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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where the court correctly instructs the jury as to the mental elements and the law on diminished capacity and voluntary intoxication, was defense counsel ineffective for failing to propose an instruction that did not accurately state the law?
2. Whether the State has the burden to disprove diminished capacity?
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5. Whether the instructions were sufficient where they accurately stated the law and permitted each side to argue their respective theories of the case?
6. Whether the defendant waived his objection that the instructions defining terms were unconstitutionally vague when he failed to propose an instruction further defining the terms?
7. Whether the court abused its discretion in imposing an exceptional sentence of 600 months?
8. Whether the court's rulings amounted to cumulative error?

B. STATEMENT OF THE CASE.

1. Procedure

On July 27, 2007, the State charged Francisco Sao, hereafter referred to as the defendant, with one count of felony murder in the second degree. The predicate felonies alleged were assault of a child in the first and second degrees. CP 3-4. In the charging document, the State also alleged the aggravating circumstances that the victim was particularly vulnerable or incapable of resistance (RCW 9.94A.535(3)(b)) and that the defendant abused a position of trust (.535(3)(n)). On September 12, 2007, the State filed an Amended Information, adding one count each of harassment and witness tampering. CP 5-6.

On July 3, 2008, the trial began, the Hon. Vicki L. Hogan presiding. RP 3. At the conclusion of the trial, the jury found the defendant guilty of all counts, as charged. CP 66-68. The jury also found that the State had proven both aggravating circumstances. CP 70.

On August 8, 2008, the court imposed an exceptional sentence, sentencing the defendant to 600 months in prison. CP 87. The court filed findings and conclusions a short time later. CP 95-98. The defendant timely filed a notice of appeal at the time of sentencing. CP 80.

2. Facts

In 2007, Kathleen Chung was 18 years old. RP 376. She had been in a relationship with Francisco Sao, the defendant, since she was 16. RP

377. At one point, the couple lived with her mother, Ya Chung, but the defendant and the elder Ms. Chung did not get along. RP166, 171.

In July 2007, the couple lived in an apartment at 12717 Addison St. in Lakewood. RP 200. The defendant and Kathie Chung had two children: 2 year old Leilani, or LaLa; and 3 month old Trumane. RP 376. The defendant had a history of domestic violence against both Kathie (RP 490) and Lala (RP 492). The defendant worked doing labor jobs for a property manager. RP 379.

On July 25, 2007, the defendant had been working all day. When he got home, Kathie made him dinner. RP 382. He then gave Trumane a bath and dried him. The defendant changed him and dressed him. RP 384, 386. He then fed him. RP 391.

Ya Chung and Lien Chung came to the apartment to see their grandchildren and to take Lala for the night. RP 173. The defendant was not happy about the grandparents' involvement and influence with Kathie. RP 397, 402. After the two older women left, the defendant yelled at Kathie and threatened to assault her. RP 398, 402.

After Ya and Lien left, Kathie could hear heard a thumping noise coming from the bedroom. RP 403. It sounded like someone was banging or punching a wall. RP 403. She went into the bedroom. She saw that Trumane did not look right. RP 406. His lips were blue. He was limp. RP 407. He had difficulty breathing and his stomach was swollen. RP 408.

When they pulled up Trumane's shirt, Kathie saw the bruises on his belly. RP 416. The defendant admitted that he had hit Trumane. RP 416.

Kathie wanted to take Trumane to the hospital, but the defendant told her "not yet." RP 409. While the two discussed what to do, Trumane's condition grew worse. RP 410-412.

Shortly thereafter, Kathie carried Trumane to the car to take him to the hospital. A neighbor saw her and sought to help. He called 911 for medical aid. RP 418. Trumane was not breathing. RP 418. The neighbor did CPR until the fire department arrived. RP 419.

The Lakewood Fire Department arrived at approximately 10:56 p.m. RP 210, 544. Travis Smith, a paramedic, began emergency treatment of Trumane. The baby was not breathing and had no pulse. RP 205. Despite efforts of the emergency workers, they were unable to restart breathing and were unable to get a pulse from Trumane. RP 209-210. When the paramedic tried to begin CPR, he discovered that every rib below Trumane's armpits was broken in half. RP 208. Trumane also had bruises on his belly. RP 204, 205. He was essentially dead at that point. RP 214. An ambulance took Trumane to nearby St. Clare Hospital. RP 213.

Dr. James Lee examined Trumane in the emergency room. Trumane was still not breathing and had no heartbeat. RP 624. Despite additional efforts to resuscitate him, Trumane's condition remained unchanged. RP 630. Dr. Lee officially determined that Trumane was dead.

RP 630. Dr. Lee observed the bruises on Trumane's buttocks and trunk.

RP 631.

Dr. Leon Kiesel, the Pierce County Medical Examiner conducted an autopsy. RP 716. The autopsy confirmed that most of Trumane's ribs were broken. RP 722, 725. Some of the rib fractures were old and rehealing. RP 722. Some of the older fractures had recently been rebroken. RP 725. The fractures were not caused by CPR. 744.

Dr. Kiesel found that Trumane's stomach and liver had both been lacerated in several places by blunt force trauma. RP 726. The bruises on the abdomen were consistent with a fist or hand striking it. RP 721. The cause of the injuries and death was blunt force trauma. RP 741.

A few days after Trumane died, the defendant fled to California. RP 614. Police later arrested him in Stockton and held him on the warrant from Washington. RP 551.

Lakewood Police Det. Eggleston went to California to interview the defendant. RP 552. In the course of a long interview, the defendant eventually admitted that he had struck Trumane. He admitted that he had spanked Trumane very hard. RP 660, 661. The defendant admitted that he had punched Trumane in the stomach at least three times, as hard as he could. RP 662, 664, 667. He explained that he was angry about his relationship with Kathie, so he took it out on Trumane. RP 668.

C. ARGUMENT.

1. THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL WHERE THE COURT CORRECTLY INSTRUCTED THE JURY REGARDING THE INTENT ELEMENT AND DIMINISHED CAPACITY.

a. Trial counsel was not ineffective where he proposed instructions regarding the issues of diminished capacity and voluntary intoxication.

The defendant has the burden to show ineffective assistance of counsel. He must show 1) that counsel's performance was deficient; and 2) that the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Cienfuegos*, 144 Wn.2d 222, 226-227, 25 P.3d 1011 (2001).

Cienfuegos was charged with first degree escape. He had been in custody for a drug charge. He had ingested drugs before his arrest and was still under the influence at the time he fled from officers transporting him from court. His defense was that, because of the influence of the drugs, he did not understand what he was doing when he ran from the officers. *Id.*, at 226.

Cienfuegos argued on appeal that his attorney was ineffective for failing to propose an instruction on diminished capacity. The Supreme Court found that Cienfuegos had been entitled to such an instruction legally. *Id.*, at 228. However, the Court held that he was not prejudiced by

failure to propose the instruction because the court properly instructed the jury regarding the mental elements, which permitted counsel to argue the defense theory of the case. *Id.*, at 230.

In the present case, the court did instruct the jury regarding diminished capacity (CP 42) as proposed by the defense (CP 20). The court also instructed the jury regarding the elements that the State was required to prove beyond a reasonable doubt. CP 50.

Because felony murder was charged, the court instructed the jury on the predicate crimes of assault of a child in the first and second degrees. CP 38, 46. Felony murder does not set forth a requisite mental state; instead, the state of mind required for the murder is the same as that which is required to prove the predicate felony. *See State v. Dennison*, 115 Wn.2d 609, 615, 801 P.2d 193 (1990). Therefore, the instructions here included the mental elements that the defendant intentionally assaulted another and recklessly inflicted the requisite level of harm. CP 38, 60.

The instructions correctly stated the law. The instructions also permitted the defense to argue its theory of the case. The defense argument focused on the defendant's lack of intent; his diminished capacity. 7/23/2008 RP 52-53, 56-57. He argued the defense and State psychologists' testimony in the light most favorable to the defendant. 7/23/2008 RP 51-53, 57. It is not ineffective assistance of counsel where the jury rejects the defendant's theory of the case and the defendant's expert.

b. The State does not have the burden to disprove diminished capacity.

The defendant is correct that once the defendant produces some evidence of self defense, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. See *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). That is because the act of self defense is a lawful act, not a crime. Justifiable homicide is established by statute. RCW 9A.16.050.

Self defense was not an issue in the present case. Requiring the State to disprove self defense is irrelevant to the issue of the burden of proof of the requisite mental state.

Washington courts have never required the State to disprove diminished capacity. In fact, *State v. James*, 47 Wn. App. 605, 609, 736 P.2d 700 (1987) specifically holds that the State has no such burden. The State always retains the ultimate burden of proving the requisite mental state beyond a reasonable doubt, and the question for the trier of fact is whether the State has proven all essential elements of the charged crime beyond a reasonable doubt. *Id.*

Unlike self-defense or insanity, diminished capacity is not a complete defense. Expert testimony may be admitted to help the jury to understand the defendant's mental state and the effect of a mental disorder upon it. See *State v. Atsbeha*, 142 Wn.2d 904, 16 P.3d 626 (2001).

Diminished capacity has been described as a rule of evidence that allows the defense to introduce evidence relevant to his state of mind. *See State v. Stumpf*, 64 Wn. App. 522, 525 n.2, 827 P.2d 294 (1992).

Diminished capacity merely raises an issue for the jury to consider when deciding if the State has proven the mental elements beyond a reasonable doubt. *State v. Nuss*, 52 Wn. App. 735, 739, 763 P.2d 1249 (1988).

In the present case, the defense presented Dr. Vincent Gollogly, a private forensic and clinical psychologist, regarding the issue of intent and diminished capacity. RP 816. Dr. Gollogly diagnosed the defendant with “amphetamine-induced psychosis.” RP 825. He testified that, based upon the defendant’s methamphetamine use, it was possible that the defendant was unable to form the intent to commit the crime against the child. RP 829.

However, as the court correctly instructed, the jury was not bound to his opinion. CP 35. Dr. Ronnei, from Western State Hospital, also evaluated the defendant. She and her fellow psychologist, Dr. Knopp, concluded that there was no evidence that the defendant lacked the capacity to form the requisite intent. RP 934. The account the defendant gave to Dr. Gollogly was contradicted by the defendant’s previous statement to police (RP 565), and by Kathie Chung’s testimony (RP 394, 477, 680).

The evidence in this case did not support the defendant’s claim of diminished capacity. Other than the defendant’s self-serving account to

Dr. Golloly, there was no evidence that he was in any type of psychotic state. There was little evidence that he was even intoxicated. Even so, the court gave an instruction (CP 41), and defense counsel argued voluntary intoxication. 7/23/2008 RP 50-51, 52, 57.

Where ineffective assistance is alleged, a defense counsel's performance at trial is evaluated from the entire record. *See State v. Kolesnik*, 146 Wn. App. 790, 799, 192 P.3d 937 (2008). Defense counsel here was presented with a case where the defendant admitted that he beat a three month old baby to death. Counsel presented a mental defense despite very little evidence to support it. He got the defendant's version of the crime in without the defendant having to take the stand. On appeal, the defendant fails to make any showing that counsel's performance was deficient, much less that he was prejudiced.

The defendant's argument that the jury was improperly instructed is without merit. The implication (App. Br., at 21) that the jury was somehow required to accept Dr. Golloly's testimony and conclusions is unsupported by the law. The jury was properly instructed regarding evaluation of evidence and the burden of proof. The trial court did not err.

2. WHERE AGGRAVATING CIRCUMSTANCES FOR SENTENCING ARE NOT ELEMENTS OF THE CRIME CHARGED, THE COURT PROPERLY INSTRUCTED THE JURY REGARDING THE ELEMENTS OF THE CRIME.

- a. While an aggravating factor for the purpose of sentencing must be pleaded and proved, it is not an element of the crime charged.

An aggravating factor is not an element of a crime, but serves to aggravate the penalty. *State v. Kincaid*, 103 Wn.2d 304, 312, 692 P.2d 823 (1985).

Defendant contends that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) require this court to treat the aggravating circumstances set forth in RCW 9.94A.535(3) as “elements” of an aggravated version of the crime of murder. Appellant brief at p.27 ff. Defendant’s argument misconstrues the holdings of these cases.

In *Apprendi*, the court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum,” whether the statute calls it an element or a sentencing factor, “must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. at 490. In *Blakely v. Washington*, 542 U.S., at 303, the court made clear that for “*Apprendi* purposes [, the statutory maximum] is the maximum sentence a judge may

impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant;” it did not matter that the legislature had enacted a longer term which it labeled the “statutory maximum” for the crime.

Nothing in *Apprendi* or its progeny holds that if a state legislature wants certain facts to affect the length of sentence, that it must include such facts within the elements of the substantive crime. Rather these cases hold that you cannot avoid the constitutional requirement that the jury determine, beyond a reasonable doubt, all relevant sentencing facts by labeling these determinations as “sentencing factors” rather than “elements” of the crime. The Washington Supreme Court has acknowledged this distinction:

While an aggravating factor must be treated like an element for purposes of the Sixth Amendment to the United States Constitution, it is decidedly not an element needed to convict the defendant of the charged crime.

*State v. Roswell*, 165 Wn.2d 186, 194, 196 P.3d 705 (2008).

Under Washington’s post- *Blakely* sentencing scheme, the jury determines whether the state has proved beyond a reasonable doubt: 1) the elements of the substantive crime of second degree [felony] murder; and, 2) the existence of an aggravating circumstance under RCW 9.94A.535(3). The court then decides whether an exceptional sentence is warranted. This statutory scheme comports with the constitutional requirements of *Apprendi*, but it does not turn an aggravating

circumstance into an element of the crime. Thus, defendant's efforts to rely on case law involving constitutional error regarding deficient instructions on the elements of a crime is misplaced.

- b. A person convicted of a crime is not entitled to the presumption of innocence; nor is the court required to instruct regarding a presumption of clemency or leniency.

As noted above, the determination of an aggravated exceptional sentence is a two step process. RCW 9.94A.537 lays out the procedure for sentences above the standard range. The jury decides if the alleged facts have been proven. The court decides whether to actually impose an exceptional sentence, and if so, the length of the sentence.

The facts supporting the aggravating circumstance must be proved to a unanimous jury beyond a reasonable doubt. RCW 9.94A.537(3). If the jury finds the facts supporting an aggravated sentence, then the court may sentence the defendant up to the statutory maximum:

(6) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

RCW 9.94A.537.

Once a defendant is convicted of a crime, there is no presumption of innocence. *See State v. Finch*, 137 Wn.2d 792, 865, 975 P.2d 967 (1999); *State v. Benn*, 120 Wn.2d 631, 668, 845 P.2d 289 (1993).

The jury's task under RCW 9.94A.537 is fact-finding, not sentencing. Therefore, there is also no presumption of leniency. It is irrelevant to their determination.

Because the court decides whether to impose the aggravated sentence, and how long it should be, leniency is a consideration for the trial judge. The statutory language says the court "may" sentence above the standard range, "if" it finds that the facts found are "substantial and compelling reasons justifying the exceptional sentence." RCW 9.94A.537(6), *supra*. Therefore, the court's decision is reviewed for abuse of discretion. *State v. Hale*, 146 Wn. App. 299, 189 P.3d 829 (2008).

In comparison, in the special sentencing proceedings under RCW 10.95.050(2) the jury's decision determines both the factors and the sentence. The court has no discretion. RCW 10.95.030, .080. The statutory language of RCW 10.95.030(1) presumes leniency. The Legislature has not chosen to include the same presumption under the statutory scheme for an aggravated sentence under RCW 9.94A.537.

The instructions to the jury correctly stated the law and the State's burden. The court committed no error.

- c. Defendant's failure to propose an instruction re: aggravating circumstances waives claim of error that language was unconstitutionally vague.

An objection to a jury instruction cannot be raised for the first time on appeal unless the instructional error is of constitutional magnitude.

*State v. Dent*, 123 Wn.2d 467, 869 P.2d 392 (1994); *State v. Fowler*, 114 Wn.2d 59, 69, 785 P.2d 808 (1990). The Supreme Court has generally refused to review claims of error regarding instructions on sentencing factors when the issue was not preserved in the trial court. See *State v. Eckenrode*, 159 Wn.2d 488, 491, 150 P.3d 1116 (2007); *State v. Schelin*, 147 Wn.2d 562, 576-77, 55 P.3d 632 (2002) (Alexander, J. concurring); see also *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (jury instructions not objected to become the law of the case); *State v. Salas*, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995) ("If no exception is taken to jury instructions, those instructions become the law of the case."); *State v. Hames*, 74 Wn.2d 721, 725, 446 P.2d 344 (1968).

Jury instructions are sufficient when, read as a whole, they accurately state the law, do not mislead the jury, and permit each party to argue its theory of the case. *State v. Teal*, 152 Wash.2d 333, 339, 96 P.3d 974 (2004). Whether words in an instruction require further definition is a matter of judgment exercised by the trial court. *State v. O'Donnell*, 142 Wn. App. 314, 325, 174 P.3d 1205 (2007). In a criminal trial, the court is

not required to define words that have an ordinary meaning. *State v. Johnson*, 119 Wn.2d 167, 173, 892 P.2d 1082 (1992).

If the defendant believes that the language or definition in a jury instruction is faulty, he has a remedy in the trial court: propose a different one. Failure to propose an instruction with the language argued by the defendant precludes a claim that the language used or definition given was unconstitutionally vague. *State v. Whitaker*, 133 Wn. App. 199, 233, 135 P. 3d 923 (2006).

Whitaker was tried for aggravated first degree murder. After his conviction, he argued on appeal that the trial court erred by failing to define “major participant.” He contended that he could raise it for the first time on appeal because the court’s instruction was unconstitutionally vague. The Supreme Court rejected the argument, first pointing out that the defendant cannot raise the absence of a definitional instruction on appeal. *Id.*, at 232. The Court went on to reject the vagueness argument:

This rationale applies to statutes and official policies, not to jury instructions. Unlike citizens who must try to conform their conduct to a vague statute, a criminal defendant who believes a jury instruction is vague has a ready remedy: proposal of a clarifying instruction. Following Scott, we conclude that Whitaker’s failure to propose a definition of “major participant” precludes review of his claim of error.

*Whitaker*, at 233.

In the present case, the defendant had the opportunity to propose instructions. He proposed two instructions: one for diminished capacity

and one for voluntary intoxication. The court used both. Except for objecting that under Washington law, felony murder does not have any lesser included offenses, he did not object or take exception to any of the other instructions given. Therefore, he waived or failed to preserve the alleged error.

The words of the aggravating circumstance “particularly vulnerable or incapable of resistance” are not technical. They have an ordinary meaning to a lay person, especially in the context of the present case. The victim was a 3 month old baby who could not walk, talk, run, hide, or scream for help. It is perhaps conceivable that a defense attorney could argue that such a victim did not fall into this category, but it would be at the expense of the credibility of the argument and the attorney.

3. THE COURT DID NOT ABUSE ITS  
DISCRETION IN SENTENCING THE  
DEFENDANT TO 600 MONTHS IN PRISON.

Once the sentencing court finds substantial and compelling reasons for imposing an exceptional sentence, it is permitted to use its discretion to determine the precise length of that sentence. *State v. Ritchie*, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995); *State v. Ross*, 71 Wn. App. 556, 568, 861 P.2d 473, 883 P.2d 329 (1993). The length of an exceptional sentence is reviewed for abuse of discretion. *State v. Branch*, 129 Wn.2d 635, 649, 919 P.2d 1228 (1996) (citing *State v. Ritchie, supra*). An exceptional

sentence is clearly excessive if (1) it is imposed on untenable grounds or for untenable reasons; (2) or it is an action no reasonable judge would have taken. *Branch*, 129 Wn.2d at 650. “The practical effect of this standard is to guarantee that an appellate court will ‘rarely, if ever’ overturn an exceptional sentence because of its length.” *Id.* at 864 (citing *State v. Clinton*, 48 Wn. App. 671, 678, 741 P.2d 52 (1987)). The clearly excessive prong gives “courts near plenary discretion to affirm the length of an exceptional sentence, just as the trial court has all but unbridled discretion in setting the length of sentence. *Id.* at 864; *State v. Oxborrow*, 106 Wn.2d 525, 529-30, 723 P.2d 1123 (1986).

A sentence is clearly excessive only if its length, in light of the record, “shocks the conscience.” *State v. Vaughn*, 83 Wn. App. 669, 924 P.2d 27 (1996) (citing *Ritchie*, 126 Wn.2d at 392-393).

In the present case, the court heard the evidence that the defendant beat to death a 3 month old baby who could not walk, talk, or resist in any way. The trial also revealed evidence of prior abuse: broken ribs that were healing. The defendant had previously beaten the child’s mother and 2 year old sister. The court heard testimony that the defendant abused two helpless children to “get to” Kathie Chung. RP 492.

Under the facts and circumstances of this case, the sentence imposed was within the court’s discretion.

4. THE TRIAL COURT DID NOT COMMIT CUMULATIVE ERROR.

The doctrine of cumulative error recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court’s weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

In this case, for the reasons set forth in the preceding sections, defendant has failed to establish any error, much less an accumulation of it. No cumulative error occurred. The court should reject defendant’s request for a new trial.

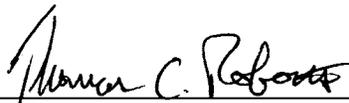
D. CONCLUSION.

Francisco Sao had a full and fair trial where the State was required to prove all the elements against him beyond a reasonable doubt. The court correctly instructed the jury on the law. For the reasons argued above,

the State respectfully requests that the defendant's conviction and sentence be affirmed.

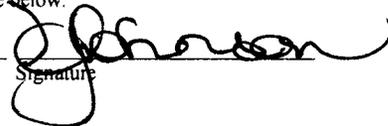
DATED: SEPTEMBER 3, 2009.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
THOMAS C. ROBERTS  
Deputy Prosecuting Attorney  
WSB # 17442

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/3/09   
Date Signature

STATE OF WASHINGTON  
BY  DEPUTY  
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COURT OF APPEALS  
TACOMA, WA