTENCE WAS INVALID. HE DID NOT WAIVE HIS RIGHT TO HAVE A JURY DETERMINE IF THERE WAS A FACTUAL BASIS FOR THE AGGRAVATING SENTENCING FACTORS.**

**(i) Under Blakely, Kennedy is entitled to a jury determination of aggravating sentencing facts.**

The Sixth Amendment to the United States Constitution guarantees the right to a jury trial. It provides that "[i]n all criminal

prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." U.S. Const Amend. VI. In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 435 (2000), the Court held that "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." *Id.* at 490. In *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct.2531, 159 L.Ed.2d 403 (2004), the Court held that *Apprendi* applies to the Sentencing Reform Act of 1981 (SRA). The *Blakely* court further held that the statutory maximum for *Apprendi* purposes is not the maximum sentence a judge may impose after finding additional facts, but is instead the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. *Blakely*, 124 S.Ct. at 2533. In other words, the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he or she may impose without any additional findings. *Id.* When facts that increase the penalty for the crime are neither admitted by the defendant nor found by a jury, the sentence

violates the defendant's Sixth Amendment right to trial by jury. *Id.*  
But nothing prevents a defendant from waiving his *Apprendi* rights.

**(ii) Kennedy did not waive his right to have a jury determine aggravating sentencing factors.**

In waving his right to a jury trial, Kennedy did not waive his right to a jury determination of aggravating sentencing factors. There is a distinction between a waiver of the right to a jury trial on the underlying charges and the waiver of the right to a jury determination of facts that are purely for sentencing purposes. See, e.g., *State v. Giles*, 132 Wn. App. 738, 739, 132 P.3d 1151 (2996), *review denied*, 160 Wn.2d 1006 (2007). Neither Kennedy's written nor oral jury waiver put him on notice that he was also waiving his right to a jury's sentencing determination:

WAIVER OF JURY TRIAL

The undersigned defendant acknowledges that he/she is aware the of the following matters concerning waiver of right to a jury trial:

1. I have been informed and fully understand that under the Constitution of the United States and the State of Washington, and the Criminal rules for Superior Court, I have the right to have my case heard by an impartial jury selected from the county where the crime(s) are alleged to have been committed.
2. I know that I could take part in the selection of the jury who would determine my guilt or innocence.

3. In the jury trial, the State must convince all the twelve citizens of my guilt beyond a reasonable doubt. In a trial by a judge, the State must only convince the judge beyond a reasonable doubt.

4. I have consulted with my lawyer regarding the decision to have my case tried by a jury or by the Court.

5. I freely and voluntarily give up my right to be tried by a jury and request trial by the Court.

CP 412.

MR. BLONDIN: Your Honor, I am going to hand up a waiver of jury trial. We've reviewed it with Mr. Kennedy and had some discussion about it now for oh, the greater half of the last week or two. I believe he understands what it entails. He does have the right to a trial by jury. We would be waiving that right and trying this case to the bench. I provided Mr. Hillman a copy of the document that I have just handed to the court.

JUDGE STONIER: Mr. Kennedy, you understand that you have a right to go to try trial in front of a jury and in the jury there would be twelve people who would decide whether you are jury or not jury. Do you understand that?

DEFENDANT: Yes, Your Honor.

JUDGE STONIER: You would be entitled, along with your attorneys, to question potential jurors and you would be involved in the selection process of the jury. Do you understand that?

DEFENDANT: Yes, Your Honor.

JUDGE STONIER: Alright. And you had discussed this with your attorneys, I understand. Is that correct?

DEFENDANT: Yes, Your Honor.

JUDGE STONIER: And you are now asking to be tried by a judge alone which means by requesting that you are waiving your right to a jury trial and one person, a judge sitting up here will make the decision whether you are guilty or not guilty. Do you understand that?

DEFENDANT: Yes, Your Honor.

JUDGE STONIER: Is that your desire to waive your right to a jury trial, to be tried by a judge.

DEFENDANT: Yes, Your Honor.

JUDGE STONIER: Is that your desire to waive your right to a jury trial, to be tried by a judge?

DEFENDANT: Yes, Your Honor.

JUDGE STONIER: Alright, are you entering this request voluntarily?

DEFENDANT: Yes, Your Honor.

JUDGE STONIER: Alright. And so instead of having to convince twelve people beyond a reasonable doubt at this point it would be one person beyond a reasonable doubt and that would be a judge. Do you understand that?

DEFENDANT: Yes, Your Honor.

JUDGE STONIER: Alright. I'll approve it. Alright. Counsel, let's proceed with other motions at this point.

RP3 211-212.

The right to a jury may only be by knowing, intelligent, and voluntary acts. *Bellevue v. Acrey*, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984). In examining a claimed waiver by a criminal

defendant of a right constitutionally guaranteed to protect a fair trial, every reasonable presumption should be indulged against the waiver of such a right, absent an adequate record to the contrary. The burden to establish a valid waiver is upon the prosecution. *Boykin v. Alabama*, 395 U.S. 238, 242, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969). See also, *Schneckloth v. Bustamonte*, 412 U.S. 218, 235-46, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973). In addition, the failure to raise this issue at trial does not constitute a waiver. An assertion of the violation of the Sixth Amendment right to a jury trial is a manifest error that may be raised for the first time on appeal. *State v. Hochhalter*, 131 Wn. App. 506, 522, 126 P.3d 104 (2006).

Under our facts, Kennedy made no valid waiver of his right to have a jury decide the aggravating sentencing factors in his case. Neither the written nor the oral waiver mentioned anything about this particular right. The remedy on an invalid jury waiver is remand for retrial. *Acrey*, 103 Wn.2d at 212.

**(iii) The trial court had no legal authority to even accept Kennedy's jury trial waiver.**

"If a jury is waived, proof [of the facts supporting the aggravating circumstances] shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the

aggravating facts.” RCW 9.94A.537. In other words, unless a defendant is willing to waive his right to a determination of aggravating sentencing factors by a judge, the judge shall not accept the defendant’s jury waiver. In Washington, there is no absolute right to waive a jury. RCW 10.01.060.<sup>9</sup> Here because the judge accepted Kennedy’s jury waiver as to guilt or innocence without a knowing, intelligent and voluntary waiver of the right to a jury on the sentencing aggravating factors, its acceptance of the jury waiver was in error. RCW 9.94A.537 doesn’t permit a hybrid waiver of one right but not the other.

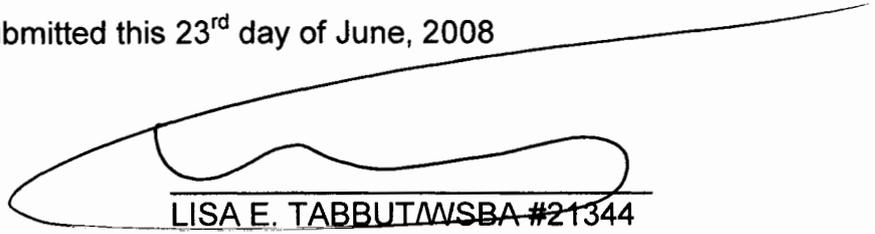
#### **F. CONCLUSION**

The trial court erred when it accepted a jury trial waiver from Andrew Kennedy without also receiving a waiver of his right to a determination of his aggravating sentencing factors by a jury. As such, the court should allow Kennedy to rescind his jury waiver and allow retrial on both guilt or innocence and the sentencing aggravating factors.

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<sup>9</sup> No person informed against or indicted for a crime shall be convicted thereof, unless by admitting the truth of the charge in his plea, by confession in open court, or by the verdict of a jury, accepted and recorded by the court: PROVIDED HOWEVER, That except in capital cases, where the person informed against or indicted for a crime is represented by counsel, such person may, with the assent of the court, waive trial by jury and submit to trial by the court.

Respectfully submitted this 23<sup>rd</sup> day of June, 2008

A handwritten signature in black ink, appearing to read "LISA E. TABBUT", is written over a horizontal line. The signature is stylized with a large loop at the end.

LISA E. TABBUT WSBA #21344  
Attorney for Appellant

FILED  
SUPERIOR COURT

APPENDIX A

2007 SEP 13 P 4: 34

COWLITZ COUNTY  
RONI A. BOOTH, CLERK

BY \_\_\_\_\_ *[Signature]*

STATE OF WASHINGTON  
COWLITZ COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-01203-9

vs.

ANDREW STEVEN KENNEDY,

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
RE: BENCH TRIAL

Defendant.

THIS MATTER having come on before the Honorable James J. Stonier, Judge of the above entitled court, for bench trial on August 1, 2007, and ending on August 17, 2007, the defendant having been present and represented by attorneys Elle Couto and Kevin Blondin, and the State being represented by Assistant Attorney General John Hillman, and the court having observed the demeanor and heard the testimony of the witnesses and having considered all the evidence and the arguments of counsel and being duly advised in all matters, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I.

On August 1, 2007, a Second Amended Information was filed charging the defendant with Murder in the Second Degree (Count I) and Homicide by Abuse (Count II).

FINDINGS OF FACT AND CONCLUSION  
OF LAW RE: BENCH TRIAL - I

142

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Scanned

ORIGINAL

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II.

1 Kiernyn Severson was born on August 4, 2003. She was the biological child of the  
2 defendant's first cousin, Rebecca Severson.

3  
4 III.

5 Kiernyn Severson was a healthy baby at birth.

6 IV.

7 Kiernyn moved to the state of Arkansas after her birth and lived there with her biological  
8 mother.

9 V.

10 On or about May 12, 2004, Kiernyn returned to Longview, Washington. Thereafter,  
11 Kiernyn lived at 501 Mallard Lane.

12 VI.

13 On June 2, 2004, the defendant assumed custody of Kiernyn Severson and thereafter  
14 remained her primary caregiver.

15 VII.

16 Defendant was Kiernyn Severson's godfather.

17 VIII.

18 Tammy Malchert, Patricia Kennedy, and Steven Kennedy never physically harmed  
19 Kiernyn Severson during the time she lived at 501 Mallard Lane.

20 IX.

21 Defendant told others during the time he had custody of her that Kiernyn stopped  
22 breathing for no apparent reason on multiple occasions. Defendant was alone with Kiernyn  
23 during these reported episodes.  
24  
25

X.

1 On July 11, 2004, defendant intentionally caused a spiral fracture of Kiernyn Severson's  
2 left arm.

XI.

3  
4 Defendant was alone with Kiernyn Severson at the time that she suffered a broken arm on  
5 July 11, 2004.

XII.

6  
7 Sometime during July 2004 the defendant intentionally hit Kiernyn on her arm and left a  
8 large bruise.

XIII.

9  
10 Sometime during July 2004 the defendant intentionally applied force/trauma to Kiernyn  
11 Severson's head causing subdural bleeding and a bruise on the back of her head.

XIV.

12  
13 On August 1, 2004, the defendant took Kiernyn Severson into his bedroom and was alone  
14 with her there for 15-30 minutes.

XV.

15  
16 Kiernyn Severson suffered fatal head injuries during the time she was in the bedroom with  
17 the defendant.

XVI.

18  
19 Kiernyn Severson died as a result of non-accidental inflicted trauma that occurred on  
20 August 1, 2004, while alone with the defendant in his bedroom.

477

XVII.

1 Kierny Severson's injuries were not consistent with the version of events described by  
2 the defendant.

XVIII.

3  
4 Kierny Severson's head injuries could not have been caused by Kierny striking her head  
5 on the defendant's chest.

XIX.

6  
7  
8 On March 14, 2005, defendant confessed to his wife and her family members that he  
9 intentionally assaulted Kierny Severson on August 1, 2004.

10 XX.

11 On March 14, 2005, defendant admitted that Kierny's death was not an accident and he  
12 knew he was going to hurt her when he took her into his bedroom on the night of August 1,  
13 2004.

14 XXI.

15 On March 14, 2005, defendant admitted that he wanted to hurt Kierny Severson when he  
16 saw her during the time that she lived in his home from May 12, 2004, to August 1, 2004.  
17 Defendant further admitted that he was having "dark thoughts."

18 XXII.

19  
20 On March 14, 2005, the defendant admitted that during the time he had custody of Kierny  
21 Severson he would intentionally stop her breathing.

22 XXIII.

23 On March 14, 2005, defendant admitted that on August 1, 2004, he took Kierny by the  
24 legs and "slammed" her head against his back.

XXIV.

1 On March 14, 2005, defendant admitted that he did the worst thing that anyone could do  
2 to Kierny Severson.

3  
4 XXV.

5 On March 14, 2005, defendant admitted that on August 1, 2004, Kierny was bleeding  
6 when he set her head on a pillow in his bedroom.

7 XXVI.

8 On March 14, 2005, the defendant admitted that "the bruising, everything, it was all me."

9 XXVII.

10 On March 14, 2005, the defendant asked his family members for forgiveness for causing  
11 Kierny Severson's death.

12 XXVIII.

13 On March 14, 2005, defendant admitted to his mother Patty Kennedy that he intentionally  
14 hurt Kierny and caused her death.

15 XXIX.

16 The testimony of Diana Ruiz, Kyle Ruiz, Tammy Malchert, Kaye Malchert, and Christie  
17 McKinney was credible with respect to their descriptions of the events of March 14, 2005.

18 XXX.

19 In April 2005, defendant admitted to Tammy Malchert that he heard Kierny Severson's  
20 arm "pop" on the night of July 11, 2004.

21 XXXI.

22 In April 2005, defendant admitted to Tammy Malchert that he hit Kierny Severson on the  
23 arm and left a large bruise that was subsequently attributed to a fall from a chair.  
24  
25

479

## XXXII.

1 The testimony of Tammy Malchert was credible with respect to statements the defendant  
2 made to her at the Cowlitz County Jail in April 2005.

## XXXIII.

3  
4 The following acts were intentional acts by the defendant against Kierny Severson prior  
5 to the fatal injuries inflicted on August 1, 2004: (1) stopping her breathing on multiple  
6 occasions, (2) hitting her in the arm and leaving a large bruise, (3) breaking her left arm on July  
7 11, 2004, and (4) inflicting head injuries that were evidenced by older blood in the subdural  
8 space, subarachnoid space, and subscalpular region at autopsy. Defendant was alone with  
9 Kierny Severson during the infliction of all of these injuries.  
10

## XXXIV.

11  
12 The court cannot find beyond a reasonable doubt that the defendant caused the fractures  
13 of Kierny Severson's legs.

## XXXV.

14  
15 The court discounts the majority of the testimony of Dr. Janice Ophoven as not credible.  
16 Dr. Ophoven's testimony was riddled with non-scientific logic and major inconsistencies.  
17

## XXXVI.

18  
19 Dr. Ophoven's opinion that Kierny Severson died from hypoxia due to pneumonia was  
20 not supported by the evidence.

## XXXVII.

21  
22 Dr. Ophoven's testimony that she knows that Kierny was not assaulted on August 1,  
23 2004, was not credible.  
24  
25

XXXVIII.

1 Dr. Ophoven's testimony that Kieryn Severson did not suffer leg fractures was not  
2 credible.

3  
4 XXXIX.

5 Kieryn Severson had an ear infection on June 15, 2004. Dr. Ophoven's testimony to the  
6 contrary was not credible.

7 XL.

8 On July 31, 2004, and August 1, 2004, Kieryn Severson was not feverish, was not  
9 vomiting, was active, interactive, and playful.

10 XLI.

11 The doctors who actually examined and cared for Kieryn Severson on August 1 and 2,  
12 2004, were credible witnesses. This includes Dr. Hoyt, Dr. Kato, Dr. Hicks, Dr. Cristofani, Dr.  
13 Metrick, ~~Dr. Bennett~~, Dr. Quint, Dr. Heskett, and Dr. Goodman.

14 XLII.

15 The opinions of those medical doctors who testified that Kieryn Severson died from non-  
16 accidental inflicted head trauma was credible.

17 XLIII.

18 On August 1, 2004, the defendant took Kieryn Severson into his bedroom and  
19 intentionally swung her head into a stationary object with violent force.

20 XLIV.

21 On August 1, 2004, defendant recklessly inflicted substantial bodily harm and caused the  
22 death of Kieryn Severson. Kieryn died on August 2, 2004, from the injuries she sustained on  
23 August 1, 2004.  
24  
25

XLV.

1 Defendant's act of swinging Kieryn Severson by her legs and striking her head against an  
2 object manifested an extreme indifference to the life of Kieryn Severson.

3  
4 XLVI.

5 Defendant engaged in a pattern or practice of physically abusing and/or torturing Kieryn  
6 Severson prior to August 1, 2004.

7 XLVII.

8 Defendant's act of causing the death of Kieryn Severson occurred on August 1, 2004, in  
9 Cowlitz County, Washington.

10 XLVIII.

11 Kieryn Severson was 362 days old, weighed 23 lbs., and could not walk on August 1,  
12 2004.

13 XLIX.

14 Kieryn was a particularly vulnerable victim and she was incapable of resisting the crimes  
15 due to extreme youth.

16 L.

17 Defendant used his position of trust as godfather and primary caregiver to facilitate the  
18 commission of the crimes.  
19  
20  
21  
22  
23  
24  
25

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the parties and subject matter.

II.

All relevant events or at least one element of each crime occurred in Cowlitz County, Washington.

III.

ANDREW STEVEN KENNEDY is guilty beyond a reasonable doubt of the crime of Murder in the Second Degree as charged in Count I. Defendant is guilty beyond a reasonable doubt in that, on August 1, 2004, in the State of Washington, the defendant intentionally assaulted Kierny Severson and recklessly inflicted substantial bodily harm, and caused the death of Kierny Severson during the course of and in furtherance of the crime of assault in the second degree.

IV.

ANDREW STEVEN KENNEDY is guilty beyond a reasonable doubt of the crime of Homicide by Abuse as charged in Count II. Defendant is guilty beyond a reasonable doubt in that, on August 1, 2004, in the State of Washington, the defendant caused the death of Kierny Severson by engaging in conduct manifesting an extreme indifference to Kierny's life, and the defendant had previously engaged in a practice or pattern of physical abuse and/or torture of Kierny Severson.

V.

The aggravating circumstance that defendant knew or should have known that Kieryn Severson was particularly vulnerable and incapable of resisting the crime due to extreme youth was proved beyond a reasonable doubt in that Kieryn Severson was 362 days old, weighed 23 lbs., and could not walk at the time of her death.

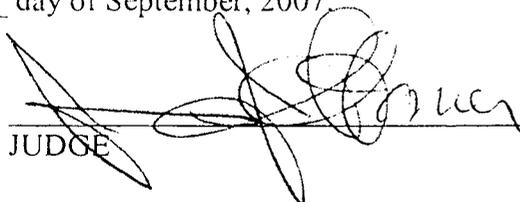
VI.

The aggravating circumstance that the defendant abused a position of trust to facilitate the commission of the crime was proved beyond a reasonable doubt in that the defendant was Kieryn's godfather and primary caregiver at the time he abused and killed her.

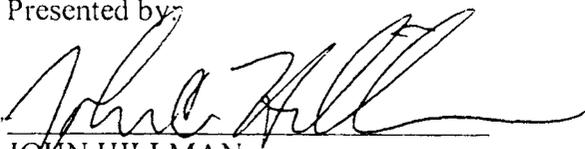
VII.

Defendant's crimes were incidents of domestic violence as that term is defined in RCW 10.99.020 because the defendant and Kieryn Severson resided together in the same home.

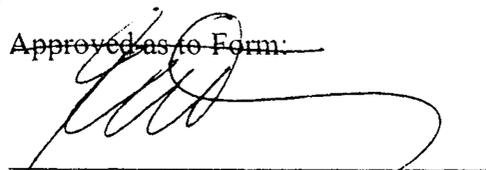
DONE IN OPEN COURT this 13<sup>th</sup> day of September, 2007.

  
\_\_\_\_\_  
JUDGE

Presented by:

  
\_\_\_\_\_  
JOHN HILLMAN  
Assistant Attorney General  
WSB # 25071

Approved as to Form:

  
\_\_\_\_\_  
ELEANOR COUTO  
Attorney for Defendant  
WSB # 19544

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DIVISION II

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STATE OF WASHINGTON  
BY JMF  
DEPUTY

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

STATE OF WASHINGTON,	)	Court of Appeals No. 36740-8-II
	)	
Respondent,	)	
	)	AFFIDAVIT OF MAILING
vs.	)	
	)	
ANDREW S. KENNEDY,	)	
	)	
Appellant.	)	

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LISA E. TABBUT, being sworn on oath, states that on the 23rd day of June 2008,  
affiant deposited in the mails of the United States of America, a properly stamped envelope  
directed to:

John C. Hillman  
Assistant Attorney General  
800 5<sup>th</sup> Ave., Ste 2000  
Seattle, WA 98104-3188

Andrew Kenndy  
c/o Patricia Kennedy  
501 Mallard Lane  
Longview, WA 98632

and that said envelope contained the following:

AFFIDAVIT OF MAILING - 1 -

LISA E. TABBUT

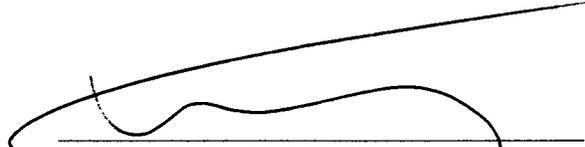
ATTORNEY AT LAW

P.O. Box 1396 • Longview, WA 98632  
Phone: (360) 425-8155 • Fax: (360) 425-9011

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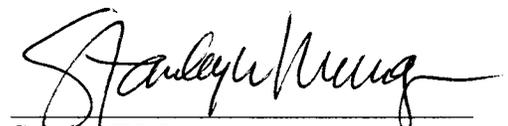
- (1) APPELLANT'S BRIEF
- (2) AFFIDAVIT OF MAILING (AAG only)

Dated this 23rd day of June 2008,

  
\_\_\_\_\_  
LISA E. TABBUT, WSBA #21344  
Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 23rd day of June 2008.



  
\_\_\_\_\_  
Stanley W. Munger  
Notary Public in and for the  
State of Washington  
Residing at Longview, WA 98632  
My commission expires 05/24/12