

NO. 43582-9

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

STATE OF WASHINGTON, RESPONDENT

v.

LAVESTER ALEXANDER JOHNSON, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable John A. McCarthy

No. 11-1-02330-5

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**RESPONSE BRIEF**

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

1. Did the trial court properly impose condition 16 on defendant's community custody, which prohibits contact with physically or mentally vulnerable individuals, where "vulnerable" can be given a meaningful, sensible, and practical interpretation when considering defendant's conduct?
2. Did the trial court exceed its statutory authority when it prohibited defendant from accessing the Internet and perusing social websites under condition 25 of defendant's community custody?
3. Where a clerical mistake is made on a judgment and sentence, is the proper remedy to remand the issue to the trial court to correct the error?
4. Concerning defendant's right to a public trial, has defendant met his burden to identify where in the record a closure occurred that would require a *Bone-Club* analysis?
5. Has defendant met his burden to provide this Court an adequate record for review?

B. STATEMENT OF THE CASE.

1. Procedure

On June 8, 2011, the Pierce County Prosecuting Attorney's Office (State) charged Lavester Alexander Johnson (defendant) with one count of child molestation in the third degree. The State later amended the information to adjust the incident date. CP 22.

Defendant's jury trial began on April 10, 2012, before the Honorable John A. McCarthy. RP 61.<sup>1</sup> The jury found defendant guilty as charged. CP 64. On May 25, 2012, the court sentenced defendant to 14 months in custody.<sup>2</sup> CP 87 (Judgment and sentence, paragraph 4.5). Defendant timely filed a notice of appeal on June 12, 2012. CP 94–113.

## 2. Facts

In early spring 2011, fourteen year-old C.P.,<sup>3</sup> C.P.'s aunt—K.A.— and C.P.'s cousins visited Tina Becerra in Spanaway, Washington. RP 83–86, 452–53. Ms. Becerra was a good friend of K.A. who had just moved into a new house and invited them to a sleepover. RP 86. Defendant, who was forty-two years old, was in a relationship with Ms. Becerra and was also at the house. RP 88–89, 507, 562–63. This was the first meeting between C.P. and defendant. RP 85.

Defendant offered to show C.P. and her cousins how to walk his dog outside. RP 91–92. While instructing C.P., defendant stood directly behind C.P. and pressed his erect penis against her. RP 92, 212–13. After C.P. and the other children had gone to bed, defendant entered C.P.'s room, crouched down next to C.P., put his fingers between her legs on the

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<sup>1</sup> There are two separately paginated verbatim report of proceedings in this case: defendant's jury trial, and sentencing. The State will respectively refer to these proceedings as "RP" and "5/25/13 RP" in its brief.

<sup>2</sup> Defendant had an offender score of 1 with a standard range of 12–14 months. CP 2

<sup>3</sup> C.P. was the victim in this case, and a minor at the time of both the crime and trial. For purposes of anonymity, the State will refer C.P. and her family by their initials.

outside of her clothes, and rubbed her vagina for about a minute. RP 102–06. He told her "good morning," and gestured her to go downstairs with him. RP 102–03. C.P. refused, so he left. RP 102–06.

The following day, C.P. was sitting on her bed next to defendant's dog when defendant entered, sat next to her, and began to pet the dog under its snout. RP 112–13. While petting the dog, defendant moved his hand from the dog's snout to C.P.'s breast. RP 113–14. C.P. stood up, left the room, and told her friends, her mother, Ms. Becerra, and a counselor what had occurred. RP 116–23.

At trial, another young woman, S.S., testified that defendant had similarly molested her on an earlier date while she visited his home when she was fourteen years-old. RP 325–30.

Defendant denied committing any of the acts described above. RP 594–95, 608–09.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY IMPOSED CONDITION 16 OF DEFENDANT'S COMMUNITY CUSTODY, WHICH PROHIBITS CONTACT WITH PHYSICALLY AND MENTALLY VULNERABLE INDIVIDUALS, BECAUSE "VULNERABLE" IS NOT UNCONSTITUTIONALLY VAGUE.

This Court reviews the trial court's imposition of a condition of community custody for an abuse of discretion. *State v. Valencia*, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010). A trial court abuses its discretion

if its decision is manifestly unreasonable, including using its discretion to impose an unconstitutional condition of community custody. *Id.* at 791–92. Under an abuse of discretion standard of review, a community custody condition does not carry a presumption of constitutionality. *Id.* at 791–93 (finding that while statutes carry a presumption of constitutionality because they are enacted by the legislature, conditions on community custody are imposed by judges and therefore carry no such presumption).

A defendant may raise a vagueness challenge against a community custody condition first time on appeal. *See, e.g., State v. Bahl*, 164 Wn.2d 739, 745, 193 P.3d 678 (2008) (invalidating a condition that prohibited access to "pornographic materials" as unconstitutionally vague); *see also Valencia*, 169 Wn.2d at 785 (involving a condition that prohibited possession or use of "any paraphernalia" that could be used to facilitate the sale or transfer of controlled substances). Due process requires a condition of community custody to (1) offer notice of what conduct is or is not permitted, and (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. *Valencia*, 169 Wn.2d at 794.

A community custody condition "is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct." *Id.* at 793 (quoting *City of Seattle v. Eze*, 111 Wn.2d 22, 27, 759 P.2d 366

(1988)) (internal quotations omitted). Neither is a condition automatically unconstitutionally vague if some of its terms are undefined. *City of Spokane v. Douglass*, 115 Wn.2d 171, 180, 795 P.2d 693 (1990). Rather, the court should afford the challenged language a meaningful, sensible, and practical interpretation. *Id.* at 180; *Bahl*, 164 Wn.2d at 754 (“When a [condition] does not define a term, the court may consider the plain and ordinary meaning as set forth in a standard dictionary.”).

The court does not test for vagueness “by examining hypothetical situations at the periphery of the [condition's] scope,” but instead by inspecting the conduct of the party who is challenging the condition. *Douglass*, 115 Wn.2d at 182–83; *see also State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992) (“If the statute does not involve First Amendment rights, then the vagueness challenge is to be evaluated by examining the statute as applied under the particular facts of the case.”).

Here, defendant challenges the court's imposition of condition 16 of his community custody, which states: “Do not initiate, or have in any way, physical contact with children under age of 18 for any reason. Do not have any contact with physically or mentally vulnerable individuals.” CP 81 (Judgment and sentence, Appendix H, condition 16) (emphasis in original). Specifically, defendant argues that the term “vulnerable” is unconstitutionally vague. Brief of Appellant at 7–8.

Defendant fails his burden to demonstrate that "vulnerable" is unconstitutionally vague. Besides merely asserting that the term "vulnerable" is vague, defendant fails to provide any examples or argument as to how the term is vague, or how an ordinary person might otherwise read "vulnerable" outside of its plain meaning. In other cases involving vagueness challenges, the courts have consistently relied on the challenger's alternative definitions to determine whether term is indeed vague. *See, e.g., Valencia*, 169 Wn.2d at 794–95 (considering the defendant's proposed alternative definitions of "any paraphernalia"); *State v. Moultrie*, 143 Wn. App. 387, 177 P.3d 776 (2008) (considering the defendant's proposed alternative definitions of "vulnerable, ill, or disabled adults"). In this case, however, defendant has not offered a single alternative definition. Without providing any alternate readings of "vulnerable," defendant's vagueness challenge is vague in itself.

This is also apparent when considering the manner defense counsel originally objected to condition 16 at trial, stating, "No. 16, okay, prohibit contact with kids. I understand. That's pretty much boilerplate. Do not have contact with physically or mentally vulnerable individuals. *Please strike that, Your Honor. That is so much garbage.* In No. 17, no contact . . . ." 5/25/2012 RP 27 (emphasis added). Absent any argument as to why "vulnerable" was vague—other than noting that it was "garbage"—the trial

court properly denied defendant's objection and imposed the community custody condition.

Because there is no statutory definition of "vulnerable," this Court must afford the term a meaningful, sensible, and practical interpretation that is guided by its dictionary definition. *See Bahl*, 164 Wn.2d at 754. The dictionary defines "vulnerable" as "capable of being wounded: defenseless against injury," or "open to attack or damage." *Webster's Third New International Dictionary* 2566–67 (2002). In Condition 16, the term "vulnerable" is not isolated, but modified with descriptors that narrow and limit the class or group to which the condition applies. Thus, Condition 16—when given a meaningful and sensible interpretation in this case—prohibits defendant from having contact with individuals who are "physically and mentally 'defenseless against injury,' or 'open to attack or damage.'"

This definition is consistent with the legislature's intent to protect children and other persons who are physically and mentally vulnerable under the general statutory scheme for sex offenses. *See generally* RCW 9A.44 (proscribing additional protections for children and individuals with mental incapacity, physical helplessness, and developmental disability). The legislature has afforded substantial protections to these groups by creating per se punishments for acts done against them. For example, the

indecent liberties statute under RCW 9A.44.100 requires the State to prove the defendant acted with "forcible compulsion" when the victim is not a physically or mentally vulnerable party. *See* RCW 9A.44.100. The statutes prohibiting child molestation, however, have no such requirement.

*Contrast* RCW 9A.44.100 (indecent liberties), *with* RCW 9A.44.083–9A.44.089 (child molestation in the first, second, and third degrees).

Similarly, the legislature has removed the consent and forcible compulsion elements from the statutes prohibiting rape of a child. *Contrast* RCW 9A.44.040–9A.44.060 (rape in the first, second, and third degrees), *with* RCW 9A.44.073–9A.44.079 (rape of a child in the first, second, and third degrees). These statutes demonstrate the legislature's intent to recognize children and physically and mentally vulnerable individuals as a group of persons in need of heightened protection. The trial court's decision to impose Condition 16 recognizes this distinction as a basis to prohibit defendant from having contact with children and physically and mentally vulnerable individuals.

The term "vulnerable," as defined above, is not unconstitutionally vague when considering defendant's conduct and the specific facts of his crimes. The evidence shows that defendant is a sexual predator of opportunity: defendant, a forty-two year-old adult, molested S.S., a fourteen year-old girl, by touching her vagina and buttocks under her

shorts while he gave her a massage when she complained about a headache (RP 325–29); he pressed his erect penis against C.P., a fourteen year-old girl, while he instructed her on how to walk a dog (RP 92, 212–13); he snuck into C.P.'s room to rub C.P.'s vagina with his fingers while everybody else in the room was asleep (RP 102–06); and he rubbed C.P.'s breast while he pet his dog, which C.P. was holding near her chest (RP 113–14).

Additionally, the court considered the pre-sentencing investigation report,<sup>4</sup> which concluded:

A risk assessment was completed during the pre-sentence interview. Factors which require attention to reduce Mr. Johnson's risk to re-offend include his sexual deviancy, drug and alcohol dependency, and mental health issues. *Recommended conditions in Appendix H will enable the Department of Corrections (DOC) to effectively monitor and supervise Mr. Johnson in the community.* Intervention applied to these areas would assist in reducing potential risk to community safety. Also, DOC, as a matter of policy, supervises sex offenders and violent offenders who are placed on supervision *at elevated levels.*

CP 125 (Pre-sentence investigation report, paragraph VIII) (emphasis added).

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<sup>4</sup> See 5/25/2012 RP 1–2, 17–19, 29–31.

Similar to prohibiting contact with children like the two fourteen year-old girls above, it was not an abuse of discretion to prohibit defendant from contacting those who are physically and mentally defenseless to injury as well (i.e., "physically and mentally vulnerable individuals"). This would afford "vulnerable" a meaningful, sensible, and practical definition in light of the facts of this case.

Defendant relies exclusively on *Moultrie*<sup>5</sup> to support his argument. Brief of Appellant at 7–8. But *Moultrie* neither supports his position to the extent he claims nor provides the remedy he seeks. In *Moultrie*, the defendant raped a twenty-eight year-old female with Down syndrome. 143 Wn. App. at 390–91. After his conviction, defendant challenged a condition on his community custody that prohibited him from contacting "vulnerable, ill or disabled adults." *Id.* at 396. The defendant argued that "vulnerable," "ill," and "disabled" were terms that:

[P]rovide[d] no meaningful reference to the adults he must avoid, . . . [and that] if he resume[d] a sales position after he [was] released from custody, there [was] no way for him to pre-evaluate potential clients because anybody behind a door, on a telephone line, or waiting in line for a milkshake could have a disability or illness, whether visible or not, and anyone who answers a door to a stranger could be considered "vulnerable."

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<sup>5</sup> 143 Wn. App. 387.

*Id.* at 396, n.17 (internal quotations omitted).

In *Moultrie*, however, the State relied on other statutory definitions, such as "vulnerable adult" and "developmental disability," to argue that the sentencing court intended to prohibit the defendant only from having contact with adults with disabilities. *Id.* at 397. The reviewing court reviewed the record and found no evidence that the trial court intended to incorporate the statutory definition and remanded *only* for the trial court *to clarify* the extent of the prohibition. *Id.* at 397–98.

Despite defendant's assertions to the contrary, *Moultrie* does not stand for either proposition that (1) "vulnerable" is per se unconstitutionally vague or overbroad, or (2) a remand for *resentencing* is necessary. First, the *Moultrie* court expressly found that the term "vulnerable" was neither unconstitutionally vague nor overbroad. *See id.* at 398. Second, the remedy the court in *Moultrie* ordered was a remand for the trial court to clarify what it meant by "vulnerable" or "disabled adults." *Id.*

Here, condition 16 is not unconstitutionally vague when considering its dictionary definition as applied to the facts of this case. Unlike *Moultrie*, there was evidence of several acts of molestation against two children—persons who might otherwise be considered physically and mentally vulnerable. The trial court thus properly imposed condition 16.

But even if this Court were to find that "vulnerable" is vague, the proper remedy would be to remand with instructions for the trial court to clarify the limits of the challenged condition of community custody.

2. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY WHEN IT IMPOSED CONDITION 25 ON DEFENDANT'S COMMUNITY CUSTODY, WHICH PROHIBITED HIM FROM USING THE INTERNET OR PERUSING SOCIAL WEBSITES.

This Court reviews de novo whether the trial court had statutory authority to impose certain conditions of community custody. *State v. Acevedo*, 159 Wn. App. 221, 231, 248 P.3d 526 (2010). A trial court may only impose statutorily authorized sentences. *State v. Paulson*, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). "If the trial court exceeds its sentencing authority, its actions are void." *Id.* When the trial court imposes an unauthorized condition on community custody, this Court remedies the error by remanding the issue with instructions to strike the unauthorized condition.<sup>6</sup> *See State v. Jones*, 118 Wn. App. 199, 212, 76 P.3d 258 (2003).

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<sup>6</sup> Defendant argues that the proper remedy would be to remand for resentencing. Brief of Appellant at 5–8. The proper remedy, however, is to remand with instructions only to strike the unauthorized condition. *See, e.g., Jones*, 118 Wn. App. at 212.

RCW 9.94A.505(8) states: "As part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter." The law defines a "crime-related prohibition" as:

[A]n order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order a court may be required by the department.

RCW 9.94A.030(10).

In *State v. O'Cain*, 144 Wn. App. 772, 184 P.3d 1262 (2008), the trial court prohibited defendant from internet access as a condition of his community custody where the defendant was convicted of rape. *Id.* at 774. The defendant in *O'Cain* pushed his victim over a fence, raped her, took her cell phone, and ran away. *Id.* at 773–74. The reviewing court found that the trial court had exceeded its statutory authority because there was no evidence or findings that the internet-access condition was related to the crime. *Id.* at 775.

Here, as part of defendant's community custody, the court imposed the following condition: "You shall not have access to the Internet at any location nor shall you have access to computers unless otherwise approved by the Court. You also are prohibited from joining or perusing any public social websites (Face book, MySpace, etc.)." CP 82 (Judgment and

sentence, Appendix H, condition 25). At sentencing, however, the court did not make any findings, nor is there evidence from trial or the pre-sentencing investigation, to support the internet-access condition as related to defendant's crime. The State respectfully requests this Court to remand the issue with instructions to strike condition 25 from Appendix H of the judgment and sentence.

3. THE PROPER REMEDY FOR A CLERICAL MISTAKE IS TO REMAND THE ISSUE FOR THE TRIAL COURT TO CORRECT THE ERROR.

Clerical mistakes in judgments and sentences are governed by RAP 7.2(e), which permits the trial court to correct such mistakes with this Court's approval. Where a clerical mistake is made on a judgment and sentence, such as an erroneous citation to an outdated statute, the proper remedy is to remand the issue to the trial court to correct the mistake. *See In re Mayer*, 128 Wn. App. 694, 701–02, 117 P.3d 353 (2005).

As identified by defendant, Appendix H of defendant's judgment and sentence includes several outdated statutory references that have since been re-codified. This Court should remand the issue to the trial court to make the following corrections:

- RCW 9.94A.712 should be corrected to RCW 9.94A.507
- RCW 9.94A.150 should be corrected to RCW 9.94A.728
- RCW 9.94A.125 should be corrected to RCW 9.94A.825

*See* CP 80 (Judgment and sentence, Appendix H).

4. DEFENDANT FAILS TO IDENTIFY WHERE ANY CLOSURE OCCURRED THAT WOULD REQUIRE A **BONE-CLUB** ANALYSIS<sup>7</sup>.

The Sixth Amendment to the federal constitution and article I, section 22 of the state constitution guarantee a defendant the right to a public trial. U.S. Const., amend. VI; Wash. Const., art. I, § 22. Also, article I, section 10 of the state constitution guarantees the public's right to public judicial proceedings. Wash. Const., art. I, § 10. This Court reviews de novo whether a defendant's right to a public trial has been violated. *In re Stockwell*, 160 Wn. App. 172, 178–79, 248 P.3d 576 (2011).

Before determining whether either article I, sections 10 and 22 have been violated, however, the court must first determine whether a closure occurred to implicate those rights. *State v. Beskurt*, 293 P.3d 1159, 2013 WL 363135 (2013). Furthermore, the defendant carries the burden to identify where in the record an alleged error affected defendant's rights. *See, e.g., State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012); *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.").

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<sup>7</sup> Arguments 3 and 4 in the State's response brief pertain to defendant's second assignment of error.

Defendant broadly argues that a closure occurred and that "[t]he violation of the right to an open and public trial is a structural error and the remedy is a remand for a new trial." Brief of Appellant at 10. Defendant alleges a closure occurred without specifying anywhere in the record that might support such an assertion. Defendant even acknowledges that the record is devoid of any discussion regarding the trial court's sealing of the juror questionnaires or closure altogether. Brief of Appellant at 10.

There is also no support in the record as to when the court sealed the questionnaires. This Court has repeatedly held that sealing the questionnaires after voir dire does not constitute a closure and does not implicate defendant's rights. *See, e.g., State v. Smith*, 162 Wn. App. 833, 847, 262 P.3d 72 (2011); *Stockwell*, 160 Wn. App. at 178–79. Without specifying when the alleged closure—if any—occurred, it is impossible to determine whether defendant's rights were implicated or violated.

Even if this Court were to consider the merits of defendant's argument, in light of the Washington State Supreme Court's recent decision in *Beskurt*, defendant must identify whose rights (i.e., the defendant's rights or the public's rights) were implicated by a closure. *See Beskurt*, 293 P.3d at 1161–63 (finding that the court's inquiry shifts depending on whose rights are implicated). In *Beskurt*, the court held that neither the defendant's nor the public's rights are violated where (1) the

questionnaires are completed prior to voir dire, (2) the questionnaires are used by the parties as a screening tool, (3) the questionnaires do not substitute oral voir dire, and (4) the public has the opportunity to observe voir dire. *See id.* at 1162.

In this case, it seems defendant's right to a public trial was not implicated because it appears (from the record available) the questionnaires were completed, and the parties used them as a screening tool, and that the parties conducted oral voir dire. *See* RP 57–61. Although the record is ambiguous as to whether the public was able to attend voir dire—defendant has identified nothing from the record that might indicate otherwise.

This Court should deny defendant's alleged violation of his right to a public trial because he has not satisfied his burden to identify where in the record a closure occurred. It is thus impossible to determine whether a ***Bone-Club*** analysis was necessary, or whether defendant's—or possibly the public's—right to an open and public trial was implicated or violated.

5. DEFENDANT FAILS HIS BURDEN TO PROVIDE AN ADEQUATE RECORD FOR REVIEW.

It is the defendant's burden to provide the reviewing court a record sufficient for review. RAP 9.2(b). An insufficient appellate record

precludes review of the alleged errors. *In re Detention of Morgan*, 161 Wn. App. 66, 83, 253 P.3d 394 (2011), *modified on other grounds by State v. Sublett*, 176 Wn.2d 58, 70–73, 292 P.3d 715 (2012).

Further complicating defendant's failure to identify where in the record a closure occurred, defendant has not included the verbatim report of proceedings for voir dire—where a closure, if any, might have occurred. Thus, even if the trial court at some point did conduct a *Bone-Club* analysis, that portion of the transcript—insofar as the State has been able to determine—has not been included for review. This Court should deny defendant's argument in this regard because he failed his burden to provide an adequate record for review, as well as identify anything that might support his argument from the current record.

D. CONCLUSION.

The trial court did not err when it prohibited defendant from having contact with physically and mentally vulnerable individuals as a condition of his community custody. The term "vulnerable" is not unconstitutionally vague because it can be given a meaningful and practical interpretation in light of defendant's conduct. The trial court, however, did exceed its statutory authority when it prohibited defendant from accessing the internet, and also made a few clerical mistakes when it relied on cited

outdated statutes as the basis for defendant's sentence. This Court should remand these issues to the trial court with instructions to strike condition 25, as well as an order to correct any clerical mistakes.

Finally, defendant has not met his burden to identify where in the record a closure occurred that would require a *Bone-Club* analysis. Accordingly, the State respectfully requests this Court to deny his claim in this regard.

DATED: April 3, 2013.

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Certificate of Service:

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

4/3/13 Cheer Kahn  
Date Signature

# PIERCE COUNTY PROSECUTOR

## April 03, 2013 - 2:38 PM

### Transmittal Letter

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Case Name: St. v. Johnson

Court of Appeals Case Number: 43582-9

**Is this a Personal Restraint Petition?** Yes  No

#### The document being Filed is:

Designation of Clerk's Papers                      Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

#### Comments:

No Comments were entered.

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A copy of this document has been emailed to the following addresses:  
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