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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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

NO. 38646-1-II

STATE OF WASHINGTON,
Plaintiff,

v.

KIMBERLY ANN PHILLIPS,
Appellant.

STATEMENT OF ADDITIONAL GROUNDS


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- a. The burden of proving the aggravating factor beyond a reasonable doubt was the State's.
- b. The defense bore the burden of having to prove the victim/witnesses incompetent to testify for the very same reasons, effectively reversing the State's burden of proof in violation of the defendant's constitutional right to Due Process.
- c. The aggravating factor of abuse of a position of trust is an included offense of particular vulnerability as it is one of the criteria of the statutory definition of "vulnerable adult".

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1. INTRODUCTION

Appellant Kimberly Phillips submits the following points as Additional Grounds for the Court's consideration pursuant to RAP 10.10.

2. ASSIGNMENTS OF ERROR

Additional Ground One: The Appellant's Offender Score was miscalculated, resulting in a complete miscarriage of justice.

a. A sentencing court must correctly calculate the standard range before imposing an exceptional sentence.

b. The sentencing court must exercise its discretion in determining whether crimes constitute "same criminal conduct".

c. Failure to do so renders the exceptional sentence subject to appellate review and remand for resentencing.

d. The court has the power and duty to correct the erroneous sentence when the error is discovered.

Additional Ground Two: The State's burden of proving the aggravating factor of particular vulnerability or being incapable of resistance was reversed by the defense having to show the victim/witnesses incompetent to testify for the same reasons under existing laws, in violation of the Due Process clause of the Fourteenth Amendment to the United States Constitution; the aggravating factor of abuse of a position of trust is an included offense of particular vulnerability as it is one of the criteria of the statutory definition of "vulnerable adult", and; the aggravating factor of particular vulnerability is unconstitutionally vague.

- a. The burden of proving the aggravating factor beyond a reasonable doubt was the State's.
- b. The defense bore the burden of having to prove the victim/witness incompetent to testify for the very same reasons, effectively reversing the State's burden of proof in violation of the defendant's constitutional right to Due Process.
- c. The aggravating factor of abuse of a position of trust is an included offense of particular vulnerability as it is one of the criteria of the statutory definition of "vulnerable adult".
- d. The aggravating factor of particular vulnerability is unconstitutionally vague.
- e. The foregoing issues prejudiced the appellant.

d. The aggravating factor of particular vulnerability is unconstitutionally vague.

e. The foregoing issues prejudiced the appellant.

Additional Ground Three: The Appellant's exceptional sentence was imposed in violation of the Legislature's Proportionality Policy, constitutes great disparity, and is clearly excessive.

a. The trial court's reasons supported by the record.

b. The stated reasons therefore do not justify an exceptional sentence as a matter of law.

c. The trial court abused its discretion by imposing a sentence that was beyond others this Court and the State Supreme Court found to be in "great disparity", or that is "clearly excessive", thus being in violation of the Legislature's Proportionality Policy.

Additional Ground Four: In supplement to counsel's assignments of error, the Appellant submits points and caselaw supporting counsel's argument regarding the state's failure to prove each element of the crime charged beyond a reasonable doubt in violation of the appellant's constitutional rights, and her restitution.

3. STATEMENT OF THE CASE

The Appellant essentially agrees with the statement of the case in counsel's opening brief with the following exceptions:

The Appellant denies any struggle with Ms. Adams, (Opening Brief p. 8) but maintains that Ms. Adams handed her the money, just as the Declaration for Determination of Probable Cause states that all the other alleged victims told police they did.

On page 11 of the Opening Brief, in the description of the condition of Ms. Seitz, the Appellant would add that Ms. Seitz' niece, Luanne Larson told the Appellant regarding Ms. Seitz, "she's not stupid". She maintains that Ms. Seitz had good days and bad days, and that Ms. Seitz agreed to loan her the money. She also states that she never saw Ms. Seitz sign anything.

The Appellant further maintains that Mr. Hokenson and she had agreed on the amount of \$3800.00, and that she did not stand by him in the bank saying, "that's not enough". She further asserts that she never saw an envelope with either \$700.00 or \$1,200.00 in it, but that Mr. Hokenson handed her \$400.00.

4. ARGUMENT

Additional Ground One: The Appellant's Offender Score was miscalculated resulting in a complete miscarriage of justice.

a. A sentencing court must correctly calculate the standard range before imposing an exceptional sentence.

"RCW 9.94A. is a determinate sentencing scheme. The trial court is required to decide "with exactitude" the number of years, months, or days that a defendant will serve. RCW 9.94A.030(17). State v. Brown, 60 Wn.App. 60, 68, 802 P.2d 803 (1990), rev. denied, 116 Wn.2d 1025.

The sentencing court in the instant case did not perform this statutory duty. They sentenced the Appellant under an offender score of eight, App. I, page 3. They failed to perform the statutory duty of same criminal conduct analysis.. RP 887-907. RCW 9.94A.589(1)(a) in pertinent part provides,

"PROVIDED, That if the court enters a finding that some or all of those 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 provision of *RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that required the same criminal intent, are committed at the same time and place, and involve the same victim."

Appellant's J & S, pages 1-3, as well as the charging information, reflect that Counts II and III, Counts V and VI, and Counts VII and VIII were each pair committed on the same day(s). They likewise each involved the same victim(s) respectively. See Appendices I and II.

b. The sentencing court must exercise its discretion in determining whether crimes constitute "same criminal conduct".

The Court was obligated to exercise its discretion in this matter, State v. Mehaffey, 125 Wn.App. 595, 601, 105 P.3d 447 (2005) ("the court must exercise the discretion vested by the statute. State v. Wright, 76 Wn.App. 811, 828-29, 888 P.2d 1214 (1995))." See also State v. Lara, 66 Wn.App. 927, 834 P.2d 70 (1992).

If the sentencing court had done according to RCW 9.94A.589(1)(a), and used "all other current and prior convictions as if they were prior convictions for the purpose of the offender score", they would have been obligated in the same manner as if they were analyzing a defendant's criminal history in order to impose a sentence that is "proportionate to the seriousness of the offense and the offender's criminal history," RCW 9.94A.010(1).

c. Failure to do so renders the exceptional sentence subject to appellate review and remand for resentencing.

State v. Parker, 132 Wn.2d 182, 188-89, 937 P.2d 575 (1997), held,

"Because the sentencing court must first correctly calculate the standard range before imposing an exceptional sentence, failure to do so is legal error subject to review. Accord. to State v. Brown, 60 Wn.App. 60, 802 P.2d 803 (1990), review denied, 116 Wn.2d 1025, 812 P.2d 103 (1991). This review is de novo. See State v. McCraw, 127 Wn.2d 281, 289, 898 P.2d 838 (1995) ("The appropriate standard of review of the sentencing court's calculation of an offender score is de novo.").

"It is axiomatic that a sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score", Collicott II, 118 Wn.2d 649, 827 P.2d 263 (1992). (appellate court may review any such departure from the SRA) State v. Mail, 121 Wn.2d 707, 711-12, 854 P. 2d 1042 (1993). Boerner, Sentencing in Washington: A Legal Analysis of the SRA of 1981 at 6 - 34 (defendant may appeal a sentence by showing "the sentencing court had a duty to follow some specific procedure required by the SRA, and that the court failed to do so").

"Such an unlawful sentence meets the "fundamental defect" standard regardless whether the error" is, "an improper sentence based upon a miscalculated offender score (Johnson) PRP of Call, 144 Wn.2d 315, 331, 28 P.3d 709 (2001); See also State v. Bolar, 129 Wn.2d 361, 917 P.2d 125 (1996); PRP of Greening, 141 Wn.2d 687, 9 P.3d 206 (2000). PRP of Goodwin, 146 Wn.2d 861, 868, 50 P.3d 618 (2002).

"Victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard, Engle v. Isaac, 456 US 107, 71 L.Ed.2d 783, 805, 102 S.Ct. 1558 (1981) (internal citation omitted).

Therefore the prejudice to appellant is manifest, and her Judgment and Sentence is invalid on its face, PRP of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002); PRP of West, 154 Wn.2d 204, 211, 110 P.3d 1122

(2005). "Miscalculating an offender score has obvious significance in the ordinary case where such an error will elevate the standard range within which the term of confinement will be set. But even where an exceptional sentence is imposed, as it was here, the erroneous addition of a point to the offender score is still a prejudicial error. Before departing from the standard range to impose an exceptional sentence, the sentencing court must have the standard range clearly in mind", Pers. Restriant of Rowland, 149 Wn.App. 496 (2009).

It would be difficult to state any better than the case cited above, and precisely such are the circumstances in the case before the bar.

d. The court has the power and duty to correct the erroneous sentence when the error is discovered.

Having shown that a) a sentencing court must correctly calculate the standard range before imposing an exceptional sentence; b) that the sentencing court was obligated to exercise its discretion in determining whether some of the current offenses encompassed same criminal conduct; c) that the failure to do so renders the exceptional sentence subject to appellate review; and that the court failed to do so in the case before the bar, as shown in the record, relief is warranted.

"By sentencing petitioner to terms beyond the maximum periods allowed by statute, the trial court exceeded its authority, and the sentences are not valid on their face. This court may therefore consider the merits of this claim for relief even though Stoudmire's petition was untimely. 'When a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence, when the error is discovered.'" In re Personal Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980) (quoting McNutt v. Delmore, 47 Wn.2d 563, 565, 288 P.2d 848 (1955))." PRP of Stoudmire, 141 Wn.2d 342, 356, 5 P.3d 1240 (2000).

By imposing consecutive sentences due to the failure of the sentencing court to perform a same criminal conduct analysis, the court imposed an exceptional sentence, RCW 9.94A.535. Even this was not warranted for the reasons stated in counsel's opening brief, issues 6, 7 and 8, as a matter of law.

Acknowledgement of an offender score, even by the failure to object, only applies to sentences within the standard range, and statute only refers to **criminal history**, not current convictions, RCW 9.94A.500, .525(1).

This would not relieve the judge of the statutory duty to perform a same criminal conduct analysis, RCW 9.94A.589(1)(a); State v. Weaver, 140 Wn.App. 349, 353, 166 P.3d 761 (2007)(Exceptional sentence was principal issue, "offender score nonetheless had to be calculated"); State v. Mehaffey, 125 Wn.App. 595, 601, 105 P.3d 447 (2005).

Further, the failure to correct such an error can be a violation of Due Process, Hicks v. Oklahoma, 447 US 343, 65 L.Ed.2d 175, 180, 100 S.Ct. 2227 (1980)(in spite of possibility that same sentence could be imposed, petitioner's right to procedure cannot be arbitrarily deprived by state).

The Court now has a duty to correct the erroneous sentence, and we ask the Court for that relief.

Additional Ground Two: The State's burden of proving the aggravating factor of particular vulnerability or being incapable of resistance was reversed by the defense having to show the victim/witnesses incompetent to testify for the same reasons under existing laws, in violation of the Due Process clause of U.S. Const. Amend. XIV; the aggravating factor of abuse of a position of trust is an included offense of particular vulnerability as it is one of the criteria of the statutory definition of "vulnerable adult", and; the aggravating factor of particular vulnerability is unconstitutionally vague.

a. The burden of proving the aggravating factor beyond a reasonable doubt was the State's.

Due process clause protects against conviction except upon proof beyond a reasonable doubt, In re Winship, 397 US 358, 90 S.Ct. 1066, 25 L.Ed.2d 368 (1970).

The factor the State was to prove was RCW 9.94A.535(2)(b), "The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health."

To prove a victim more vulnerable to Theft 1 than the typical victim, it is crucial that there be proof that the alleged victim was vulnerable to a level that is able to raise a defendant's sentence in a criminal case within the confines of the Constitution, Winship.

In order to prove a person vulnerable or at financial risk in even a limited sense, RCW 11.88.010(1)(a) is the standard, (the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs)..

The Legislature stressed again individual rights and limitations, and the consideration of them at great length in RCW 11.88.005 (recognized that liberty and autonomy should be restricted 'only to the minimum extent necessary').

The standard for incompetence in this area is "unsound mind", In re Nelson, 12 Wn.2d 382, 398 (1942)("It is the settled law", "unsound mind and under guardianship").

The standard of proof for finding of incompetence for this area is, "clear, cogent, and convincing evidence", RCW 11.88.045(3).

Black's Law Dictionary, Ninth Edition, 2009 defined "clear and convincing evidence" as

"Evidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, but less than evidence beyond a reasonable doubt, the norm for criminal trials".

In closing, the state summed up what the record shows, "First of all, they are either physically or mentally vulnerable or naive. They are elderly" ... "They trusted people", "or just plainly naive". RP 830, 831.

She continued with this improper standard to the jury, "Joy Ostrander clearly has memory problems. He has significant

hearing issues". RP 839 "Corinne is again elderly. She lives by herself. She's very physically small, frail, and lives by herself. She doesn't drive so she walks everywhere" RP 841. She stated of Hokenson, "clearly has some memory issues. Easily confused. ...problems walking, going blind in one eye, walks with a cane and he's got some heart issues as well" RP 843.

None of these things equate, as a matter of law, to a finding of proof beyond a reasonable doubt of particular vulnerability or inability to resist, when they have not warranted a finding of incapacity by clear and convincing evidence under RCW 11.88.045(3).

The court's response to defense's argument about this was, "They're told what the burden of proof is and the State has each -- has to prove each element of the crimes. I think that's a sufficient set of instructions that will not cause any prejudice to the defendant." The court immediately followed with, "Instruction 6, "incompetent" is a legal term. Nowhere else in here have any of the alleged victims been described as incompetent. And I think that is confusing to give that. It also is not included in the "particular vulnerability" set of instructions.

Same thing with Number 7. We talk about advancing age and some types of natural guardianships here. A number of these alleged victims had powers of attorney and others, for example, could act on their behalf. I don't think we

need to give this instruction. I think this is confusing and unnecessary under the facts presented in this case" RP 820.

These statements clearly reflect the ignorance of the very thing defense counsel had been stating all along. This also proves that the appellant was convicted of an aggravating factor on less evidence than that required in a civil trial. As previously stated, these things do not equate, as a matter of law, to a finding of proof beyond a reasonable doubt of particular vulnerability. Other criminal statutes require this finding, State v. Simms, 95 Wn.App. 910, 913, 977 P.2d 647 (1999)(RCW 9A.40.010 "requires two prongs: (1) that the victim is an incompetent person, and (2) that the legal guardian or person or institution having lawful control or custody did not consent.").

The State having established, required or proven none of the vulnerabilities specific to the crime charged even to a lower standard of proof, or instructed the jury on the law regarding the correct standard, the result is a denial of that constitutional requirement.

We also submit that a finding of competency to testify precludes a finding of particular vulnerability .

Notwithstanding the reasons stated here, the appellant will also show that the burden of proof was in fact reversed for the reasons stated in (b).

b. The defense bore the burden of having to prove the victim/witness incompetent to testify for the very same reasons.

"[u]nder RCW 5.60.050, the following persons are not competent to testify: Those who are of unsound mind. CrR 6.12 is virtually identical.

"This court has said that "unsound mind" as used here, means total lack of comprehension or the inability to distinguish between right and wrong." ... "where a person has been adjudicated insane, a presumption of incompetency arises, rebuttable by the person offering the witness. **Where there has been no such adjudication, the burden is on the party opposing the witness to prove incompetence**", State v. Smith, 97 Wn.2d 801, 650 P.2d 201 (1982) (internal citations omitted) (emphasis mine).

In the Smith case, the court, "justifiably found" the victim/witness competent to testify. Likewise, in State v. Johnston, 143 Wn.App. 1, 13-14, 177 P.3d 1127 (2007), the standard is, "unsound mind", "the term "unsound mind", in this context, means the "total lack of comprehension or the inability to distinguish between right and wrong." "The burden is on the party opposing the witness to show incompetence. Id."

The State Supreme Court held, "we have a statute which declares that a person of unsound mind is not competent to testify, the statute itself offers no definition of the term 'unsound mind.'" Nevertheless, we think it must include those persons only who are commonly called insane", State v. Bishop, 51 Wn.2d 884, 885 (1958); State v. Wyse, 71 Wn.2d 434, 437 (1967).

With any case alleging the aggravating factor of particular vulnerability, the chances are directly proportionate that the alleged victims will likely have some condition that would bring into question their competency to testify. This would give the defense an entirely correct desire to challenge this under the court rules and existing laws, but for the **glaring** fact that they would be forced to make the State's case for them if they did.

It can hardly be denied that this effectively reverses the burden of proof the State should bear to prove beyond a reasonable doubt every element of the crime charged, Winship, 25 L.Ed.2d at 375, namely that the alleged victim(s) suffered from , "advanced age, disability, or ill health" **to the level that would make them**, "particularly vulnerable or incapable of resistance", that being "unsound mind".

This situation of causing the defense to have to choose between the right to challenge the competency of the witness and proving the state's case for them, is inherently coercive, RP 10/13/08 72-74, RP 10/23/08 475.

Clearly having to prove "unsound mind" for both the defense to prove incompetency to testify, and for the State to prove particular vulnerability to the point that any of the conditions listed would make the victims more vulnerable than the typical victim of theft in the first degree is a reversal of the burden of proof in violation of the Due Process clause.

c. The aggravating factor of abuse of a position of trust is an included offense of particular vulnerability as it is one of the criteria of the statutory definition of "vulnerable adult".

As stated previously, statute defines "vulnerable adult" in RCW 74.34.020(13) as,

"Vulnerable adult" **includes** a person:

(a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or

(b) Found incapacitated under chapter 11.88 RCW; or

(c) Who has a developmental disability as defined under RCW 71A.10.020; or

(d) Admitted to any facility; or

(e) Receiving services from home health, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or

(f) Receiving services from an individual provider." (emphasis mine).

Notwithstanding the previous contentions that the state failed to show the alleged victims met any of these criteria beyond a reasonable doubt, except age, the appellant also makes the following contentions.

Statute includes in the definition of "vulnerable adult" facts that would place them in the care of persons or agencies that would be in a position of trust over them as defined in caselaw. Simply by virtue of the definition which states facts that implies their special needs, or being under the care of persons who are then in a position of trust as defined in caselaw, the language clearly includes a person in a position of trust when the offense is against a person defined as a vulnerable adult by statute.

This is seen in other statutes, State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987)(planning is included in the premeditation element of attempted first degree murder, and was already considered, thus not justifying an exceptional sentence); State v. Nguyen, 165 Wn.2d 428 (2008)(physical control while under the influence is an included offense of DUI). Like Nguyen, this meets "the commission of which is necessarily included" in the charged offense test, as it regards the other aggravating factor, and it cannot do "double duty" as a second aggravating factor, Cunningham v. California, 549 US 270, 127 S.Ct. 856, 166 L.Ed.2d 856, 868 (2007) LEXIS 1324.

The statute also implies that by "position of trust" that the Legislature meant it in a professional manner, (pharmacist, physician, or other medical professional), in spite of the list being non-exclusive. Only in caselaw has that been expanded.

As in the previous contentions, the state failed to show the alleged victims had the functional, mental, or physical inability to care for themselves beyond a reasonable doubt; the alleged victims were not found incapacitated under chapter 11.88 RCW; or were admitted to any facility; or were receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or receiving services from an individual

provider (as defined in RCW 74.34.020(7) under contract with the department). The only possible exception being Ms. Seitz, for whom no evidence was offered or entered to show this.

Further, statute also states that abuse of a position of trust is one of the criteria for the following other aggravating factors, but is not included as a criteria for that of particular vulnerability.

RCW 9.94A.535 states abuse of a position of trust in (d)(iv) as:

"(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense."

and (e)(vi):

"(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professionals)."

The appellant having not been licensed, proved to be employed by the persons, or in a position of fiduciary responsibility as stated within RCW 9.94A.535, she was not in a position of trust as statute or caselaw define.

If the appellant had been a licensed provider or care person as defined and required by statute, and found to have committed a crime against a patient, the aggravating factor of abuse of trust would necessarily preclude the additional aggravating factor of vulnerable adult. The person would not have been in the position of trust had the alleged victim not been defined as such, and is a fact considered in the aggravating factor of particular vulnerability in the statutory definition of vulnerable adult, and therefore an included offense.

d. The aggravating factor of particular vulnerability is unconstitutionally vague.

"A statute is unconstitutionally vague if [it] does not (1) define the criminal offense with sufficient definiteness such that ordinary persons understand what conduct is proscribed or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement." Parmelee v. O'Neel, 145 Wn.app. 223, 240-41, 186 P.3d 1094 (2008).

RCW 9.94A.535(2)(b) provides, "The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health", as a factor enabling the court to impose a sentence outside the standard range.

If one must prove that a person is more vulnerable to the commission of the crime of theft due to these criteria, and there is no definition or standard, they "would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case, Winship, 25 L.Ed.2d at 375." The vagueness of the statute would result in prejudice to the defendant, where there is a stated standard for the civil requirement to be proven by "clear, cogent, and convincing evidence", RCW 11.88.045(3), and the aggravating factor as written allows a finding of guilty without reaching

that lower standard in a criminal case, we submit that the statute is unconstitutional. It fails to "provide ascertainable standards of guilt to protect against arbitrary enforcement, Parmelee at 240-41. It also does not "define the criminal offense with sufficient definiteness such that ordinary persons understand what conduct is proscribed" if the varied and sundry ailments presented by the state could convict, and there is no bar with which to measure or defend against them. This also entirely fails to "give notice to persons of common intelligence and causes them to guess at its meaning and differ as to its application", Parmelee, at 241. This is shown in the statutes and caselaw proffered in the previous sections.

Any statute such as an aggravating factor to a felony, which could elevate one's loss of liberty from a range of 85 to 110 months, to 344 months in the instant case, must give fair warning of the proscribed conduct. It is unfairness of a constitutional magnitude to allow otherwise. That the confusion existed even to the court is proven in the statements related in section (a), RP 820.

In spite of a long list of behaviors described in the ordinance, the U.S. Supreme Court declared it void for vagueness, in Papachristou v. City of Jacksonville, 405 US 156, 31 L.Ed.2d 110, 115, 92 S.Ct. 839 (1972. See also US v. Hariss, 347 US 621, 98 L.Ed. 989, 996, 74 S.Ct. 808;

Thornhill v. Alabama, 310 US 88, 84 L.Ed. 1093, 60 S.Ct. 736;
Herndon v. Lowry, 301 US 242, 81 L.Ed.1066, 57 S.Ct. 732".

The statute in question here reads only, "the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health" as it may apply to any crime.

One can easily see how a small child cannot physically resist an adult who commits an assault upon their person and would therefore be vulnerable. Also a pedestrian in a deliberate vehicular assault, State v. Nordby, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986)("completely defenseless" against an automobile as a pedestrian).

But to prove a number of persons more vulnerable than the typical victim of theft by deception due to unspecific, varied, and vague allegations of illness or inability, that any number of people in society might suffer from, puts a defendant at a complete loss to be able to defend against.

The Appellant has shown that the State's burden of proving the aggravating factor of particular vulnerability or being incapable of resistance was reversed by the defense having to show the victim/witness incompetent to testify for the same reasons under existing laws, that of unsound mind, in violation of the Due Process clause of the Fourteenth Amendment to the U.S. Constitution.

The appellant also has shown that the aggravating factor of abuse of a position of trust is a fact included in the statutory definition of vulnerable adult, and should therefore not be considered as an additional aggravating factor.

The appellant further believes she has shown that the aggravating factor, RCW 9.94A.535(2)(b) is unconstitutionally vague.

Finally, she also submits that the finding of guilt under the aggravating factor of particular vulnerability is precluded by the finding that the victims were competent to testify.

e. The foregoing issues prejudiced the appellant.

The State had the burden of proving the elements of the aggravating factor beyond a reasonable doubt, In re Winship, 397 US 358, 99 S.Ct. 1068, 25 L.Ed2d 368 (1970) (due process clause protected an accused in a criminal prosecution against conviction except upon proof beyond a reasonable doubt).

There is no standard or requirement to meet to prove the elements of the aggravating factor, those being "particularly vulnerable" or "incapable of resistance", due to "advanced age, disability, or ill health", that meet the standard of proof beyond a reasonable doubt.

The Court's own statements acknowledge both the lack of standard and the vagueness of the evidence expected in order to fulfill the elements of the aggravating factor,

"the state does have the burden to establish ...also that they were particularly vulnerable to some extent because of the mental conditions.

I think that can be accomplished by -- if they are not competent, that potentially can be accomplished by the use of other testimony, other family members, et cetera." RP 71
No one was proven incompetent beyond a reasonable doubt.

This shows that without establishing the person to be incompetent **as a matter of law** the court is allowing the state to offer to the unknowing jury as law **any** showing that the alleged victims were vulnerable to "some" (any) extent.

The, "Defendant is entitled to a correct statement of the law and should not have to convince the jury what the law is. State v. Acosta, 101 Wn.2d 612, 621-22, 683 P.2d 1069 (1984)", State v. Thomas, 109 Wn.2d 222, 228, 743 P.2d 816 (1987).

Defense counsel stated many times that the competency or incompetency would, "drastically" affect the defense to the charges, RP 4 - 6, 8, 10 - 14, etc. Counsel further stated the difficulties presented by the competency issue in virtually every area of the trial, see Motion to Appoint Expert Testimony, Declaration in Support of Motion to Appoint Expert to Evaluate Competency, Defendant's Motions in Limine and Trial Brief, Motion to Sever Counts. These were all areas essential to a fair trial, and were affected.

The defense's hands were further tied by having to prove by unsoundness of mind that the witnesses were incompetent to testify by the standards in the DSM-IV and caselaw.

The state should have been required to prove unsoundness of mind by the same or higher standard in law, to show that the victims were more vulnerable than the typical victim of theft by deception, due to the specific allegation of dementia.

Defense counsel proffered authority regarding this from the DSM-IV. See RP 05/07/08 6-9, 14-15, 07/18/08 4-8, 11-12, 14-16, 20, 10/13/08 42-44, 72-74, which ended with the horrifying threat of "waiving" the aggravating factor by coercion, "if we are doing it because of the court's ruling, then I am not sure it is voluntary. This is a really complex issue." RP 74.

The level of unsoundness of mind for criminal cases can be established by the DSM-IV, and is an accepted authority by the courts, State v. Greene, 92 Wn.App. 80, 960 P.2d 980 (1998). While Greene discussed the unsoundness of the defendant's mind, it thoroughly discusses the merits of the DSM-IV, and the standard of proof for a criminal case. This supports the contention that the aggravating factor has not been proven in the case before the bar.

The DSM-IV is the standardized authority used by virtually every treatment provider and insurance company for diagnosis, treatment and coverage of mental illnesses, alcoholism, drug use, and many other disorders and diseases. A diagnosis under the various Axes of this table would have shown a level of debility by an authority accepted by the courts and would have shown whether or not it was of a level that met this burden. Not reaching that level or burden as a matter of law, denied the appellant a fair trial.

Invoking the right and privilege of challenging the competency of the victim/witnesses, under the same standards of unsound mind and diagnoses listed in the same common authority and caselaw, is a reversal of the burden of proof and is prejudicial, Smith v. Smith, 454 F.2d 572 (1971); US v. Alston, 551 F.2d 315 (1978),

"The fundamental principle that serious doubts as to whether a defendant was prejudiced by trial defects should be resolved in the defendant's favor compels reversal here", Alston, 551 F.2d at 320, 321.

Without having to meet a standard and prove the aggravating factor beyond a reasonable doubt, the presentation of allegations regarding the victim's illnesses or transitory psychiatric or memory issues, it is prejudicial, as it only served to enflame the passions or sympathy of the jury, Berger v. US, 295 US 78, 55 S.Ct. 629, 79 L.Ed.1314 (1935); CNMI v. Mendiola, 976 F.2d 475, 486 (9th Cir. 1992).

Without the coercive effect of the burden shifting, had the defense been able to successfully challenge the competency of the victim/witnesses, the state would have been markedly limited in the evidence or testimony it would have been able to present, which could clearly have changed the outcome. This is further supported by the fact that even the affidavit of probable cause states for **every** allegation facts which support the defendant's continued assertions that the money was given or loaned willingly to her, see Appendix III.

The Declaration for Determination of Probable Cause states for each count that the money was in fact given to her, "giving her cash", "with the promise of having it paid back at a higher amount". Marie Adams' testimony bears out that she was a savvy business woman and thought she would make a quick \$2,000.00 profit from a short-term loan. Ms. Adams bragged about her business accumen, RP 253 "I have a brilliant mind", "I was in real estate all my life", "Speculation, LA properties", "I had a lot of private lenders in my day when I was permitting up in real estate" RP 199. "So I thought, well, you know, I am used to paying bonuses myself through the years to get money when I was needing money to buy another piece of real estate with it or whatever, you know, called permitting up in the real estate. So this was perfectly normal talk to me because you do give money. When you borrow money, you pay a bonus", "All through the years I was working" RP 200.

Likewise, regarding counts II and III, the Declaration states that, "the check appeared to be signed by the victim". This was also supported by testimony. Also for count IV it satates, "the victim withdrew \$7500", and that, "the victim walked out of the bank and handed the money to the defendant". Again in counts V and VI we see, "so he could withdraw \$5500 which he gave to the suspect". This is repeated for counts VII and VIII, "the suspect was ultimately given all of this money", "gave the money to the suspect". App. III.

The appellant submits that each of the errors shown has prejudiced her, and that the cumulative effect of those errors overwhelmingly served to deprive her of a fair trial under the constitutional rights guaranteed under the due process clause and caselaw proffered, and asks this Court for relief according to the errors alleged.

Additional Ground Three: The Appellant's exceptional sentence was imposed in violation of the Legislature's Proportionality Policy, constitutes great disparity, and is "clearly excessive".

a. The trial court's reasons are not supported by the record.

As stated in counsel's opening brief, assignments of error numbers 5 and 6, which the appellant incorporates by reference, age alone is not evidence of being particularly vulnerable or incapable of resistance, RCW 11.88.010(1)(c); In re Nelson, supra.

For the reasons stated in the preceding issues, and those following, the appellant submits that the record shows that the imposition of an exceptional sentence was not borne out by the record.

RCW 9.94A.535 - Departures from the guidelines, states,

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

The court cannot use, other than criminal history, any fact not found by a jury beyond a reasonable doubt, Apprendi v. New Jersey, 530 US 466, 120 S.Ct. 2348, 147 L.Ed.2d 556 (2000). Our state requires notice of the crime charged and every element of it in the information, State v. Recuenco, (Recuenco III) 163 Wn.2d 428, 434, 180 P.3d 1276 (2008).

The allegations charged in the case before the bar were, as it regards the exceptional sentence, the aggravating factor of particular vulnerability for all eight counts, and abuse of a position of trust for counts II and III.

At no point in the records does the evidence presented reach proof of unsoundness of mind, or incapacity under the law as it regards RCW 11.88, State v. Simms, 95 Wn.App. 910, 913, 977 P.2d 647 (1999); State v. Greene, 92 Wn.App. 80, 960 P.2d 980 (1998).

RCW 34.020(13) defines "Vulnerable adult", as

- "(a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or
- (b) Found incapacitated under chapter 11.88 RCW; or
- (c) Who has a developmental disability as defined under RCW 71A.10.020; or
- (d) Admitted to any facility; or
- (e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or
- (f) Receiving services from an individual provider."

Likewise, RCW 74.34.020(7) provides,

"'Individual provider' means a person under contract with the department to provide services in the home under chapter 74.09. or 74.39. RCW."

If the Court would please examine the testimony of the alleged victims as well as Ms. Seitz's niece, the Court will see that no alleged victim fit any of the criteria in RCW 74.34.020(13) except age, no evidence or proof was offered or admitted that rose to the level of RCW 11.88, Ms. Phillips is not an "individual provider" as a matter of law, or even an employee, and no other criteria apply.

No proof of the criteria of vulnerable adult was offered or admitted into the record, much less a showing of, "more vulnerable to the commission of the crime than the typical victim of Theft by deception.

The only possible exception was Ms. Seitz, who was purportedly incompetent to testify, and purportedly under care, but no evidence was offered or entered into the record other than hearsay testimony as proof beyond a reasonable doubt, State v. Chadderton, 119 Wn.2d 390, 832 P.2d 481 (1991)(record was inadequate to determine whether such aggravating circumstances were sufficiently substantial and compelling to warrant an exceptional sentence in this case").

The exceptional sentence should not be based on facts not charged, proven or stipulated to, Pers. Restraint of Beito, 267 Wn.2d 497 (2009); Recuenco III, 163 Wn.2d 428, 180 P.3d 1276 (2008).

None of the alleged victims had ever been ruled incapacitated or had a guardian appointed to them, or had a court determine that, "the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs", as defined in RCW 11.88.010(1)(b). Each of the persons had control over their own financial affairs.

Without such proof, the trial court's reasons are not supported by the record that they were more vulnerable to the crime, and being in a position of trust is included in the definition of vulnerable adult, see ground two (c).

b. The stated reasons therefore do not justify an exceptional sentence as a matter of law.

Having not proven any particular vulnerability of constitutionally sufficient level, none having been found to be vulnerable adults or incompetent under the statutes cited, and having been found competent to testify, the court's reasons therefore do not justify an exceptional sentence as a matter of law.

The legal adequacy of an aggravating factor is reviewed by a 2-part analysis, State v. Grewe, 117 Wn.2d 211, 215-16, 813 P.2d 1238 (1991).

For the first part of the necessary analysis, we must see that since there is no statutory age that declares any or every person particularly vulnerable or incapable of resistance, and there was no evidence presented other than age, no court ruling stating that they were vulnerable adults according to statute, or guardianship appointed due to such vulnerability, we must conclude that there is no factor that the Legislature had not already considered when establishing the standard range. Such consideration is not allowed, Cunningham v. California, 549 US 270, 127 S.Ct. 856, 166 L.Ed.2d 856, 869 (2007).

For the second part of the analysis, the asserted aggravating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category, State v. Grewe, 117 Wn.2d at 215-16.

In Grewe, the Court lists several cases. The first is State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987). They held that, to constitute justification, the sophistication must be "'of a kind not usually associated with the commission of the offense[s] in question.'" (internal citations omitted).

Having eliminated two of the three stated aggravating factors, the Court remanded Green's case stating, "we conclude that remand is appropriate in the instant case **in light of the great disparity, some 20 years, between the sentence imposed and the midpoint of the standard range. This difference is simply too great** for this court to assume that the trial judge would still impose the same sentence if he were to consider only the single justifiable reason."

Having already established the burden that must be met in order to determine that any person is at significant risk of financial harm in order to put even the minimum amount of restriction upon that person, and there being nothing in the record reaching that level, there is nothing "of a kind not usually associated with the commission of the offense[s] in question", or "substantial and compelling to distinguish the crime in question from others in the same category", in that age alone is not a statutory element. The persons were not shown, as a matter of law, to be, "more vulnerable to the commission of the crime than the typical victim", therefore the charges must be viewed as the legislature considered when computing the standard range.

c. The trial court abused its discretion by imposing a sentence that was "clearly excessive".

"The SRA does not define the term "clearly excessive" nor otherwise explicitly indicate the standard of review to be used in determining if a particular sentence is "clearly excessive". However, three important sources - the language of the SRA itself, the express recommendations of the Sentencing Guidelines Commission, and the Washington courts' previous interpretation of identical language in the juvenile court's decision regarding length of an exceptional sentence should not be reversed as "clearly excessive" absent an abuse of discretion. We hereby adopt that standard of review", State v. Oxborrow, 106 Wn.2d 525, 529-30, 723 P.2d 1123 (1986).

Oxborrow had been sentenced to consecutive sentences of 10 years for first degree theft, and 5 years for violation of a cease and desist order in connection with the sale of securities, in which he had defrauded between 900 and 1,200 investors of 58 million dollars. The standard range for each count of theft was 0 - 90 days, and the court found that the exceptional sentences were justified as Oxborrow's crime, "fulfill **all** of the listed criteria for a "major economic offense", Oxborrow, at 533.

We also ask the Court to please see the report of the largest case of credit and debit card data theft ever in the United States, attached as Appendix V.

It is reported that Albert Gonzalez, who allegedly broke his own record, by trying to steal 130 Million credit card numbers, is facing federal charges, and if convicted, faces a 20 year sentence.

When compared to the appellant's conviction for theft of \$36,919.10, from five people, and sentence of 344 months, (28.66 years) in prison, abuse of discretion is manifest.

One can hardly deny that such a sentence is "clearly excessive" under any standard, State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987) (20 year increase in sentence for first degree robbery and attempted first degree murder for one aggravating factor remanded due to "great disparity"); State v. Nordby, 106 Wn.2d 514, 723 P.2d 1117 (1986) (16 month sentence for deliberate vehicular assault of a 15 year old pedestrian resulting in two severely broken legs, a broken arm and a several-day long coma was warranted); State v. Dunavan, 57 Wn.App. 332, 788 P.2d 576 (1990) (39 month sentence for vehicular homicide hit-and-run vacated not justified).

The standard range is sufficient, as considered if the correct offender score were used in light of a same criminal conduct analysis.

There would still be a score of six points, for a range of 17 - 22 months each, and five counts running consecutively due to separate victims, for a total of 85 - 110 months. The statutory maximum for this offense is 60 months, RCW 9A.20.02(c) The sentence imposed was over 13 times the high end of the standard range, and over five times the statutory maximum.

The appellant asks the Court to also consider that under Washington Laws, 1981, Ch 137 § 12(4), first degree murder is to incur a sentence of not less than 20 years, assault in the first degree where the offender used force or means likely to result in death or intended to kill the victim, not less than five years, and rape in the first degree, not less than three years. The appellant was sentenced to more than all of these put together, for a non-violent offense.

In the above-named legislation, §1 states,

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to add a new chapter to Title 9 RCW designed to:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve him or herself; and
- (6) Make frugal use of the state's resources.

The sentence in this case violates every goal of the legislation.. It does not ensure the punishment is proportionate to the seriousness of the offense: it is a seriousness level **II** offense - which the legislature took into account - theft 1 - theft over the value of \$1500 - but the appellant was given a sentence equal to a level **XIII with 9 or more points to level XV with 7 points.**

It does not promote respect for the law by providing a punishment that is just; It is not commensurate with the punishment imposed on others committing similar offenses - only 28.1% of theft 1 cases were sentenced to prison in the fiscal year 2008, and the average sentence was 26.0 months. For 2009, 26.6% were prison sentences with an average of 35.0 months. See Appendix IV; This does not protect the public any further; It effectively denies the offender an opportunity to improve herself; and, it is a flagrant misuse of the state's resources.

Having shown that the court would accept "some" i.e., ANY evidence to support this exceptional sentence in violation of the appellant's constitutional rights, we submit that the court's reasons may have been supported instead by personal opinion. The court gave a recitation of a client he represented who suffered from dementia and Alzheimer's, who had been repeatedly raped by the person driving the bus to the day camp that she attended. The court admitted that this was a dilemma for him, RP 07/18/08 p.12-13. RP 902-905.

"Well, I guess the dilemma that I have is that I have had experience with folks with Alzheimer's. I represented a woman who was early onset dementia and significantly impaired by Alzheimer's, ...he was also taking her to his house and raping her on a daily basis"

This may have influenced the court, as his response to the defense motion for appointment of an expert to evaluate the victim/witnesses, Dr. Trowbridge specifically, who is qualified as an expert to determine competency and is a lawyer, was,

"I think having Trowbridge do an evaluation doesn't answer the questions for me. I may disagree with his evaluation. I may disagree with his conclusion."

This may very well have influenced the court's decision to impose this extraordinary sentence in the face of the presentation of less evidence than required for a civil case, the result of which shows a distinct lack of appearance of fairness, RP 902-905.

Individually and collectively this shows that the trial court abused its discretion by imposing a sentence that was "clearly excessive". Together, these issues show that the reasons are not supported by the record, and therefore the stated reasons do not justify an exceptional sentence as a matter of law; and, this sentence is beyond others the Supreme Court found in great disparity,

is clearly excessive, and violates every aspect of the Legislature's Proportionality Policy for a non-violent offense.

We beg the Court to follow the holdings of the State Supreme Court in the proffered caselaw, and grant relief from this exceptional sentence for the reasons submitted.

Additional Ground Four: In supplement to counsel's assignments of error, the Appellant submits points and caselaw supporting counsel's argument regarding the state's failure to prove each element of the crime charged beyond a reasonable doubt in violation of the Appellant's constitutional rights, and her restitution.

In counsel's opening brief, pages 53 - 58, regarding insufficient evidence, the Appellant wishes to add for the Court's consideration, In re Winship, 397 US 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)(Constitution prohibits conviction except upon proof beyond a reasonable doubt); Jackson v. Virginia, 443 US 307, 61 L.Ed.2d 560, 573, 99 S.Ct. 2781 (1979)(cannot use a pyramiding of inferences; critical inquiry on review must be to determine whether record on review must be to determine whether record could reasonably support finding of guilt beyond a reasonable doubt); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); U.S. Const. Amend. XIV Due Process Clause.

For the issue of restitution, the Appellant proffers the following caselaw and provisions. U.S. v. Martin, 195 F.3d 961, 968 (7th.Cir. 1999)(quoting US v. Rice, 38 F.3d 1536 (9th Cir. 1994) it is critical to determine whether the judges finding that defendant caused loss can be sustained);

5. CONCLUSION

The Appellant's Judgment and Sentence is invalid on its face. The court failed in its statutorily required duty to perform a same criminal conduct analysis, which resulted in a fundamental defect and a complete miscarriage of justice. The failure to correct this could result in a violation of the Appellant's Due Process rights under the U.S. Constitution, and she begs the Court for relief in correction of this error.

The defense having to prove by a standard of "unsound mind" the burden of incompetency of the victim/witnesses the very same allegations that the state was obligated to prove for a finding that the victim/witnesses were particularly vulnerable to the crime of theft 1, effectively reversed the burden of proof in violation of the Appellant's Due Process rights under the U.S. Constitution.

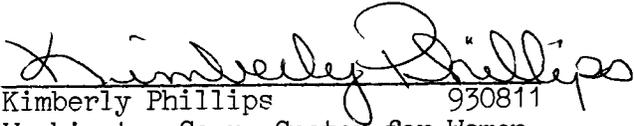
The Appellant has further shown that the aggravating factor of abuse of a position of trust is included in the statutory definition of vulnerable adult, and contends that therefore it is an included offense of particular vulnerability under the facts of this case.

The Appellant respectfully submits that individually and collectively, these errors prejudiced her, for the reasons given in the argument, and that relief is warranted for the rights violations alleged.

Finally, the Appellant believes that her exceptional sentence was imposed without support in the record, leaving the conclusion that the reasons given do not justify an exceptional sentence as a matter of law; that the sentence itself was clearly excessive can hardly be stressed adequately; that such an imposition in the face of the SRA itself, the express recommendations of the Sentencing Guidelines Commission, the sentences given for the same offense throughout the state, and the rulings of the State Supreme Court on like cases contrary to this one show great disparity, violation of the Legislatures Proportionality Policy for a non-violent offense, and abuse of discretion.

All persons have the right to the expectation of a fair sentence. The loss of liberty for the protracted period of 344 months shows the protected right lost by the violations herein. The caselaw and Constitutional provisions proffered show the standard that was denied the Appellant. Reversal is the remedy required for such a deprivation, and the Appellant begs the Court for succor and justice in that relief, and thanks the Court for its consideration.

Respectfully Submitted,


Kimberly Phillips 930811
Washington Corr. Center for Women
9601 Bujacloh Rd. NW
Gig Harbor, WA 98332-8300

STATE OF WASHINGTON)
COUNTY OF PIERCE) ss.

I, KIMBERLY PHILLIPS, DECLARE THAT ON 03/01/10, I CAUSED THE FOLLOWING DOCUMENTS TO BE PLACED IN THE PRISON LEGAL MAIL SYSTEM PER GR 3.1:

STATEMENT OF ADDITIONAL GROUNDS
APPENDICES TO APPELLANT'S S.O.A.G.
MOTION FOR LEAVE TO FILE S.O.A.G.

AND MAILED TO THE FOLLOWING PERSONS/PLACES:

COURT OF APPEALS, DIV. II
450 BROADWAY, STE. 300
TACOMA, WA. 98402

PIERCE CO. PROS. OFF.
KIMBERLY DEMARCO
930 TACOMA AVE S. RM 946
TACOMA, WA. 98402

SHERI ARNOLD, ATTY.
P.O. BOX 7718
TACOMA, WA. 98402

FILED
COURT OF APPEALS
DIVISION II
10 MAR - 3 PM 12:01
STATE OF WASHINGTON
BY Kimberly Phillips
DEPUTY

DONE SO UNDER PENALTY OF PERJURY, ACCORDING
TO THE LAWS OF THE STATE OF WASHINGTON,
THIS 1ST DAY OF MARCH, 2010, IN GIG HARBOR,
PIERCE COUNTY, WASHINGTON.

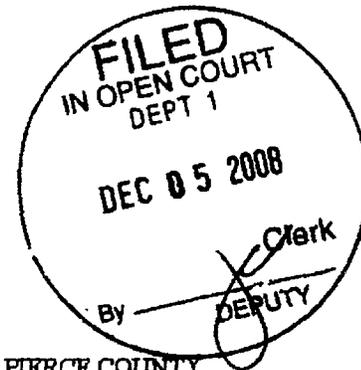
DATED: 3-1-10

Kimberly Phillips SIGNED
KIMBERLY PHILLIPS 930811 MB 257
WASHINGTON CORR. CENTER FOR WOMEN
9601 BUTACICH RD. NW
GIG HARBOR, WA. 98332-8300

APPENDIX I

Appellant's Judgment and Sentence

07-1-05353-2



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 07-1-05353-2

DEC 08 2008

vs.

KIMBERLY ANN PHILLIPS

Defendant.

JUDGMENT AND SENTENCE (JS)

- Prison [] RCW 9.94A.712 Prison Confinement
 Jail One Year or Less
 First-Time Offender
 Special Sexual Offender Sentencing Alternative
 Special Drug Offender Sentencing Alternative
 Breaking The Cycle (BTC)
 Clerk's Action Required, para 4.5
 (SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6
 and 5.8

SID: 13571983

DOB: 2/11/66

I. HEARING

- 1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

- 2.1 CURRENT OFFENSE(S): The defendant was found guilty on 10/30/08
 by [] plea [X] jury-verdict [] bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	THEFT IN THE FIRST DEGREE	9A.56.020(1)(b) AND 9A.56.030(1)(a) AND 9.94A.535(3)(b)		3/30/07	072540779 07006738
II	THEFT IN THE FIRST DEGREE	9A.56.020(1)(b) AND 9A.56.030(1)(a) AND 9.94A.535(3)(b)		6/26/07 AND 7/4/07	072540779 07006738

JUDGMENT AND SENTENCE (JS)
 (Felony) (7/2007) Page 1 of 12

08-9-15113-2

Office of Prosecuting Attorney
 930 Tacoma Avenue S. Room 946
 Tacoma, Washington 98402-2171
 Telephone: (253) 798-7400

07-1-05353-2

III	THEFT IN THE FIRST DEGREE	9A.56.020(1)(b) AND 9A.56.030(1)(a) AND 9.94A.535(3)(b)		6/26/07 AND 7/4/07	072540779 07006738
IV	THEFT IN THE FIRST DEGREE	9A.56.020(1)(b) AND 9A.56.030(1)(a) AND 9.94A.535(3)(b)		9/18/07	072540779 07006738
V	THEFT IN THE FIRST DEGREE	9A.56.020(1)(b) AND 9A.56.030(1)(a) AND 9.94A.535(3)(b)		8/10/07 AND 8/23/07	072540779 07006738
VI	THEFT IN THE FIRST DEGREE	9A.56.020(1)(b) AND 9A.56.030(1)(a) AND 9.94A.535(3)(b)		8/23/07	072540779 07006738
VII	THEFT IN THE FIRST DEGREE	9A.56.020(1)(b) AND 9A.56.030(1)(a) AND 9.94A.535(3)(b)		9/10/07	072540779 07006738
VIII	THEFT IN THE FIRST DEGREE	9A.56.020(1)(b) AND 9A.56.030(1)(a) AND 9.94A.535(3)(b)		9/10/07	072540779 07006738

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Horn, See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW 9.94A.533(6). (If the crime is a drug offense, include the type of drug in the second column.)

as charged in the ORIGINAL Information

- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	AG/J ADULT JUV	TYPE OF CRIME
1	THEFT 2	5/13/88	PIERCE	1/26/88	ADULT	NV - Wash
2	BURGLARY 2	4/14/89	PIERCE	12/7/88	ADULT	NV
3	THEFT 2 5X	4/14/89	PIERCE	12/7/88	ADULT	NV - Wash
4	FORGERY	10/16/87	PIERCE	4/8/07	ADULT	NV - Wash

- The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

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2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	8	II	33-43 MOS	NONE	33-43 MOS	10 YRS
II	8	II	33-43 MOS	NONE	33-43 MOS	10 YRS
III	8	II	33-43 MOS	NONE	33-43 MOS	10 YRS
IV	8	II	33-43 MOS	NONE	33-43 MOS	10 YRS
V	8	II	33-43 MOS	NONE	33-43 MOS	10 YRS
VI	8	II	33-43 MOS	NONE	33-43 MOS	10 YRS
VII	8	II	33-43 MOS	NONE	33-43 MOS	10 YRS
VIII	8	II	33-43 MOS	NONE	33-43 MOS	10 YRS

2.4 **EXCEPTIONAL SENTENCE.** Substantial and compelling reasons exist which justify an exceptional sentence:

within below the standard range for Count(s) _____.

above the standard range for Count(s) _____.

The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defend's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are attached as follows: N/A

III. JUDGMENT

3.1 The defendant is **GUILTY** of the Counts and Charges listed in Paragraph 2.1.

3.2 The court **DISMISSES** Counts _____ The defendant is found **NOT GUILTY** of Counts _____

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IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTN/RJN \$ LOC Restitution to: to be determined
 \$ _____ Restitution to: _____
 (Name and Address--address may be withheld and provided confidentially to Clerk's Office).
 PCV \$ 500.00 Crime Victim assessment
 DNA \$ 100.00 DNA Database Fee
 PUB \$ 1000.00 Court-Appointed Attorney Fees and Defense Costs
 FRC \$ 200.00 Criminal Filing Fee
 FCM \$ _____ Fine

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

\$ _____ Other Costs for: _____
 \$ _____ Other Costs for: _____
 \$ 1800.00 TOTAL

The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

shall be set by the prosecutor

is scheduled for 2-6-09 1:30 Dept 1

RESTITUTION. Order Attached

Restitution ordered above shall be paid jointly and severally with:

NAME of other defendant	CAUSE NUMBER	(Victim name)	(Amount-\$)
RJN			

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ _____ per month commencing _____ RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

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The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b)

[] COSTS OF INCARCERATION. In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.160.

4.1b ELECTRONIC MONITORING REIMBURSEMENT. The defendant is ordered to reimburse (name of electronic monitoring agency) at _____ for the cost of pretrial electronic monitoring in the amount of \$ _____.

4.2 [X] DNA TESTING. The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.3 NO CONTACT

The defendant shall not have contact with (Victims or families - listed below) (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for 10 years (not to exceed the maximum statutory sentence).

[] Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 OTHER:

Audrey Seitz' family
Corrine Gundersen or her family
Robert Hokenson or his family
Marie Adams or her family
Joy Ostrander or his family

4.4a BOND IS HEREBY EXONERATED

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

<u>43</u> months on Count <u>I</u>	<u>43</u> months on Count <u>III</u>
<u>43</u> months on Count <u>II</u>	<u>43</u> months on Count <u>IV</u>

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43 months on Count V 43 months on Count VIII
43 months on Count VI _____ months on Count _____
43 months on Count VII _____ months on Count _____

Actual number of months of total confinement ordered is: 344 months

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.

CONSECUTIVE CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served ~~concurrently~~, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively:

all counts to run consecutive to each other

The sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for the following cause numbers. RCW 9.94A.589: _____

Confinement shall commence immediately unless otherwise set forth here: _____

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 3 the days

4.6 COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows:

Count _____ for _____ months,
 Count _____ for _____ months,
 Count _____ for _____ months,

COMMUNITY CUSTODY is ordered as follows:

Count _____ for a range from: _____ to _____ Months,
 Count _____ for a range from: _____ to _____ Months,
 Count _____ for a range from: _____ to _____ Months,

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Count _____ for a range from: _____ to _____ Months,
 Count _____ for a range from: _____ to _____ Months,
 Count _____ for a range from: _____ to _____ Months,

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding and chapter 69.50 or 69.52 RCW offense not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced under RCW 9.94A.712 and violent offenses committed on or after July 1, 2000. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories, or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) the defendant committed a current or prior:		
i) Sex offense	ii) Violent offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)		v) Residential burglary offense
vi) Offense for manufacture, delivery or possession with intent to deliver methamphetamine including its salts, isomers, and salts of isomers,		
vii) Offense for delivery of a controlled substance to a minor, or attempt, solicitation or conspiracy (vi, vii)		
b) the conditions of community placement or community custody include chemical dependency treatment.		
c) the defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745.		

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) pay supervision fees as determined by DOC; (7) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC, and (8) for sex offenses, submit to electronic monitoring if imposed by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

- The defendant shall not consume any alcohol.
- Defendant shall have no contact with: _____
- Defendant shall remain within outside of a specified geographical boundary, to wit: _____
- Defendant shall not reside in a community protection zone (within 880 feet of the facilities or grounds of a public or private school). (RCW 9.94A.030(8))
- The defendant shall participate in the following crime-related treatment or counseling services: _____
- The defendant shall undergo an evaluation for treatment for domestic violence substance abuse

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mental health anger management and fully comply with all recommended treatment.

The defendant shall comply with the following crime-related prohibitions: _____

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: _____

For sentences imposed under RCW 9.94A.712, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

PROVIDED: That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense.

4.7 **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100, RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505. The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW

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9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 **RESTITUTION HEARING.**

Defendant waives any right to be present at any restitution hearing (sign initials): KP

5.5 **CRIMINAL ENFORCEMENT AND CIVIL COLLECTION.** Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

5.6 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200.

N/A

5.8 [] The court finds that Court _____ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

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5.10 OTHER: _____

DONE in Open Court and in the presence of the defendant this date: 12-5-08

JUDGE

Print name

[Signature]
JAMES ORLANDO

[Signature]
Rosarie Martinelli

Deputy Prosecuting Attorney

Print name: ROSARIE MARTINELLI

WSB # 25078

[Signature]
Linda King

Attorney for Defendant

Print name: LINDA KING

WSB # 16160

[Signature]
Kimberly Phillips

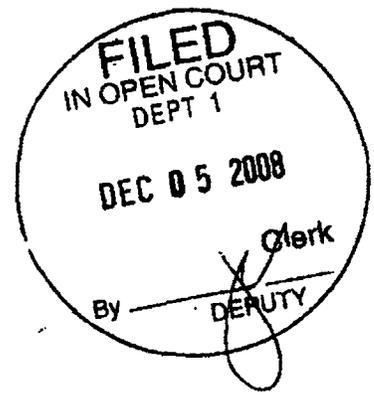
Defendant

Print name: KIMBERLY PHILLIPS

VOTING RIGHTS STATEMENT: RCW 10.64.140. I acknowledge that my right to vote has been lost due to felony convictions. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature:

[Signature]
Kimberly Phillips



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CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 07-1-05353-2

I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF COURT REPORTER

Randy York
Court Reporter

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IDENTIFICATION OF DEFENDANT

SID No. 13571983
(If no SID take fingerprint card for State Patrol)

Date of Birth 2/11/66

FBI No. 57346HA1

Local ID No. UNKNOWN

PCN No. UNKNOWN

Other

Alias name, SSN, DOB: _____

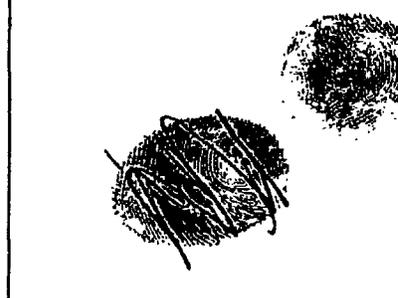
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<input type="checkbox"/>	Native American	<input type="checkbox"/>	Other: :	<input checked="" type="checkbox"/>	Non-Hispanic
				<input type="checkbox"/>	Hispanic
				<input type="checkbox"/>	Male
				<input checked="" type="checkbox"/>	Female

FINGERPRINTS

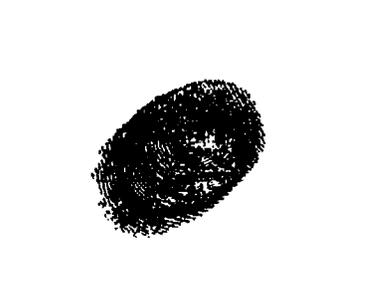
Left four fingers taken simultaneously



Left Thumb



Right Thumb



Right four fingers taken simultaneously



I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk

Janet Costanti

Dated: 12-5-08

DEFENDANT'S SIGNATURE: *John Phillips*

DEFENDANT'S ADDRESS: _____

APPENDIX II

Charging Information

October 17 2007 8:30 AM

KEVIN STOCK
COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 07-1-05353-2

vs.

KIMBERLY ANN PHILLIPS,

INFORMATION

Defendant.

DOB: 2/11/1966

SEX : FEMALE

RACE: WHITE

PCN#:

SID#: 13571983

DOL#: WA PHILLKA346CJ

COUNT I

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse KIMBERLY ANN PHILLIPS of the crime of THEFT IN THE FIRST DEGREE, committed as follows:

That KIMBERLY ANN PHILLIPS, in the State of Washington, on or about the 30th day of March, 2007, did unlawfully and feloniously obtain control over property and/or services other than a firearm or a motor vehicle, belonging to another, of a value exceeding \$1,500, by color or aid of deception with intent to deprive said owner of such property and/or services, contrary to RCW 9A.56.020(1)(b) and 9A.56.030(1)(a), and the crime was aggravated by the following circumstance: pursuant to RCW 9.94A.535(3)(b), the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance, and against the peace and dignity of the State of Washington.

COUNT II

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse KIMBERLY ANN PHILLIPS of the crime of THEFT IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or

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so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That KIMBERLY ANN PHILLIPS, in the State of Washington, during the period between the 26th day of June, 2007 and the 4th day of July, 2007, did unlawfully and feloniously obtain control over property and/or services other than a firearm or a motor vehicle, belonging to another, of a value exceeding \$1,500, by color or aid of deception with intent to deprive said owner of such property and/or services, contrary to RCW 9A.56.020(1)(b) and 9A.56.030(1)(a), and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(3)(n), the defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense, and/or pursuant to RCW 9.94A.535(3)(b), the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance, and against the peace and dignity of the State of Washington.

COUNT III

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse KIMBERLY ANN PHILLIPS of the crime of THEFT IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That KIMBERLY ANN PHILLIPS, in the State of Washington, during the period between the 26th day of June, 2007 and the 4th day of July, 2007, did unlawfully and feloniously obtain control over property and/or services other than a firearm or a motor vehicle, belonging to another, of a value exceeding \$1,500, by color or aid of deception with intent to deprive said owner of such property and/or services, contrary to RCW 9A.56.020(1)(b) and 9A.56.030(1)(a), and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(3)(b), the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance, and/or pursuant to RCW 9.94A.535(3)(n), the defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense, and against the peace and dignity of the State of Washington.

COUNT IV

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse KIMBERLY ANN PHILLIPS of the crime of THEFT IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or

so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That KIMBERLY ANN PHILLIPS, in the State of Washington, on or about the 18th day of September, 2007, did unlawfully and feloniously obtain control over property and/or services other than a firearm or a motor vehicle, belonging to another, of a value exceeding \$1,500, by color or aid of deception with intent to deprive said owner of such property and/or services, contrary to RCW 9A.56.020(1)(b) and 9A.56.030(1)(a), and the crime was aggravated by the following circumstance: pursuant to RCW 9.94A.535(3)(b), the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance, and against the peace and dignity of the State of Washington.

COUNT V

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse KIMBERLY ANN PHILLIPS of the crime of THEFT IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That KIMBERLY ANN PHILLIPS, in the State of Washington, during the period between the 10th day of August, 2007 and the 23rd day of August, 2007, did unlawfully and feloniously obtain control over property and/or services other than a firearm or a motor vehicle, belonging to another, of a value exceeding \$1,500, by color or aid of deception with intent to deprive said owner of such property and/or services, contrary to RCW 9A.56.020(1)(b) and 9A.56.030(1)(a), and the crime was aggravated by the following circumstance: pursuant to RCW 9.94A.535(3)(b), the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance, and against the peace and dignity of the State of Washington.

COUNT VI

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse KIMBERLY ANN PHILLIPS of the crime of THEFT IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That KIMBERLY ANN PHILLIPS, in the State of Washington, on or about the 23rd day of August, 2007, did unlawfully and feloniously obtain control over property and/or services other than a firearm or a motor vehicle, belonging to another, of a value exceeding \$1,500, by color or aid of

deception with intent to deprive said owner of such property and/or services, contrary to RCW 9A.56.020(1)(b) and 9A.56.030(1)(a), and the crime was aggravated by the following circumstance: pursuant to RCW 9.94A.535(3)(b), the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance, and against the peace and dignity of the State of Washington.

COUNT VII

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse KIMBERLY ANN PHILLIPS of the crime of THEFT IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That KIMBERLY ANN PHILLIPS, in the State of Washington, on or about the 10th day of September, 2007, did unlawfully and feloniously obtain control over property and/or services other than a firearm or a motor vehicle, belonging to another, of a value exceeding \$1,500, by color or aid of deception with intent to deprive said owner of such property and/or services, contrary to RCW 9A.56.020(1)(b) and 9A.56.030(1)(a), and the crime was aggravated by the following circumstance: pursuant to RCW 9.94A.535(3)(b), the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance, and against the peace and dignity of the State of Washington.

COUNT VIII

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse KIMBERLY ANN PHILLIPS of the crime of THEFT IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That KIMBERLY ANN PHILLIPS, in the State of Washington, on or about the 10th day of September, 2007, did unlawfully and feloniously obtain control over property and/or services other than a firearm or a motor vehicle, belonging to another, of a value exceeding \$1,500, by color or aid of deception with intent to deprive said owner of such property and/or services, contrary to RCW 9A.56.020(1)(b) and 9A.56.030(1)(a), and the crime was aggravated by the following circumstance: pursuant to RCW 9.94A.535(3)(b), the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance, and against the peace and dignity of the State of Washington.

DATED this 17th day of October, 2007.

TACOMA POLICE DEPARTMENT
WA02703

GERALD A. HORNE
Pierce County Prosecuting Attorney

lkw

By: /s/ LISA WAGNER
LISA WAGNER
Deputy Prosecuting Attorney
WSB#: 16718

APPENDIX III

Declaration for Determination of Probable Cause

1 SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

2 STATE OF WASHINGTON,

3 Plaintiff,

CAUSE NO. 07-1-05353-2

4 vs.

5 KIMBERLY ANN PHILLIPS,

DECLARATION FOR DETERMINATION OF
PROBABLE CAUSE

6 Defendant.

7 LISA WAGNER, declares under penalty of perjury:

8 That I am a deputy prosecuting attorney for Pierce County and I am familiar with the police
9 report and/or investigation conducted by the Tacoma Police Department, University Place Police
10 Department, Fife Police Department and Puyallup Police Department, incident numbers, 07003709,
072360343, 070910369, 07006738, 072540779;

11 That the police report and/or investigation provided me the following information;

12 That in Pierce County, Washington, on or about the 30th day March, 2007 to the 18th day of
September, 2007, the defendant, KIMBERLY ANN PHILLIPS, did commit eight counts of Theft in the
First Degree.

13 Detectives for that Tacoma Police Department, Pierce County Sheriff's Department, Fife Police
14 Department and Puyallup Police Department were all working separate cases where elderly victims were
each scammed out of thousands of dollars by a white female suspect. The suspect in each case was later
15 identified as defendant Phillips via video surveillance photos and photo montages. The detective
investigating the cases for the Tacoma Police Department was advised by another TPD detective that the
16 suspect in the video surveillance photos for the TPD cases was defendant Phillips, who had been arrested
in the late 80's for a series of similar crimes. The detective ran the defendant's criminal history and
17 confirmed that she had been arrested for victimizing elderly victims on numerous occasions dating back
to the late 1980's. Following is a list of the 5 separate cases (2 with TPD) that the four agencies worked
on regarding the thefts by defendant Phillips:

18 1) PCSD (Count I): Victim Marie Adams, 82 years old, contacted the PCSD and reported that
she had been tricked into giving her cash to a white female suspect with the promise of having it paid
19 back at a higher amount. The second report prepared by the detective clarifies some of the information
provided by the responding officer in the initial report. Because of the confusion between the two reports,
the following information is taken from the victim's handwritten statement: Adams is wheelchair bound
20 and had been trying to locate a live-in caretaker. She reported that the suspect, defendant Phillips, came to
her house on 3/3/07 to talk about the job. The defendant identified herself as "Lisa". Adams stated that
21 the defendant immediately began calling her "Mom" and told the victim that she had a \$67,000 check to
pick up in Fife that was owing to her from a previous house in Portland that had been water damaged. The
22 victim stated that the defendant also told her that she owed \$14,000 for furniture storage and that the
\$14,000 had to be paid in cash before they would release the \$67,000 check. The defendant said she did
23 not have enough money, that she needed another \$2000. The defendant told the victim that if she gave her
the \$2000 she would give the victim a \$2000 bonus back. The victim said no, but the defendant persisted
24 and talked the victim into going to Fife with her to talk to "the lady with the \$67,000" check to verify and
get the whole thing settled. The victim agreed and they drove the victim's car to a building in Fife. The

DECLARATION FOR DETERMINATION
OF PROBABLE CAUSE -1

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400

1 victim said that the defendant stopped and called the "building in Fife" or somewhere and then said she
2 needed \$7000 not just \$2000. The victim told her "No." The victim said that the defendant drove to a
3 bank and the victim stayed in the car. The defendant then drove them to the victim's bank, Washington
4 Mutual at 72nd and Pacific. The victim told the defendant she was not giving her the \$7000 and told her to
5 take her home. The victim said that the defendant got very angry and began yelling at her.

6 The victim reported that the defendant began driving and made another call, purportedly to the
7 person with the \$67,000 check. The defendant then told the victim that she now only had to only give her
8 \$5300 and that the lady with the check would verify it. The defendant again told the victim she would
9 make \$2000 on the transaction. The victim and defendant drove to the victim's bank and the victim
10 withdrew \$5000 in \$100 bills. The defendant is shown in the video surveillance photos of this
11 withdrawal. They then drove to Fife to verify the \$67,000 check. Once there the defendant told the victim
12 she would not be able to go in because there were only stairs and no ramps. The defendant went inside
13 and came back with a piece of paper that had written on it that the check would be released once the
14 \$14,000 was paid. The victim refused to give the defendant the \$5000. The defendant again began yelling
15 at the victim and drove to another bank and then drove back to Fife and brought out another handwritten
16 note from inside the building. The defendant then said she would give the victim a receipt for the \$5000
17 and the victim could keep the defendant's truck keys, and said that the victim was letting her down. The
18 defendant wrote out a \$5000 receipt, and the victim handed over the cash. The defendant went into the
19 Fife building again and when she came out she said it would be 3 days before she could get the money.
20 The victim said she panicked because she knew she had been scammed and told this to the defendant. The
21 defendant began screaming at the victim. The victim has high blood pressure and congestive heart failure
22 and was concerned about the defendant yelling at her. The defendant eventually took the victim home and
23 eventually left with the victim's \$5000. The victim reported that the defendant had gotten into the
24 victim's purse and stole the \$5000 receipt as well as the two handwritten notes about the \$67,000. She
also said that the defendant called her later and laughed about taking the items and said that the victim
had no proof.

2) Puyallup PD (Counts II and III): On 7/6/07 Luanne Larson contacted the Puyallup Police
Department on behalf of her aunt, victim Audrey Seitz. The victim is 78, and has dementia and
Alzheimers. Larson is the victim's primary caretaker and reported that she had hired a new caregiver on
6/26/07 to care for the victim. She found the caregiver after posting an ad. Larson said that the new
caregiver identified herself as Kim Trilman. Larson later identified that caregiver as defendant Phillips
via a photo montage. Larson said she left town for two days with the defendant caring for the victim.
When Larson returned she learned from the bank that a check in the amount of \$4783.20 had been cashed
on 7/4/07. Larson obtained a copy of the check and saw that it appeared to have been signed by the victim
and was written to Money Tree. Larson then found out that \$9500 had been transferred from the victim's
savings account to her checking account and at that time \$2500 was withdrawn from the account. The
victim did not remember anything about the incident. Larson said she had not seen or heard from the
defendant. Officers obtained video surveillance of the person who withdrew \$2500 from the victim's
account. Larson confirmed that the suspect was the person she hired. Money Tree was contacted and
could only provide paperwork purportedly filled out by the victim at the time the check was cashed. The
check contains the victim's signature, which is completely different handwriting than on the rest of the
check.

3) Fife PD (Count IV): On 9/24/07 victim Corinne Gunderson and her son, Doug Gunderson
contacted the Fife Police Department regarding a fraud report. The victim is 86 years old. Her son stated
that that on 9/18/07 his mother was walking home carrying two bags of groceries when a female pulled
over and offered to help. The victim declined, but the female insisted and assisted the victim into her
vehicle and then drove the victim home. While inside the residence the female, later identified as
defendant Phillips, explained to the victim that she worked for a bank and needed the victim's assistance
to catch a teller who had been stealing from the bank. The defendant drove the victim to her bank in Fife
where the victim withdrew \$7500. The report states that the victim walked out of the bank and handed
the money to the defendant, however video surveillance of the incident shows the defendant standing next

1 to the victim, arms crossed, as the victim withdrew the money. The defendant drove the victim back to
2 her residence and said she would deposit the money back into the victim's account. She then left the
3 residence, but called back two times and said she would deposit the money, but never did. The victim did
4 not report the fraud. The son found out about it when he saw the withdrawal from something received in
5 the mail

6 4) TPD:

7 A) (Counts V and VI) On 8/24/07 Karen Anderson contacted the Tacoma Police
8 Department on behalf of her father, victim Joy Ostrander. Ostrander is 91 years old. Anderson stated that
9 two weeks earlier a white female knocked on her father's door and asked to use the phone. The victim
10 allowed her to do so. The female then struck up a conversation with the victim and asked for some
11 money. The victim gave her \$20.00. A week later the same female returned to the victim's house and
12 again asked to use the phone. During this incident the female got the victim to show her where he kept his
13 cash. The next day the victim discovered that all of his cash was missing, which was approximately
14 \$2000.00. Anderson stated that the day before the victim's girlfriend was visiting the victim when he
15 received a phone call from the suspect. The victim's girlfriend got on the phone and heard the female on
16 the other end of the line say, "I'll see you at five." The victim's girlfriend left shortly thereafter and then
17 returned at noon to take the victim out to lunch. The victim explained that he had just returned and had
18 been dropped off by the suspect. The victim reported that the suspect had picked him up and drove him to
19 a Wells Fargo so he could withdraw \$5500 which he gave to the suspect. Anderson stated that the victim
20 has memory loss and has issues explaining why he gave the suspect money. Video surveillance from the
21 cash withdrawal shows a female resembling the defendant standing next to the victim at the time of the
22 withdrawal;

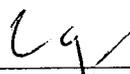
23 B) (Counts VII and VIII) On 9/11/07 Michael Winger contacted the Tacoma Police Department
24 and stated that his father in law, victim Robert Hokenson (85 years old) had been working in his backyard
on 9/10/07 when he was approached by a female who said that she lived in the neighborhood. She asked
the victim if he had \$400 she could borrow to get her car fixed. The victim agreed to loan her the money
and went into his home with the suspect following him. The victim pulled \$3300 from a drawer and the
suspect was ultimately given all of this money. Winger said that the victim then drove the suspect to two
locations, one of which was the TAPCO in Fircrest. The victim and suspect entered the bank and the
suspect handed the teller a note that had the amount of \$3080 written on it. The victim said he was
making a withdrawal. The cash was given to the victim and the two then left the bank. On the drive back
the victim gave the money to the suspect. Once they returned the suspect walked away. Virginia
Hokenson, the victim's wife, said she later received several phone calls from the suspect. Winger
provided photos of the suspect taken at the teller window. The detective investigating the two TPD cases
compared the photos from the incident involving victim Ostrander and from the incident involving victim
Hokenson and determined that it was the same suspect in both sets of photos. It was another detective
who had prior dealings with the defendant who was able to identify her from the surveillance photos. The
victim's son in law stated that the victim has suffered several mini-strokes, which had negatively affected
his reasoning and caused him to become easily confused.

The TPD detective received a phone call from a female identifying herself as defendant Phillips

1 on 9/14/07. The female denied stealing from anyone. She did admit taking "Joe" (many people refer to
2 victim Joy Ostrander as "Joe") to the bank once, but denied stealing from him.

3 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
4 WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

5 DATED: October 16, 2007
6 PLACE: TACOMA, WA

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8 _____
9 LISA WAGNER, WSB# 16718

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APPENDIX V

Article reporting Federal Prosecutors charging
Albert Gonzalez with theft of 130 million credit
and debit card numbers facing 20 year prison term

Gov't: Man tried to steal 130M credit card numbers

 Associated Press

By DEVLIN BARRETT, Associated Press Writer

45 mins ago

WASHINGTON – Federal prosecutors on Monday charged a Miami man with the largest case of credit and debit card data theft ever in the United States, accusing the one-time government informant of trying to gain access to 130 million accounts.

Albert Gonzalez, 28, broke his own record for identity theft by hacking into retail networks, according to prosecutors, though they say his illicit computer exploits ended when he went to jail on charges stemming from a previous case.

Gonzalez is a former informant for the U.S. Secret Service who helped the agency hunt hackers, authorities say. The agency later found out that he had also been working with criminals and feeding them information on ongoing investigations, even warning off at least one individual, according to authorities.

Gonzalez, who is already in jail awaiting trial in a hacking case, was indicted Monday in New Jersey and charged with conspiring with two other unnamed suspects to steal the private information.

Prosecutors say Gonzalez, who is known online as "soupnazi," targeted customers of convenience store giant 7-Eleven Inc. and supermarket chain Hannaford Brothers, Co. Inc. They also targeted Heartland Payment Systems, a New Jersey-based card payment processor.

Gonzalez is awaiting trial in New York for allegedly helping hack the computer network of the national restaurant chain Dave and Buster's. Trial in that case is due to begin next month.

He faces up to 20 years in prison if convicted of the new charges.

The Justice Department said the new case represents the largest alleged credit and debit card data breach ever charged in the United States, beginning in October 2006.

Gonzalez allegedly devised a sophisticated attack to penetrate the computer networks, steal the card data, and send that data to computer servers in California, Illinois, Latvia, the Netherlands and Ukraine.

Also last year, the Justice Department announced additional charges against Gonzalez and others for hacking retail companies' computers for the theft of approximately 40 million credit cards. At the time, that was believed to be the biggest single case of hacking private computer networks to steal credit card data, puncturing the electronic defenses of retailers including Barnes & Noble, Sports Authority and OfficeMax.

At the time of those charges, officials said the alleged thieves weren't computer geniuses, just opportunists who used a technique called "wardriving," which involved cruising through different areas with a laptop

computer and looking for accessible wireless Internet signals. Once they located a vulnerable network, they installed so-called "sniffer programs" that captured credit and debit card numbers as they moved through a retailer's processing networks.

Gonzalez faces a possible life sentence if convicted in that case.

Restaurants are among the most common targets for hackers, experts said, because they often fail to update their antivirus software and other computer security systems.

(This version CORRECTS the suspect's name to Gonzalez, not Gonzales, per updated Justice Department information.)

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DIVISION II

10 MAR -8 AM 9:28

STATE OF WASHINGTON

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

BY C
DEPUTY

NO. 38646-1-II

STATE OF WASHINGTON,
Plaintiff,

v.

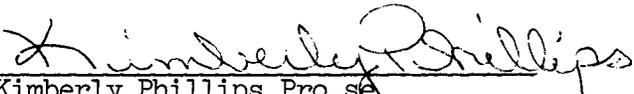
KIMBERLY ANN PHILLIPS,
Appellant.

STATEMENT OF ADDITIONAL AUTHORITIES


Kimerly Phillips Pro se
Washington Corr. Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332-8300

The Appellant, Kimberly Phillips, submits the following additional authority in support of her Statement of Additional Grounds. Specifically, issue number two, in which it is contended that the jury was not specifically instructed on the legal standard for finding a person vulnerable to a level that would meet constitutional requirements for an aggravating factor, State v. Gordon, 153 Wn.App. 516 (Dec. 2009)(not harmless error where deprived of constitutionally sufficient instructions on the aggravating factors of deliberate cruelty and victim vulnerability under Ring v. Arizona, 536 US 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) and Apprendi v. New Jersey, 530 US 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)).

Respectfully Submitted,


Kimberly Phillips Pro se
Washington Corr. Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332-8300

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10 MAR -8 AM 9:28

STATE OF WASHINGTON

BY C
DEPUTY

IN THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

THE STATE OF WASHINGTON)
COUNTY OF PIERCE) ss. DECLARATION OF MAILING

I, Kimberly Phillips, state that on this 3rd day of March,
2010, I deposited in the mail of the United States of America a properly stamped
envelope containing a copy of the following described documents:

Statement of Additional Authority was placed in the prison legal
mail system per GR 3.1

I further state that I sent these copies to the following addresses:
Pierce Co. Pros. Office Appellate Div.
Ms. Demarco
930 Tacoma Ave. S. Rm. 946
Tacoma, WA 98402

Dated: 3-3-10

Kimberly Phillips

Signature

Kimberly Phillips

930811

Print Name & DOC

Washington Correction Center for Women
9601 Bujacich Rd. N.W.
Gig Harbor, Washington 98332-8300

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COURT OF APPEALS
DIVISION II

10 MAR -8 AM 9:28

STATE OF WASHINGTON

BY C
DEPUTY

IN THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

THE STATE OF WASHINGTON)
COUNTY OF PIERCE) ss. DECLARATION OF MAILING

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Statement of Additional Authority was placed in the prison legal
mail system per GR 3.1

I further state that I sent these copies to the following addresses:

Court of Appeals Div. II
950 Broadway, Suite 300

SHERI ARNOLD, ATTY.
PO Box 7718

Tacoma, WA 98402

Tacoma, WA 98402

Dated: 3-3-10

Kimberly Phillips

Kimberly Phillips

Signature
930811

Print Name & DOC

Washington Correction Center for Women
9601 Bujacich Rd. N.W.
Gig Harbor, Washington 98332-8300