

62926-3

62926-3

NO. 62926-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL RYAN,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 OCT 20 PM 3:44

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MICHAEL HEAVEY

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DENNIS J. McCURDY
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	7
C. <u>ARGUMENT</u>	9
1. FIVE OF THE DEFENDANT'S SIX CLAIMS ARE BARRED BECAUSE THEY ARE UNTIMELY OR HAVE ALREADY BEEN RAISED AND REJECTED	9
2. GOVERNED BY SETTLED LAW, KIDNAPPING AND ROBBERY CONVICTIONS DO NOT VIOLATE DOUBLE JEOPARDY	11
3. THE KIDNAP MERGER DOCTRINE HAS BEEN REJECTED IN WASHINGTON, AND AMPLE EVIDENCE SUPPORTS THE CONVICTIONS	14
4. WHETHER A COURT CAN IMPOSE BUT ONE FIREARM ENHANCEMENT EVEN THOUGH A DEFENDANT COMMITS CRIMES AGAINST DIFFERENT PERSONS IS AN ISSUE GOVERNED BY EXISTING CASE LAW	18
5. THE ACT OF BEING ARMED WITH A FIREARM DID NOT ELEVATE THE DEGREE OF THE DEFENDANT'S ROBBERY OR KIDNAPPING CONVICTIONS, AND IMPOSING PUNISHMENT FOR A FIREARM ENHANCEMENT DOES NOT VIOLATE DOUBLE JEOPARDY	22

7

6. THE DEFENDANT'S CLAIM THAT A JURY MUST DECIDE IF HIS CRIMES WERE "SEPARATE AND DISTINCT" SERIOUS VIOLENT OFFENSES IS GOVERNED BY UNITED STATES SUPREME COURT CASE LAW..... 27

7. THE PREMISE BEHIND THE DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL IS FAULTY AND HIS CLAIM SHOULD BE DENIED 29

D. CONCLUSION 35

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Apprendi v. New Jersey, 530 U.S. 466,
120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)..... 27, 28

Blakely v. Washington, 542 U.S. 296,
124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)..... 26, 27

Missouri v. Hunter, 459 U.S. 359,
103 S. Ct. 673, 74 L. Ed. 2d 535 (1983)..... 21

Oregon v. Ice, ___ U.S. ___,
129 S. Ct. 711, 172 L. Ed. 2d 517 (2009)..... 28

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 29

United States v. Dixon, 509 U.S. 688,
113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993)..... 12

Washington State:

Buchanan v. International Broth. of Teamsters,
94 Wn.2d 508, 617 P.2d 1004 (1980)..... 21

In re Delgado, 149 Wn. App. 223,
204 P.3d 936 (2009)..... 19, 26, 28

In re Stranger Creek, 77 Wn.2d 649,
466 P.2d 508 (1970)..... 13

In re Fletcher, 113 Wn.2d 42,
776 P.2d 114 (1989)..... 12

Roberson v. Perez, 156 Wn.2d 33,
123 P.3d 844 (2005)..... 10

<u>State v. Adamy</u> , 151 Wn. App. 583, 213 P.3d 627 (2009).....	33
<u>State v. Aguirre</u> , COA No. 36186-8-II, <u>rev. granted</u> , 165 Wn.2d 1036 (2009).....	26
<u>State v. Baldwin</u> , 150 Wn.2d 448, 78 P.3d 1005 (2003).....	13
<u>State v. Barberio</u> , 121 Wn.2d 48, 846 P.2d 519 (1993).....	9, 10
<u>State v. Barnes</u> , 153 Wn.2d 378, 103 P.3d 1219 (2005).....	24
<u>State v. Bauers</u> , 25 Wn.2d 825, 172 P.2d 279 (1946).....	10
<u>State v. Brown</u> , 111 Wn.2d 124, 761 P.2d 588 (1988).....	21
<u>State v. Caldwell</u> , 47 Wn. App. 317, 734 P.2d 542, <u>rev. denied</u> , 108 Wn.2d 1018 (1987).....	25
<u>State v. Calle</u> , 125 Wn.2d 769, 888 P.2d 155 (1995).....	11
<u>State v. Chrisman</u> , 100 Wn.2d 814, 676 P.2d 419 (1984).....	28
<u>State v. Claborn</u> , 95 Wn.2d 629, 628 P.2d 467 (1981).....	19
<u>State v. Cubias</u> , 155 Wn.2d 549, 120 P.3d 929 (2005).....	28
<u>State v. Elmi</u> , 138 Wn. App. 306, 156 P.3d 281 (2007).....	19
<u>State v. Esparza</u> , 135 Wn. App. 54, 143 P.3d 612 (2006).....	19

<u>State v. Fenter</u> , 89 Wn.2d 57, 569 P.2d 67 (1977).....	21
<u>State v. Friederich-Tibbets</u> , 123 Wn.2d 250, 866 P.2d 1257 (1994).....	30
<u>State v. Frohs</u> , 83 Wn. App. 803, 924 P.2d 384 (1996).....	11
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105, <u>cert. denied</u> , 516 U.S. 843 (1995).....	13
<u>State v. Gocken</u> , 127 Wn.2d 95, 896 P.2d 1267 (1995).....	12
<u>State v. Green</u> , 94 Wn.2d 671, 600 P.2d 1249 (1979).....	15
<u>State v. Gurske</u> , 155 W.2d 134, 118 P.3d 333 (2005).....	24
<u>State v. Harris</u> , 102 Wn.2d 148, 685 P.2d 584 (1984).....	21, 25
<u>State v. Horton</u> , 59 Wn. App. 412, 798 P.2d 813 (1990), <u>rev. denied</u> , 116 Wn.2d 1017 (1991).....	26
<u>State v. Husted</u> , 118 Wn. App. 92, 74 P.3d 672 (2003), <u>rev. denied</u> , 151 Wn.2d 1014 (2004).....	19, 25
<u>State v. Jacobsen</u> , 78 Wn.2d 491, 477 P.2d 1 (1970).....	10
<u>State v. Kelley</u> , 146 Wn. App. 370, 189 P.3d 853 (2008), <u>rev. granted</u> , 165 Wn.2d 1027 (2009).....	25, 26
<u>State v. Korum</u> , 120 Wn. App. 686, 86 P.2d 166 (2004).....	3, 4, 16. 33

<u>State v. Korum</u> , 157 Wn.2d 614, 141 P.3d 13 (2006).....	4, 12
<u>State v. Laviollette</u> , 118 Wn.2d 670, 826 P.2d 684 (1992).....	28
<u>State v. Lessley</u> , 118 Wn.2d 773, 827 P.2d 996 (1992).....	28, 29
<u>State v. Louis</u> , 155 Wn.2d 563, 120 P.3d 936 (2005).....	4, 12, 14
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	29, 30, 34
<u>State v. McGill</u> , 112 Wn. App. 95, 47 P.3d 173 (2002).....	30, 31, 32, 33
<u>State v. Nguyen</u> , 134 Wn. App. 863, 142 P.3d 1117 (2006), <u>rev. denied</u> , 163 Wn.2d 1053, <u>cert. denied</u> , 129 S. Ct. 644 (2008).....	25, 26
<u>State v. Pentland</u> , 43 Wn. App. 808, 719 P.2d 605, <u>rev. denied</u> , 106 Wn.2d 1016 (1986).....	25
<u>State v. Price</u> , 103 Wn. App. 845, 14 P.3d 841 (2000).....	28
<u>State v. Pryor</u> , 115 Wn.2d 445, 799 P.2d 244 (1990).....	32
<u>State v. Ryan</u> , 123 Wn. App. 1004, 2004 WL 1875485, 52892-1-I (2004).....	3
<u>State v. Ryan</u> , 136 Wn. App. 1051, 2007 WL 211199, 55871-4-I (2007).....	5
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	16

<u>State v. Sanchez</u> , 69 Wn. App. 255, 848 P.2d 208 (1993).....	31
<u>State v. Sauve</u> , 100 Wn.2d 84, 666 P.2d 894 (1983).....	10
<u>State v. Smith</u> , 31 Wn. App. 226, 640 P.2d 25 (1982).....	16
<u>State v. Tessema</u> , 139 Wn. App. 483, 162 P.3d 420 (2007), <u>rev. denied</u> , 163 Wn.2d 1018 (2008).....	25, 26
<u>State v. Tili</u> , 148 Wn.2d 350, 60 P.3d 1192 (2003).....	11
<u>State v. Tilton</u> , 149 Wn.2d 775, 72 P.3d 735 (2003).....	16
<u>State v. Toney</u> , 149 Wn. App. 787, 205 P.3d 944 (2009).....	25, 26
<u>State v. Vike</u> , 125 Wn.2d 407, 885 P.2d 824 (1994).....	28
<u>State v. Vladovic</u> , 99 Wn.2d 413, 662 P.2d 853 (1983).....	11, 12, 14, 16
<u>State v. Ward</u> , 125 Wn. App. 243, 104 P.3d 670 (2004).....	18
<u>State v. Willis</u> , 153 Wn.2d 366, 103 P.3d 1213 (2005).....	24
<u>State v. Wilson</u> , 125 Wn.2d 212, 883 P.2d 320 (1994).....	29

Statutes

Washington State:

RCW 9.41.010.....	23
RCW 9.94A.030	27
RCW 9.94A.510	19, 20
RCW 9.94A.533	19
RCW 9.94A.585	30
RCW 9.94A.589	27, 28
RCW 9A.40.010	17
RCW 9A.40.020	17, 22
RCW 9A.40.030	22
RCW 9A.56.190	23
RCW 9A.56.200	23
RCW 9A.56.210	23

A. ISSUES PRESENTED

1. This appeal stems from a resentencing of the defendant from a 2003 conviction. May the defendant raise issues that he could have raised in his two prior direct appeals, or his personal restraint petition, when the issues were not raised at his resentencing?

2. May the defendant raise issues that this Court has previously rejected?

3. Do convictions for first-degree robbery and first-degree kidnapping violate double jeopardy?

4. Could a rational trier of fact have found sufficient evidence of kidnapping where the defendant removed three persons from a store at gunpoint, bound and gagged them, and left them in a locked warehouse after closing time?

5. When a defendant commits separate and distinct crimes against different individuals while armed with a firearm, can more than one firearm enhancement be imposed?

6. Were the defendant's convictions for robbery and kidnapping elevated by proof of his being armed with a firearm, and if so, does imposing a firearm enhancement violate double jeopardy?

7. Should the Court reject the defendant's claim that the sentencing court erred in imposing consecutive sentences for his serious violent offenses where the court in his bench trial found beyond a reasonable doubt that he committed the crimes against different victims?

8. Can the defendant challenge his standard range sentence by claiming ineffective assistance of counsel?

B STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On December 12, 2002, the defendant was charged with first-degree robbery with a firearm enhancement and first-degree kidnapping with a firearm enhancement. CP 1-9. On July 8, 2003, with no plea having occurred, the State amended the charges, adding two counts of first-degree kidnapping with firearm enhancements. CP 10-12. The defendant then waived jury and proceeded to a bench trial by way of a stipulation to certain evidence; with the trial court finding the defendant guilty as charged. CP 93-97; CP ____, Sub # 67, 68 & 69.

The defendant was sentenced on August 1, 2003. The defendant has a prior armed robbery conviction out of Illinois, and a

prior assault with a deadly weapon conviction out of California.

CP 19. The court imposed a mandatory life sentence based on the fact that his current conviction was his third "most serious offense" under the three-strikes Persistent Offender Accountability Act.

CP 16. The defendant appealed.

On appeal, the State conceded that the documentation submitted at sentencing did not show that the defendant's armed robbery conviction out of Illinois was comparable to a Washington strike offense. See CP 22-27 (includes this Court's unpublished decision, State v. Ryan, 123 Wn. App. 1004, 2004 WL 1875485, 52892-1-I (2004)). A mandate was issued on October 15, 2004, ordering the case be "[r]emand[ed] for an evidentiary hearing to allow the State to prove classification of the disputed conviction." Id.

On February 11, 2005, the defendant was resentenced. The State determined it could not prove that the defendant's Illinois armed robbery conviction was a comparable offense. In sentencing the defendant, the court found that all three of the defendant's kidnapping convictions merged into his robbery conviction. CP 28-34. The sentencing judge found merger based on his belief that he was legally constrained by State v. Korum, 120 Wn. App. 686,

86 P.2d 166 (2004), a then recent case out of Division II. CP 98-101; CP ____, sub # 112 ("This court cannot overrule Division II or ignore their decision"). The Court of Appeals in Korum held that kidnapping merges into robbery for double jeopardy purposes.

The sentencing court imposed a high-end sentence of 68 months on the defendant's robbery conviction, plus a 60-month firearm enhancement, with all other counts and enhancements merging into the robbery conviction. CP 28-34. On March 9, 2005, the State filed a timely notice of appeal challenging the court's double jeopardy/merger determination. CP ____, Sub # 114.

On October 6, 2005, the Supreme Court ruled that kidnapping does not merge into robbery. State v. Louis, 155 Wn.2d 563, 120 P.3d 936 (2005).¹ With the Louis decision controlling the one issue on appeal in the defendant's case, on October 14, 2005, the defendant filed an untimely notice of cross-appeal, raising a myriad of new issues. CP ____, Sub # 129.

In his cross-appeal, the defendant claimed (1) that there was insufficient evidence he was armed with a firearm, (2) that there was no authority for imposing a firearm enhancement, (3) that his

¹ In 2006, the Supreme Court overturned Division II's decision in Korum, again holding the kidnapping does not merge into robbery. State v. Korum, 157 Wn.2d 614, 141 P.3d 13 (2006).

robbery conviction was elevated to a higher degree by his being armed with a firearm and that imposing punishment for the enhancement violated double jeopardy, (4) that his attorney had a conflict of interest, and (5) that the firearm enhancement statute was an unconstitutional bill of attainder, violated equal protection and constituted double jeopardy. See CP 37-45 (includes unpublished decision, State v. Ryan, 136 Wn. App. 1051, 2007 WL 211199, 55871-4-1 (2007)).

On January 29, 2007, this Court issued an opinion affirming that the trial court acted in error when it found the defendant's kidnapping convictions merged into his robbery conviction. Id. This Court rejected all of the defendant's claims raised in his cross-appeal. A mandate issued on September 12, 2008, ordering that the case be remanded "for resentencing." CP 37-45.

On January 8, 2009, the defendant filed a motion entitled Submission of Legal Claims in which he argued that there was insufficient evidence supporting his convictions for kidnapping, that the kidnappings were merely incidental to his robbery conviction, and that there was no authority to impose the firearm enhancements. CP 47-75. The motion was transferred to this Court as a personal restraint petition (PRP). CP ____, Sub # 139.

This Court dismissed the petition, a decision that became final on July 2, 2009. CP ____, Sub # 158.

The defendant was resentenced on January 23, 2009.² The defendant agreed with the State as to his offender score and standard range on each count. CP 76-78. The court imposed the following sentence:

On count I, Robbery in the First Degree, with an offender score of 8 and a standard range of 108 to 144 months, the court imposed a sentence of 130 months. CP 85, 87.

On count II, Kidnapping in the First Degree, with an offender score of 4 and a standard range of 72 to 96 months, the court imposed a sentence of 85 months. CP 85, 87.

On count III, Kidnapping in the First Degree, with an offender score of 0 and a standard range of 51 to 68 months, the court imposed a sentence of 61 months. CP 85, 87.

On count IV, Kidnapping in the First Degree, with an offender score of 0 and a standard range of 51 to 68 months, the court imposed a sentence of 61 months. CP 85, 87.

² The verbatim report of proceedings is cited as follows: 1RP 11/21/08; 2RP 1/23/09.

Counts II, III and IV are serious violent offenses and were thus ordered served consecutive to each other. CP 87. The court also imposed four 60-month firearm enhancements. CP 87. The defendant filed a notice of appeal in which he indicated he was challenging the sentence imposed. CP 83. The defendant now seeks on appeal to challenge both his sentence and his convictions.

2. SUBSTANTIVE FACTS

The below facts are taken from the trial court's Findings of Fact and Conclusions of Law of his trial. CP ____, Sub # 69. Additional facts can be found in Exhibit 1, a notebook the defendant stipulated contained true facts that could be considered by the court. CP 93-97.

On the night of December 5, 2002, the defendant entered the B & B Auto Parts Store in Renton at closing time with a fully-functional 9mm handgun. There were four people in the store at the time, three employees, Carl Freeman, Kristel Schmidt, Adam Fisher, and one customer, Gene Sarda. The defendant pointed the loaded gun at each of the four victims. He then forced the four victims at gunpoint into a bathroom in a back warehouse. Carl

Freeman was then forced to bind the other three with duct tape and place tape over their eyes and mouths.

The defendant then took Freeman back into the main store area where he was forced to empty the cash registers and the lock-boxes underneath the registers. Freeman was also forced to open the store safe.

After pocketing the money, the defendant returned to the bathroom, took all four victims into the warehouse and re-bound each victim in a separate location, "in places they were unlikely to be found." Each victim was secured with duct tape to a separate warehouse shelf, and tape was again placed over their eyes and mouth. The defendant threatened to kill each of the victims.

The defendant then exited the store, locking the door behind him. He was immediately arrested by police who had been alerted to the robbery by one of the victims who had earlier been able to secretly call 911 on a cell phone. The defendant then made a full confession. \$1100 was found in his pocket, along with the loaded handgun and a pair of gloves.

Additional facts are contained in the argument sections they pertain.

C. ARGUMENT

1. FIVE OF THE DEFENDANT'S SIX CLAIMS ARE BARRED BECAUSE THEY ARE UNTIMELY OR HAVE ALREADY BEEN RAISED AND REJECTED.

The defendant raises five claims that should not be reviewed: (1) that kidnapping and robbery convictions violate double jeopardy, (2) that there is insufficient evidence to support his kidnapping convictions, (3) that the court cannot impose more than one firearm enhancement, (4) that his robbery and kidnapping convictions were elevated to a higher degree by proof of being armed with a firearm and thus imposing punishment for a firearm enhancement violates double jeopardy, and (5) that a jury must decide if his kidnapping convictions were separate and distinct crimes allowing for consecutive sentences. These issues all could have been raised in the defendant's prior direct appeals and PRP, and were not; or the issues were raised and this Court ruled against the defendant. As such, he is barred from raising the issues anew.

Washington law holds that a defendant may not raise an issue in a second appeal (in this case, including the defendant's PRP, his fourth appeal), that could have been raised in the first appeal, unless the issue was reconsidered by the trial court in the proceedings upon remand. State v. Barberio, 121 Wn.2d 48, 846

P.2d 519 (1993); State v. Jacobsen, 78 Wn.2d 491, 493, 477 P.2d 1 (1970) ("We adhere to our policy which prohibits issues from being presented on a second appeal that were or could have been raised on the first appeal") (citing State v. Bauers, 25 Wn.2d 825, 172 P.2d 279 (1946)).

Even though an appeal raises issues of constitutional import, at some point the appellate process must stop. Where...the issues could have been raised on the first appeal, we hold they may not be raised in a second appeal.

State v. Sauve, 100 Wn.2d 84, 87, 666 P.2d 894 (1983) (declining to address Sauve's constitutional search issues in his second appeal).³

In addition, *res judicata*, or claim preclusion, prohibits the same parties from litigating a second suit on the same claim or any other claim that could have been, but was not, raised in the first suit. Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). Collateral estoppel, or issue preclusion, applies to criminal cases and means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again

³ The Court noted that a defendant is not without a remedy. If the defendant can make a prima facie showing of actual prejudice arising from a constitutional error, he can obtain relief via a personal restraint petition. Sauve, 100 Wn.2d at 87.

be litigated between the same parties in any future litigation. State v. Tili, 148 Wn.2d 350, 360, 60 P.3d 1192 (2003).

All the above listed issues were either not raised in the defendant's prior appeals or were raised and decided. At his resentencing, none of these issues were raised anew. It has been almost eight years--and three prior appeals--since the defendant committed his crimes. This Court should put finality to these issues and not consider them in this appeal.

2. GOVERNED BY SETTLED LAW, KIDNAPPING AND ROBBERY CONVICTIONS DO NOT VIOLATE DOUBLE JEOPARDY.

The defendant contends his convictions for robbery and kidnapping violate double jeopardy. He is incorrect. Along with this Court having already decided this issue, the issue is governed by settled law.

The Washington State Supreme Court has repeatedly held that first-degree robbery and first-degree kidnapping do not merge⁴

⁴ The term "merger" is used (and misused) in several different contexts. As used herein, it is a doctrine of statutory interpretation used to determine whether the legislature intended to impose multiple punishments for a single act that violates several statutory provisions. State v. Vladovic, 99 Wn.2d 413, 419 n.2, 662 P.2d 853 (1983). Merger is simply part of the test for double jeopardy. State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996) (citing State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995)).

or otherwise violate double jeopardy. See Korum, 157 Wn.2d 614; Louis, *supra*; In re Fletcher, 113 Wn.2d 42, 776 P.2d 114 (1989); Vladovic, *supra*.

The defendant "urges this Court to revisit," the " cursory analysis" done by the Supreme Court in these cases. Def. br. at 8. He then posits that "[t]he 'force' used to accomplish both [kidnapping and robbery] was the same in fact and law" and therefore the crimes violate double jeopardy. Def. br. at 8. The defendant's claim is simply wrong.

Arguing that the same facts prove both crimes and therefore violate double jeopardy is a concept that was rejected many years ago by both the United States Supreme Court and the Washington Supreme Court. See United States v. Dixon, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993) (rejecting the same conduct fact based test for determining double jeopardy); State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995) (recognizing that a factual analysis based test had been rejected by the United States Supreme Court and that the State double jeopardy clause does not provide broader protection than its federal counterpart).

In Korum, Louis, Fletcher, and Vladovic, the Supreme Court held that convictions for robbery and kidnapping do not violate

double jeopardy. The statutes at issue have remained essentially unchanged. *Stare decisis* requires this Court to hold firm to these well-reasoned and properly decided cases. State v. Gentry, 125 Wn.2d 570, 587 n.12, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995). The doctrine of *stare decisis* can be overcome only by a clear showing that an established rule is incorrect and harmful. In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970). The defendant has failed to meet this burden.

In addition, the defendant's double jeopardy argument fails for another reason as well, one he does not address. "When offenses harm different victims, the offenses are not factually the same for purposes of double jeopardy." State v. Baldwin, 150 Wn.2d 448, 457, 78 P.3d 1005 (2003). Therefore, even were it legally possible that in some cases kidnapping and robbery convictions could violate double jeopardy, they cannot here.

The victim of the robbery (count I) was Carl Freeman. CP 10; CP ____, Sub # 69. The victim of the kidnapping in count II was Adam Fisher. CP 11; CP ____, Sub # 69. The victim of the kidnapping in count III was Kristel Schmidt. CP 11; CP ____, Sub # 69. The victim of the kidnapping in count IV was Gene Sarda.

CP 12; CP ____, Sub # 69. With different victims, the defendant's convictions cannot violate double jeopardy.

3. THE KIDNAP MERGER DOCTRINE HAS BEEN REJECTED IN WASHINGTON, AND AMPLE EVIDENCE SUPPORTS THE CONVICTIONS.

The defendant contends that his kidnappings were merely "incidental" to his robbery and therefore there is insufficient evidence to support his kidnapping convictions. The defendant seems to have combined two different subjects: the "kidnap merger" doctrine that has been rejected in Washington, and a sufficiency of the evidence review.

Years ago, the Supreme Court considered a proposed doctrine, coined the "kidnap merger" doctrine, wherein the "forced movement of a person cannot support a conviction for kidnapping if it is merely incidental to some other offense." See Vladovic, 99 Wn.2d at 428 (Utter's dissent). This doctrine has been rejected in Washington. The doctrine was proposed by Justice Utter, but the majority of the Court rejected it. Id. Years later, the Supreme Court again rejected the doctrine. See Louis, 155 Wn.2d at 570-71 (rejecting Louis' claim that his kidnapping of a jewelry store clerk was merely incidental to his robbery of the store).

Of particular relevance here, while the defendant repeatedly says his kidnapping convictions were merely incidental to his robbery, he fails to explain how his robbery of Carl Freeman and his kidnapping of three totally separate persons can be crimes that were merely incidental to his robbery. In this regard, the defendant's reliance on State v. Green, 94 Wn.2d 671, 600 P.2d 1249 (1979) is misguided.

In Green, witnesses in an apartment building heard screams coming from an alley. The witnesses observed Green holding a young child while trying to silence her. Green then carried the girl a "short distance" around a corner and killed her. Green, at 222-23. Green was charged with kidnapping in aggravation of first-degree murder. The Supreme Court ruled that "after considering the evidence most favorable to the State, we conclude there is not substantial evidence to support a determination of kidnapping." Id. at 219. In short, the court found that Green did not try to secret the victim to a place she was not likely to be found, that the killing itself could not constitute restraint by means of deadly force, and thus the element of abduction was missing. Id. Green is a pure sufficiency of the evidence case. The test for sufficiency of the

evidence does not change just because one of the charged crimes happens to be kidnapping.⁵

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). A reviewing court will draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A factual sufficiency review "does not require the reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt but rather only whether any rational trier of fact could be so convinced." State v. Smith, 31 Wn. App. 226, 640 P.2d 25 (1982).

⁵ The defendant's reliance on the Court of Appeals decision in Korum is also unavailing. The Court of Appeals stated that "restraint and movement of a victim that is merely incidental and integral to commission of another crime," may merge. Korum, 120 Wn. App. at 703-04 (emphasis added). In making this statement, the court cited to Justice Utter's dissent in Vladovic, a concept that has been rejected. Still, even under Justice Utter's proposed kidnap merger doctrine, it was recognized that the concept only applied if each crime have the same victim. This was evidenced in Justice Utter explaining that the State did not charge Vladovic with robbing and kidnapping the same victim "because the injuries of the robbery and kidnapping involved different people, [and thus] they clearly created separate and distinct injuries." Korum, at 704 (citing Vladovic, at 421-22 (Utter's dissent)). Justice Utter and the Court of Appeals in Korum both recognized that if you have separate victims, you cannot apply the kidnap merger doctrine.

As charged and proved here in count II, the trial court had to find that the defendant intentionally abducted Adam Fisher⁶ with intent to facilitate the commission of robbery. CP 11; RCW 9A.40.020(1)(b). Abduct means "to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(2). Restrain means "to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty." RCW 9A.40.010(1).

Each kidnap victim had a loaded 9mm gun pointed at them. Each was threatened with death. Each was removed from the store area and taken into a bathroom where they were bound and gagged. After the robbery was complete, the defendant again moved the victims, this time to a warehouse area where he bound each victim to a separate warehouse shelf. He then covered their eyes and mouth with duct tape, leaving his bound victims while he left the store, making sure the door was locked behind him. But for the fact that one of the victims had previously been able to call 911, it could easily have been the following morning before the victims

⁶ Counts III and IV charged the same means of kidnapping with the victims being Kristel Schmidt and Gene Sarda. CP 11-12.

were discovered. Under these facts, a jury could reasonably find this abduction was substantial, and not merely an incidental part of the robbery. In short, this was not a stickup, wherein a gun is pointed at someone (necessarily restraining them) and the defendant then makes off with the money.

4. WHETHER A COURT CAN IMPOSE BUT ONE FIREARM ENHANCEMENT EVEN THOUGH A DEFENDANT COMMITS CRIMES AGAINST DIFFERENT PERSONS IS AN ISSUE GOVERNED BY EXISTING CASE LAW.

The defendant argues that the imposition of a firearm enhancement for each victim he committed a crime against constitutes double jeopardy because it exceeds the unit of prosecution under the firearm enhancement statute. This argument should be rejected. The legislative intent of the firearm statute is crystal clear, when a person commits a crime while armed with a firearm, that person will receive an enhanced sentence for each qualifying offense, notwithstanding the fact that there may be multiple qualifying offenses and enhancements.

This issue is governed by existing law. See State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2004) (defendant pointed a single gun at two people--statute "unambiguously shows legislative

intent to impose two enhancements"); State v. Husted, 118 Wn. App. 92, 74 P.3d 672 (2003) (defendant broke into home and raped victim at knife point--court found legislature clearly intended two enhancements where there are two eligible offenses), rev. denied, 151 Wn.2d 1014 (2004); State v. Esparza, 135 Wn. App. 54, 143 P.3d 612 (2006) (attempted robbery of jewelry store and assault of clerk, firearm enhancement appropriately added to both counts); State v. Elmj, 138 Wn. App. 306, 156 P.3d 281 (2007) (attempted murder and multiple counts of assault all appropriately had weapon enhancements); In re Delgado, 149 Wn. App. 223, 204 P.3d 936 (2009) (attempted murder and kidnapping both with enhancements); also State v. Claborn, 95 Wn.2d 629, 628 P.2d 467 (1981) (one firearm used in burglary and theft, an enhancement is not an offense for double jeopardy purposes).

RCW 9.94A.510, later recodified at RCW 9.94A.533, provides that "additional times **shall** be added to the standard sentence range for felony crimes. . .if the offender or an accomplice was armed with a firearm" and, the offender is being sentenced for one of the crimes listed in the statute. RCW 9.94A.510(3) (emphasis added). First-degree robbery and first-degree kidnapping are qualifying offenses. RCW 9.94A.510(3)(a).

The statute also provides that "[i]f the offender is being sentenced for more than one offense, the firearm enhancement **or enhancements** must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement." RCW 9.94A.510(3) (emphasis added). In addition, the statute requires that "all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements." RCW 9.94A.510(e).

Finally, the statute provides that the "[f]irearm enhancements in this section **shall** apply to **all** felony crimes," except certain enumerated crimes not relevant here. RCW 9.94A.510(f) (emphasis added).

Where "a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct...a court's task of statutory construction is at an end and the prosecutor may seek and the trial

court or jury may impose cumulative punishment under such statutes in a single trial." State v. Harris, 102 Wn.2d 148, 160, 685 P.2d 584 (1984) (citing Missouri v. Hunter,⁷ 459 U.S. 359, 368-69, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983)) overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988).

The legislative intent here is clearly expressed in the statutes, as has been found by court after court after court. Had the legislature intended something different, they have had the ability for years to change the statute, but have not done so. The failure of the legislature to amend the statute indicates the intent to concur in the judicial construction of the statute. Buchanan v. International Broth. of Teamsters, 94 Wn.2d 508, 617 P.2d 1004 (1980); State v. Fenter, 89 Wn.2d 57, 70, 569 P.2d 67 (1977).

⁷ In Missouri v. Hunter, the defendant was convicted of armed robbery and a separate crime which enhanced his punishment for committing a felony while being armed with a firearm. The Missouri Supreme Court found that the crimes were the "same offense" and therefore could not be punished separately. The United States Supreme Court disagreed. The Court held that it is irrelevant whether the crimes are the "same offense," when the legislative intent clearly shows they intended both crimes be punished separately. Hunter, 459 U.S. at 368-69.

5. THE ACT OF BEING ARMED WITH A FIREARM DID NOT ELEVATE THE DEGREE OF THE DEFENDANT'S ROBBERY OR KIDNAPPING CONVICTIONS, AND IMPOSING PUNISHMENT FOR A FIREARM ENHANCEMENT DOES NOT VIOLATE DOUBLE JEOPARDY.

The defendant contends that each of his convictions was elevated to a higher degree by his being armed with a firearm; and thus, imposing punishment for a firearm enhancement violates double jeopardy. This is incorrect.

First, in making his conclusory statement, the defendant ignores the statutes and how he was charged. A person is guilty of kidnapping in the second degree if he intentionally abducts another person. RCW 9A.40.030. A person is guilty of kidnapping in the first degree if the person intentionally abducts another person with intent to (a) hold him for ransom or reward, or as a shield or hostage, (b) facilitate commission of any felony or flight thereafter, (c) inflict bodily injury on him, (d) inflict extreme mental distress on him or a third person, or (e) interfere with the performance of any governmental function. RCW 9A.40.020. The defendant was charged and convicted under subsection (1)(b) of the statute. CP 11-12. Neither under the statute, nor as charged, is kidnapping

elevated to first-degree kidnapping by the fact the perpetrator is armed with a firearm.

A person commits robbery in the second degree when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. RCW 9A.56.190; RCW 9A.56.210. A person commits robbery in the first degree if in the commission of a robbery or in immediate flight therefrom, he (i) is armed with a deadly weapon, (ii) displays what appears to be a firearm or other deadly weapon, or (iii) inflicts bodily injury. RCW 9A.56.200. The defendant was not charged with first-degree robbery under subsection (1)(a)(i), the armed with the firearm means of committing first-degree robbery. Rather, the defendant was charged and convicted under subsection (1)(a)(ii), the displays what appears to be a firearm means of committing first-degree robbery. CP 10.

In terms of the firearm enhancement, the item possessed must be an actual firearm, not something that appears to be a firearm. RCW 9.41.010. Additionally, a person is "armed" within the meaning of the enhancement statute "if a weapon is easily

accessible and readily available for use." State v. Gurske, 155 Wn.2d 134, 137-38, 118 P.3d 333 (2005) (recognizing that being armed is not confined to those defendants with a deadly weapon actually in hand); see also, State v. Barnes, 153 Wn.2d 378, 103 P.3d 1219 (2005) (firearm under a car seat--defendant still considered armed); State v. Willis, 153 Wn.2d 366, 367, 103 P.3d 1213 (2005) (no evidence Willis displayed firearm in committing burglary, but still armed).

Thus, the factual premise of the defendant's argument in regards to the robbery is also incorrect. As charged here, the act of being armed with a firearm--the firearm enhancement--does not elevate robbery to first-degree robbery.

In addition, the defendant's legal proposition is also wrong. The defendant argues against existing case law that the imposition of a firearm enhancement where the underlying offense includes an element of possession or use of a deadly weapon violates double jeopardy.

The statutory language of the enhancement statute is provided in section (4) above. No case has ever held that imposing a weapons enhancement where the underlying charge includes use of a weapon violates double jeopardy. The list of cases rejecting

such an argument is many. See State v. Tessema, 139 Wn. App. 483, 162 P.3d 420 (2007) (second-degree assault with a firearm), rev. denied, 163 Wn.2d 1018 (2008); State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006) (first-degree burglary, assault and robbery with a firearm), rev. denied, 163 Wn.2d 1053, cert. denied, 129 S. Ct. 644 (2008); State v. Toney, 149 Wn. App. 787, 205 P.3d 944 (2009); Harris, supra (firearm enhancement and armed robbery); Husted, supra (rape with deadly weapon enhancement permissible notwithstanding fact that being armed with a deadly weapon is an element of rape); State v. Caldwell, 47 Wn. App. 317, 734 P.2d 542, rev. denied, 108 Wn.2d 1018 (1987) (first-degree burglary with a deadly weapon enhancement does not violate double jeopardy); State v. Pentland, 43 Wn. App. 808, 719 P.2d 605 (with "unusual clarity" the legislature clearly expressed that a person who commits first-degree rape with a knife receive an enhanced sentence notwithstanding the fact that being armed is an element of first-degree rape), rev. denied, 106 Wn.2d 1016 (1986); State v. Kelley, 146 Wn. App. 370, 189 P.3d 853 (2008) (second-degree assault with a firearm enhancement), rev. granted, 165 Wn.2d 1027 (2009)⁸; State v. Horton, 59 Wn. App. 412, 418, 798

⁸ Along with Kelley, the Supreme Court has accepted review of an unpublished

P.2d 813 (1990) ("it is immaterial that being armed with a deadly weapon is an element of the offense of second degree assault; the enhancement statute can still pertain"), rev. denied, 116 Wn.2d 1017 (1991).

The defendant's only argument to the contrary is an argument that the United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) requires that these cases be reexamined. This argument has been rejected before. See Kelley, supra; Toney, supra; Delgado, supra; Tessema, supra; Nguyen, supra.

The Blakely decision did not involve a double jeopardy challenge, nor did it have anything to do with whether the legislature intended an enhanced sentence when a person commits certain crimes while armed with a deadly weapon. Rather, the Court in Blakely held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Blakely, 542 U.S. at 301-02. The firearm enhancements to which the defendant was convicted

case, State v. Aguirre, COA No. 36186-8-II, rev. granted, 165 Wn.2d 1036 (2009) wherein the Court may hear this issue. Both cases involve second-degree assault with a firearm.

were proved to a jury beyond a reasonable doubt. The Blakely decision is of no moment to the defendant's case.

The legislative intent is clearly expressed in the statute, when a person commits certain crimes while armed with a firearm, that person will receive an enhanced sentence for each qualifying offense, notwithstanding the fact that being armed with a firearm may be an element of the underlying offense.

6. THE DEFENDANT'S CLAIM THAT A JURY MUST DECIDE IF HIS CRIMES WERE "SEPARATE AND DISTINCT" SERIOUS VIOLENT OFFENSES IS GOVERNED BY UNITED STATES SUPREME COURT CASE LAW.

Kidnapping in the first-degree is a serious violent offense. RCW 9.94A.030. Under RCW 9.94A.589(1)(b), serious violent offenses arising from "separate and distinct criminal conduct" must be served consecutively. The defendant contends that under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and the Sixth Amendment, a jury must make the determination whether his kidnapping convictions arose from separate and distinct criminal conduct. The defendant is wrong.

In Oregon v. Ice, ___ U.S. ___, 129 S. Ct. 711, 718-19, 172 L. Ed. 2d 517 (2009), the United States Supreme Court rejected the application of Apprendi and the Sixth Amendment to the determination of whether to impose a concurrent or consecutive sentence. See also Delgado, 149 Wn. App. at 238-39 (recognizing authority of Ice and State v. Cubias, 155 Wn.2d 549, 556, 120 P.3d 929 (2005)). The United States Supreme Court is the final arbiter of controversies arising under the Federal Constitution and their decision is binding on this court. State v. Chrisman, 100 Wn.2d 814, 816, 676 P.2d 419 (1984); State v. Laviollette, 118 Wn.2d 670, 826 P.2d 684 (1992). The defendant does not cite to Ice, nor explain how this Court is not bound by the decision.

Further, the defendant's argument fails for practical reasons as well. Offenses constitute the "same criminal conduct" if they (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589. Offenses that do not constitute the "same criminal conduct" are necessarily "separate and distinct." State v. Price, 103 Wn. App. 845, 855, 14 P.3d 841 (2000). The absence of any one of the prongs prevents a finding of "same criminal conduct." State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); State v. Lessley,

118 Wn.2d 773, 778, 827 P.2d 996 (1992). Separate victims constitute separate and distinct criminal conduct. State v. Wilson, 125 Wn.2d 212, 883 P.2d 320 (1994).

Here, each kidnapping involved a separate victim. Thus, it is not legally possible that they could be found to constitute anything but separate and distinct criminal conduct. Additionally, the defendant waived his right to a jury. The court found, beyond a reasonable doubt, that the defendant committed three acts of kidnapping of three different victims. CP ____, Sub # 69.

7. THE PREMISE BEHIND THE DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL IS FAULTY AND HIS CLAIM SHOULD BE DENIED.

The defendant claims that he must be resentenced because his attorney was ineffective for not asking for an exceptional sentence. This claim is built on a faulty premise and should be denied.

To show ineffective assistance of counsel, a defendant must show: (1) that defense counsel was deficient and (2) that counsel's deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251

(1995). Defense counsel's performance is deficient if there is a reasonable probability that but for counsel's unprofessional errors, the proceeding's results would have been different. McFarland, 127 Wn.2d at 335. Counsel's representation is presumed to have been reasonable and all significant decisions by counsel were in the exercise of reasonable professional judgment. Id.

In most cases, a defendant may not appeal from a standard range sentence. RCW 9.94A.585; State v. Friederich-Tibbets, 123 Wn.2d 250, 252, 866 P.2d 1257 (1994). However, a court may review a court's decision to impose a standard range sentence in “circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.” State v. McGill, 112 Wn. App. 95, 98-99, 47 P.3d 173 (2002) (citations omitted). This is not the situation here and this is where the defendant's faulty premise lies.

The defendant contends his case is akin to McGill. It is not. McGill was convicted of a number of drug sales to a confidential informant. There is clear longstanding case law that under such a situation, an exceptional sentence below the standard range is highly possible under the multiple offense policy of the Sentencing

Reform Act.⁹ The sentencing court was unaware of the pertinent case law and believed it was bound by the standard range. The judge stated:

I'm sure you are aware that the legislature has decided that judges should not have discretion beyond a certain sentencing range on these matters. And sometimes some of these drug cases, it seems like, when you compare them to some of the really violent and dangerous offenses, it doesn't seem to be justified. But it's not my call to determine the standard range. The legislature has done that for me.

So I have no option but to sentence you within the range on these of 87 months to 116 months. But I do get to decide where in that range the sentence is appropriate.

McGill, 112 Wn. App. at 98-99. The court then imposed a sentence of 87 months, a sentence at the bottom of the standard range. Id.

The Court of Appeals reversed, finding that the trial court failed to exercise its discretion because "it erroneously believed it lacked the authority to do so." McGill, at 100. Here, there is absolutely nothing in the record suggesting that if the circumstances had warranted, the sentencing court did not know it had the power to impose an exceptional sentence. Further, this was a trial by stipulated evidence; the defendant does not point to any facts the trial court was unaware of.

⁹ See also State v. Sanchez, 69 Wn. App. 255, 848 P.2d 208 (1993).

In order to reverse, the Court of Appeals in McGill also had to find prejudice. As the Court stated, "[r]emand is not mandated when the reviewing court is confident that the trial court would impose the same sentence when it considers only valid factors." McGill, at 100, (citing State v. Pryor, 115 Wn.2d 445, 456, 799 P.2d 244 (1990)). The Court found prejudice in the judge's words of feeling bound by a standard range that the judge said he felt was too high, while at the same time the judge pontificated about the many reasons to impose as low a sentence as possible. McGill, at 100-01 ("the trial court's comments indicate it would have considered an exceptional sentence had it known it could").

Here, there is no indication the court would have imposed a different sentence. After listening to defense counsel's reasons for imposing a low end sentence--essentially the same reasons the defendant on appeal claims the court should have imposed an exceptional sentence--the court imposed a midrange sentence on each count--consecutive. There is nothing in the record wherein the defendant can prove prejudice; nothing that demonstrates the

trial court would have imposed an exceptional sentence below the standard range.¹⁰

The court in McGill also found counsel ineffective. When the sentencing court erroneously indicated it did not have the authority to impose an exceptional sentence, it was incumbent upon defense counsel to provide the court with the clear and applicable authority concerning the multiple offense policy. McGill, at 101-02, see also State v. Adamy, 151 Wn. App. 583, 213 P.3d 627 (2009). Such is not the case here.

Here, the defendant claims his counsel told the court it did not have the authority to impose an exceptional sentence. This is not the case. Defense counsel gave his reasons for imposing a low end sentence and simply expressed his belief that he did not see facts that would warrant the imposition of an exceptional sentence-- not that one could not be imposed.

[I]n reviewing the transcripts in this case, it does appear...that Mr. Ryan did acknowledge that his conduct was wrongful. I think there were statements he made at a prior sentencing that he didn't want to

¹⁰ The defendant argues that the court previously gave the defendant a lesser sentence in merging his kidnapping with his robbery, and that this shows the court would have given the defendant an exceptional sentence. This is incorrect. At the defendant's prior sentencing, the court merged the defendant's convictions because it believed it was legally constrained by the Court of Appeals decision in Korum. CP ___, Sub # 112 ("This court cannot overrule Division II or ignore their decision"). After merging the count, the court actually imposed the highest sentence possible within the standard range. CP 28-34.

make the State or the county go through an unnecessary trial.

I think to an extent he has taken responsibility for this case. It also seems that, I think the Court's hands are somewhat tied in the sense of what the Court can impose, but the sentence, while his conduct merits a sentence reflecting the seriousness of his acts, it seems, this sentence seems to go beyond what is necessary to punish for these acts.

I would ask the Court to impose a bottom of the range sentence, not a high end range.

2RP 10.

This was not defense counsel telling the court that under no circumstances did the court have the legal authority to impose an exceptional sentence. This was defense counsel doing exactly as the court in McFarland discussed, expressing his "reasonable professional judgment" that the facts warranted a low end sentence. To find otherwise would be to hold that anytime counsel argues for a low end sentence, but not an exceptional sentence, then counsel would be ineffective. The case law does not stand for this proposition and the facts do not support the defendant's ineffective assistance of counsel claim.

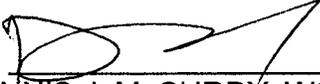
D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 20 day of October, 2009.

Respectfully submitted,

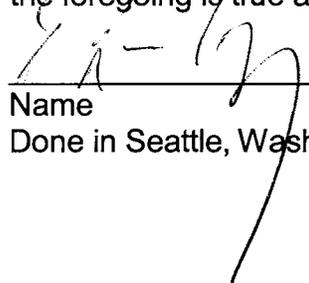
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DENNIS J. McCURDY, WSBA #21975
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

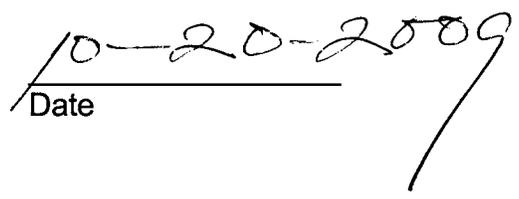
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. RYAN, Cause No. 62926-3-1, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington



Date