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## **A. STATEMENT OF THE CASE**

On January 12, 2007, Respondent Brian Garner failed to abide by his sex offender registration requirements with the Cowlitz County Sheriff. The Cowlitz County Prosecutor charged Garner with failure to register. CP 1-2. After protracted negotiations, Garner entered a guilty plea to an amended information on June 6, 2007.<sup>1</sup> RP 1-3; CP 3-10.

At the plea hearing, the State asked the court to consider Garner's conviction as an unranked offense with a standard range of 0-12 months.<sup>2</sup> RP 1, 3; CP 4. The State asked the court to impose a 17-month exceptional sentence. RP 3; CP 5. Garner agreed with the sentence. RP 4. Prosecutor Mike Nguyen further specified in his plea recommendation on Garner's plea form that Garner not be given community custody. CP 5.

The court granted the State's sentencing request: an exceptional sentence upward to 17 months and no community custody. CP 17. The judgment and sentenced clarifies that the

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<sup>1</sup> The State did not include the amended information in its Clerk's Papers. Instead, it only included the original information. CP 1-2.

<sup>2</sup> Garner's criminal history, as reflected in the judgment and sentence, indicates two prior convictions for failure to register. One of the convictions is from Idaho. Garner did not object to the criminal history. There was no discussion about the comparability of the Idaho failure to register to Washington law. CP 13.

court imposed the exceptional sentence because of parties' stipulation to it. CP 14.

The State did not appeal Garner's sentence.

Nine months later, the court received a letter from the Sentencing Guidelines Commission (SGC). CP 24-37. The SGC recommended that the court amend Garner's judgment and sentence to add 36-48 months of community custody because Garner's "sentence is eligible for 36-48 months of community custody." CP 24. At a hearing on March 26, 2008, the court declined to amend the judgment and sentence to add community custody. RP 10-11. Instead, it entered the following bench order to clarify Garner's sentence:

Pursuant to the DOC's remand of Mr. Garner's case to this court for clarification of the sentence, this court finds that community custody is not imposed in the case and does not impose it as part of the exceptional sentence.

CP 38.

Although the State has appealed the court's order, CP 39-40, it does not challenge the court's actual order in the body of its appeal. Brief of Appellant at pages 1-3.

**B. ARGUMENT**

**1. THIS COURT SHOULD STRIKE THE STATE'S BRIEF AS IT DOES NOT ASSIGN ERROR TO ANY ACTION TAKEN BY THE TRIAL COURT.**

RAP 10.3(a)(4) requires that an Appellant's brief contain assignments of error. "The brief of appellant shall contain . . . a separate and concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." RAP 10.3(a)(4). The State's brief contains no assignments of error. Consequently, this court should strike the State's brief. An appellate court may decline to consider an issue not raised in the assignment of error portion of the proponent's brief. State v. DiLuzio, 121 Wn. App. 822, 830, 90 P.3d 1141 (2004).

**2. THE STATE HAS NO REMEDY ON APPEAL BECAUSE IT DOES NOT CHALLENGE ANY ACTION TAKEN BY THE TRIAL COURT.**

As noted under Argument 1, the State fails to assign error to any action taken by the trial court. Instead, the State seemingly seeks an advisory opinion from this Court when it asks in its issue

statement, "Is community custody required when a defendant has a felony conviction for failure to register as a sex offender?" Appellant's Brief at page 1. The trial court did not answer that question and, consequently, neither should this court.

When asked by the Sentencing Guidelines Commission to amend Garner's judgment and sentence to add 36-48 months of community custody, the trial court did not do so. Instead, the court clarified by its order that it imposed the penalty the State originally requested in its plea agreement. In short, the court clarified that the lack of community custody was part of Garner's exceptional sentence:

Pursuant to the DOC's remand of Mr. Garner's case to this court for clarification of the sentence, this court finds that community custody is not imposed in the case and does not impose it as part of the exceptional sentence.

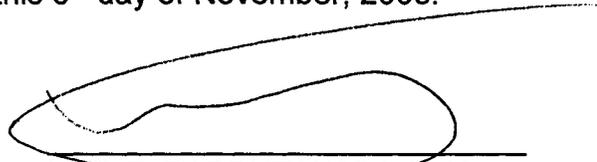
CP 38.

The State doesn't challenge this clarification. Without a challenge to what the trial court actually did, there is no remedy available to the State. The appeal should be denied.

### **C. CONCLUSION**

The State's appeal should be dismissed. It fails to seek any relief that this court can grant.

Respectfully submitted this 3<sup>rd</sup> day of November, 2008.

A handwritten signature in black ink, appearing to read "LISA E. TABBUT", is written over a horizontal line. The signature is somewhat stylized and loops back to the left.

LISA E. TABBUT/WSBA #21344  
Attorney for Respondent

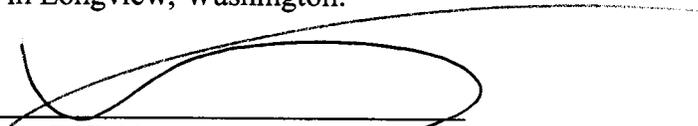


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I certify under penalty of perjury pursuant to the laws of the State of Washington  
that the foregoing is true and correct.

Dated this 4th day of November 2008, in Longview, Washington.



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