

65071-8

65071-8

NO. 65071-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GHE CHAM,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA DOYLE

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	3
1. PROCEDURAL FACTS .....	3
2. SUBSTANTIVE FACTS .....	4
C. <u>ARGUMENT</u> .....	6
1. THE LACK OF A LIMITING INSTRUCTION DOES NOT REQUIRE REVERSAL .....	6
a. Cham's Failure To Request A Limiting Instruction Precludes Review .....	8
b. Cham's Counsel Provided Effective Representation .....	11
2. CHAM EXERCISED HIS RIGHT TO A JURY TRIAL BEFORE PROPERLY WAIVING HIS RIGHT ON THE RAPID RECIDIVISM AGGRAVATOR .....	17
3. THE TRIAL COURT'S FINDINGS OF FACT SUPPORT IMPOSING AN EXCEPTIONAL SENTENCE BASED ON CHAM'S RAPID RECIDIVISM .....	23
4. CHAM'S BELATED CHALLENGE TO THE SPECIAL VERDICT INSTRUCTION SHOULD BE REJECTED .....	30
D. <u>CONCLUSION</u> .....	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) ..... 21

Blakely v. Washington, 542 U.S. 296,  
124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) ..... 25, 34

Strickland v. Washington, 466 U.S. 668,  
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) ..... 11, 12, 15

United States v. Ferreboeuf, 632 F.2d 832  
(9th Cir. 1980), cert. denied,  
450 U.S. 934 (1981) ..... 21

United States v. Mason, 85 F.3d 471  
(10th Cir. 1996) ..... 21

Washington v. Recuenco, 548 U.S. 212,  
126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) ..... 27

Washington State:

C.J.C. v. Corp. of Catholic Bishop of Yakima,  
138 Wn.2d 699, 985 P.2d 262 (1999)..... 24

City of Seattle v. Rainwater, 86 Wn.2d 567,  
546 P.2d 450 (1976)..... 31

In re Pers. Restraint of Brett, 142 Wn.2d 868,  
16 P.3d 601 (2001)..... 11

n re Det. of Moore, 167 Wn.2d 113,  
216 P.3d 1015 (2009)..... 22

State v. Alvarez, 128 Wn.2d 1,  
904 P.2d 754 (1995)..... 30

<u>State v. Bashaw</u> , 169 Wn.2d 133, 234 P.3d 195 (2010).....	30, 32, 33, 34, 35
<u>State v. Brown</u> , 113 Wn.2d 520, 782 P.2d 1013 (1989).....	9
<u>State v. Bunker</u> , 169 Wn.2d 571, 238 P.3d 487 (2010).....	23
<u>State v. Butler</u> , 75 Wn. App. 47, 876 P.2d 481 (1994), <u>review denied</u> , 125 Wn.2d 1021 (1995).....	25, 26, 27
<u>State v. Davis</u> , 163 Wn.2d 606, 184 P.3d 639 (2008).....	34
<u>State v. DeVincentis</u> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	7, 10
<u>State v. Foxhoven</u> , 161 Wn.2d 168, 163 P.3d 786 (2007).....	8, 9
<u>State v. Freeburg</u> , 105 Wn. App. 492, 20 P.3d 984 (2001).....	8
<u>State v. Goebel</u> , 36 Wn.2d 367, 218 P.2d 300 (1950).....	9
<u>State v. Goldberg</u> , 149 Wn.2d 888, 72 P.3d 1083 (2003).....	32, 33
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	12, 16
<u>State v. Hess</u> , 86 Wn.2d 51, 541 P.2d 1222 (1975).....	10
<u>State v. Hos</u> , 154 Wn. App. 238, 225 P.3d 389, <u>review denied</u> , 169 Wn.2d 1008 (2010).....	19, 22
<u>State v. Hughes</u> , 154 Wn.2d 118, 110 P.3d 192 (2005).....	27, 28, 29, 30

<u>State v. Johnson</u> , 104 Wn.2d 338, 705 P.2d 773 (1985).....	21, 22
<u>State v. Lord</u> , 117 Wn.2d 829, 822 P.2d 177 (1991).....	12
<u>State v. Lough</u> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	7, 9
<u>State v. Mahmood</u> , 45 Wn. App. 200, 724 P.2d 1021, <u>review denied</u> , 107 Wn.2d 1002 (1986).....	10
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	12
<u>State v. Noyes</u> , 69 Wn.2d 441, 418 P.2d 471 (1966), <u>cert. denied</u> , 386 U.S. 968 (1967).....	10
<u>State v. Ortega</u> , 134 Wn. App. 617, 142 P.3d 175 (2006), <u>review denied</u> , 160 Wn.2d 1016 (2007).....	10
<u>State v. Powell</u> , 167 Wn.2d 672, 223 P.3d 493 (2009).....	21
<u>State v. Russell</u> , 154 Wn. App. 775, 225 P.3d 478, <u>review granted</u> , 169 Wn.2d 1006 (2010).....	8, 9
<u>State v. Salas</u> , 127 Wn.2d 173, 89 P.2d 1246 (1995).....	31
<u>State v. Saltz</u> , 137 Wn. App. 576, 154 P.3d 282 (2007).....	27, 28, 29, 30
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	32
<u>State v. Sonneland</u> , 80 Wn.2d 343, 494 P.2d 469 (1972).....	29

<u>State v. Stegall</u> , 124 Wn.2d 719, 881 P.2d 979 (1994).....	20
<u>State v. Stein</u> , 140 Wn. App. 43, 165 P.3d 16 (2007), <u>review denied</u> , 163 Wn.2d 1045 (2008).....	8
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	11
<u>State v. Wicke</u> , 91 Wn.2d 638, 591 P.2d 452 (1979).....	19, 22

### Constitutional Provisions

#### Federal:

U.S. Const. amend. VI .....	2, 18, 23, 28
-----------------------------	---------------

### Statutes

#### Washington State:

Laws of 2005, ch. 68, § 1 .....	25
RCW 9.94A.535 .....	24, 26
RCW 9.94A.537 .....	2, 33, 34
RCW 10.95.020.....	33
RCW 69.50.430.....	35
RCW 69.50.435.....	33

Rules and Regulations

Washington State:

CrR 6.15..... 31  
ER 105 ..... 1, 8, 9, 10  
ER 404 ..... 1, 6, 7, 8, 9, 16  
RAP 2.5..... 32

Other Authorities

SB 5477 (2005)..... 27  
WPIC 160.00..... 31

**A. ISSUES**

1. Under ER 105 and longstanding jurisprudence, a party's failure to request a limiting instruction at trial prevents that party from claiming on appeal that such an instruction should have been given. At trial, Cham did not request a limiting instruction regarding the admission of ER 404(b) evidence. Did Cham waive his right to challenge the trial court's failure to give a limiting instruction?

2. To prevail on an ineffective assistance of counsel claim, the defendant must show deficient performance and resulting prejudice. Legitimate trial tactics and strategy cannot form the basis of an ineffective assistance of counsel claim. A defendant is prejudiced when there is a reasonable probability that but for counsel's deficient performance, the trial would have resulted in a different outcome. At trial, the State's key witnesses offered conflicting testimony about prior domestic violence incidents. Cham's counsel did not request a limiting instruction regarding this evidence. Instead, Cham's counsel focused on the witnesses' inconsistent testimony to challenge their credibility and argue reasonable doubt in closing argument. Does counsel's failure to

request a limiting instruction reflect a legitimate trial strategy? If not, has Cham failed to demonstrate prejudice?

3. The Sixth Amendment guarantees a defendant's right to trial by jury. Cham received two jury trials, the first ending in mistrial. After the jury convicted Cham on four felony counts and found an aggravating factor, Cham waived his right to jury trial on the second aggravating factor. Defense counsel did not file a written waiver, but indicated Cham's waiver on the record. The trial court did not question Cham about his decision. Given these circumstances, did Cham properly waive his right to a jury trial on the rapid recidivism factor?

4. A defendant who commits an offense shortly after being released from incarceration may receive an exceptional sentence for rapid recidivism. The trial court found that Cham committed the current offenses one hour and one minute after being released from jail. Is this finding sufficient to impose an exceptional sentence based on rapid recidivism?

5. RCW 9.94A.537(3) requires a jury's verdict on an aggravating circumstance to be unanimous. The trial court instructed the jury that it must decide unanimously whether an aggravating circumstance existed. Cham did not object to the

court's instruction at trial. Did Cham waive his right to challenge the court's instruction? If not, did the trial court properly instruct the jury?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged Ghe Cham with Assault in the Second Degree, Unlawful Imprisonment, Felony Harassment, Felony Violation of a Court Order, and Assault in the Fourth Degree.<sup>1</sup> CP 16-20. The State alleged the domestic violence designation for each crime and two aggravating factors, rapid recidivism and the presence of minor children. CP 16-20. Cham successfully sought a bifurcated trial on the rapid recidivism factor. 1RP 17-24.<sup>2</sup>

The jury convicted Cham on the four felony counts and found that Cham committed the offenses in the presence of his minor children. CP 62-70. Following his conviction, Cham

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<sup>1</sup> A second count of Felony Harassment was dismissed at trial.

<sup>2</sup> The Verbatim Report of Proceedings consists of twelve volumes. The State has adopted the Appellant's reference system: 1RP (1/28/10), 2RP (2/1/10, 2/3/10, and 2/4/10), 3RP (2/3/10 - Voir Dire), 4RP (2/3/10 - Direct Examination of Witness Pfaff), 5RP (2/3/10 - Mistrial), 6RP (2/8/10), 7RP (2/9/10), 8RP (2/10/10), 9RP (2/16/10), 10RP (2/17/10), 11RP (2/18/10), and 12RP (3/12/10).

requested a bench trial on the rapid recidivism factor and waived the jury's presence. 11RP 4-5. The trial court found that Cham was a rapid recidivist and imposed an exceptional sentence of 74 months total, based on both aggravating factors. CP 76; 11RP 8; 12RP 12-14. Additionally, the trial court imposed 18 months of community custody upon Cham's release. CP 77.

## **2. SUBSTANTIVE FACTS**

On March 31, 2009, Ghe Cham was released from the King County Jail at 6:59 a.m. 11RP 5-6. An hour later, Cham appeared at his wife's doorstep, despite having been ordered a month earlier to have no contact with her. 7RP 35-36, 95. Cham's no contact order stemmed from his prior conviction for Assault in the Second Degree against his wife, Lyphoa "Sally" Thi. 7RP 35-36.

When Cham appeared at Sally's home, Sally told him to leave but Cham refused. 7RP 83. Cham pushed Sally into the kids' bedroom and kicked Sally in the eye. 7RP 84. Sally's eye swelled shut and she could not see out of it for a week. 7RP 99. Cham refused to let Sally leave the bedroom and threatened to beat her more if she tried to escape. 7RP 85-86. Sally believed that Cham would follow through with his threat. 7RP 85-86.

Although Sally testified that Cham kicked her only once, Sally and Cham's teenage daughter, Cathy, remembered the incident differently. 7RP 86. Cathy testified that she awoke that morning to her 4-year-old brother Mohamed crying and urging her to wake up and go into the living room. 7RP 60; 8RP 106. Cathy refused until she heard Cham yelling and found him in the living room with both hands around Sally's neck. 8RP 106. Cham slapped and choked Sally as Cathy stood by with Mohamed holding on tightly to her leg. 8RP 107. According to Cathy, Cham kicked Sally eight times and twice pushed Sally's head into the wall. 8RP 109, 112. Sally tried to escape, but Cham dragged her back into the apartment and continued beating her. 8RP 108.

The abuse continued uninterrupted for three hours until Ronald Newquist, the apartment manager, inadvertently stopped by to collect the rent and change the blinds. 8RP 115; 9RP 27. Cathy answered the door with a "scared" look and told Newquist what had happened, pleading with him not to leave. 9RP 29-30. When Newquist demanded to see Sally, Cham refused until Newquist threatened to call the police. 9RP 31. Cham quickly left and was later apprehended by police. 8RP 42-45; 9RP 31. Newquist entered the apartment and found Sally sitting on the bed with her

head down, one eye completely closed, and her whole face "black and blue." 9RP 32-33. Newquist called the police and Sally went to Harborview Hospital for treatment. 7RP 48; 9RP 34.

C. **ARGUMENT**

1. **THE LACK OF A LIMITING INSTRUCTION DOES NOT REQUIRE REVERSAL.**

Cham argues that the trial court's failure to give a limiting instruction *sua sponte*, on ER 404(b) evidence, is reversible error. Alternatively, Cham contends that his counsel's failure to request a limiting instruction resulted in ineffective assistance. Cham's argument fails on both counts. Cham's failure to request a limiting instruction at trial precludes him from seeking review on appeal. Moreover, his counsel made a legitimate, tactical decision not to request a limiting instruction based on key witnesses' conflicting testimony at trial. Cham cannot show that he was prejudiced by the lack of a limiting instruction.

To admit evidence of other crimes, wrongs, or acts, the trial court must: (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for introducing the evidence, (3) determine whether the evidence is relevant to prove

an element of the crime charged, and (4) weigh the probative value of admitting the evidence against the prejudicial effect. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). The purpose of ER 404(b) is "not intended to deprive the State of relevant evidence necessary to establish an essential element of its case," rather it is designed to prevent the State from arguing that a defendant is guilty based on prior bad acts that show a propensity to commit the crime charged. Id. at 859. A trial court's decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

At trial, the State sought to admit ER 404(b) evidence of prior domestic violence incidents involving Cham and Sally. 1RP 34-35; 2RP 40-43. The State specifically sought to introduce evidence of Cham's prior conviction for Assault in the Second Degree-Domestic Violence, Sally's 911 call from that incident, and the no contact orders issued under that case. 1RP 33-34; 7RP 69-72; 9RP 48-57. The State also sought to introduce testimony from Cathy that she had seen Cham assault Sally 5-10 times. 2RP 42-43. Although defense counsel objected to admitting

the ER 404(b) evidence, the trial court found that it was relevant and admissible to prove reasonable fear. 1RP 36-37. Defense counsel did not propose or request a limiting instruction regarding the ER 404(b) evidence.

**a. Cham's Failure To Request A Limiting Instruction Precludes Review.**

When a trial court admits evidence under ER 404(b), the party whom the evidence is admitted against is entitled to a limiting instruction indicating the proper scope and use of the evidence. ER 105; State v. Freeburg, 105 Wn. App. 492, 501, 20 P.3d 984 (2001). A party who fails to request a limiting instruction generally "waives any argument on appeal that the trial court should have given the instruction." State v. Stein, 140 Wn. App. 43, 70, 165 P.3d 16 (2007), review denied, 163 Wn.2d 1045 (2008).

Cham argues that the trial court erred by failing to give a limiting instruction at trial, even though he failed to ask for one. *App. Br.* at 10. To support his argument, Cham relies primarily on State v. Foxhoven, 161 Wn.2d 168, 163 P.3d 786 (2007), and State v. Russell, 154 Wn. App. 775, 784, 225 P.3d 478, review granted,

169 Wn.2d 1006 (2010).<sup>3</sup> In Foxhoven, the Washington Supreme Court noted, in *dicta*, that "a limiting instruction must be given" if ER 404(b) evidence is admitted at trial. Foxhoven, 161 Wn.2d at 175 (citing Lough, 125 Wn.2d at 864).<sup>4</sup> Relying on this statement, Division Two of the Court of Appeals held that a trial court's failure *sua sponte* to provide a limiting instruction amounts to an abuse of discretion requiring reversal. Russell, 154 Wn. App. at 786.

The contention, however, that a trial court must provide a limiting instruction whenever ER 404(b) evidence is admitted, regardless of whether a party requests such an instruction, flies in the face of ER 105 and longstanding jurisprudence to the contrary. ER 105 directs a trial court to give a limiting instruction "upon

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<sup>3</sup> The other cases cited by Cham, State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989), and State v. Goebel, 36 Wn.2d 367, 218 P.2d 300 (1950), shed little light on the issue at hand, specifically whether trial courts have a duty *sua sponte* to give a limiting instruction whenever ER 404(b) evidence is admitted. Both Brown and Goebel indicate that a trial court *should* give a limiting instruction, but do not suggest that that one *must* be given. Brown, 113 Wn.2d at 529; Goebel, 36 Wn.2d at 379. Further, both cases are silent on the critical question of whether defense counsel requested a limiting instruction.

<sup>4</sup> The Supreme Court's reliance on Lough for the proposition that a limiting instruction must always be given, regardless of whether it is requested, is misplaced given that Lough never discussed the issue. 125 Wn.2d at 864. Although the Lough court noted that the trial court gave multiple, clear limiting instructions, the court never suggested that a trial court must give such an instruction *sua sponte*. Id.

request."<sup>5</sup> For decades, the Washington Supreme Court has consistently held that a party's failure to request a limiting instruction at trial waives the issue on appeal. See, e.g., DeVincentis, 150 Wn.2d at 23 n.3 (the request for a limiting instruction must be made by the complaining party); State v. Hess, 86 Wn.2d 51, 52, 541 P.2d 1222 (1975) (defendant's failure to request a limiting instruction at trial precluded review on appeal); State v. Noyes, 69 Wn.2d 441, 446-47, 418 P.2d 471 (1966) (same), cert. denied, 386 U.S. 968 (1967). This Court has similarly followed suit. E.g., State v. Ortega, 134 Wn. App. 617, 625, 142 P.3d 175 (2006), review denied, 160 Wn.2d 1016 (2007); State v. Mahmood, 45 Wn. App. 200, 213, 724 P.2d 1021, review denied, 107 Wn.2d 1002 (1986).

Cham thus cannot claim that the trial court erred by failing to give a limiting instruction when he failed to request one below. The Court should adhere to longstanding precedent and find that Cham's failure to request a limiting instruction precludes him from seeking review on appeal.

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<sup>5</sup> ER 105 provides in full, "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

**b. Cham's Counsel Provided Effective Representation.**

Cham argues alternatively that his counsel's failure to request a limiting instruction resulted in ineffective assistance of counsel. *App. Br.* at 12. Cham's claim is meritless. Given the conflicting and somewhat vague testimony offered by Sally and Cathy about the prior abuse, counsel's failure to request a limiting instruction was a legitimate, tactical decision. Moreover, Cham cannot show that he was prejudiced by counsel's failure to request a limiting instruction.

Ineffective assistance of counsel claims present a mixed question of law and fact. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). As a result, they are reviewed *de novo*. Id. To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) his attorney's conduct fell below an objective standard of reasonableness and (2) this deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Prejudice exists where "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different."

State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). If the defendant fails to demonstrate either prong, the inquiry ends. Id.

Courts presume that counsel has provided effective representation and are "highly deferential" when scrutinizing counsel's performance. Strickland, 466 U.S. at 689. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction . . . and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id.

On review, the relevant inquiry is "whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. There is a "wide range" of reasonable performance and a recognition that even the best criminal defense attorneys take different approaches to defending someone. Id. at 689. If counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot be the basis for an ineffective assistance of counsel claim. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). The defendant must show the absence of legitimate strategic or tactical reasons to support the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Cham contends that "no legitimate reason" supports his counsel's failure to request a limiting instruction, but fails to make any effort to demonstrate prejudice. *App. Br.* at 17. Cham's claim fails because his attorney's conduct was reasonable in light of the witnesses' conflicting testimony, and Cham cannot demonstrate the required "but for" standard of prejudice.

Cham decries his counsel's failure to propose a limiting instruction without acknowledging his counsel's heavy reliance on Sally and Cathy's inconsistent testimony to challenge their credibility and argue reasonable doubt in closing argument. At trial, Sally could describe only two prior incidents where Cham abused her, the July 5, 2008 incident resulting in the second degree assault conviction and another incident when Cham threatened to jump on her. 7RP 75-79. Sally testified that Cham never strangled her before July 2008. 7RP 101. Cathy, on the other hand, testified that Cham started "getting physical" with Sally five years earlier. 8RP 95, 99. According to Cathy, Cham initially yelled at and hit Sally and then escalated to slapping, punching, and choking her. 8RP 100, 102-05. By Cathy's count, Cham choked Sally more than five times over the years and caused Sally injuries similar to the ones she received in the charged incident. 8RP 105, 139-40.

Cathy, however, was unable to provide any detail about these incidents. During cross examination, Cathy started "guessing" that the incidents occurred during the springtime because it was "hot and cold" outside. 8RP 125. Cathy could not remember if the police were called, nor could Cathy remember any details about the prior incidents where Sally sustained similar injuries to the ones she sustained in the charged incident. 8RP 126-27, 140-41.

Cham's counsel capitalized on Cathy's lack of memory and the inconsistencies in Cathy's and Sally's testimony to challenge both witnesses' credibility and to argue that reasonable doubt existed. In closing argument, defense counsel contended, "They (Cathy and Sally) were inconsistent with what happened on March 31<sup>st</sup>, 2009. And they were inconsistent with past events. And that inconsistent testimony, ladies and gentlemen, is reasonable doubt." 10RP 35. Defense counsel relied on Sally's and Cathy's inconsistent testimony about past incidents to cast doubt on their testimony about the charged incident. 10RP 35, 47. Further, defense counsel argued that Cathy's vague recollection of past incidents amounted to an "exaggeration" of what had occurred and provided a reason to question her credibility as a whole. 10RP 36.

Similarly, defense counsel used the photographs taken of Sally's injuries on July 5, 2008 and on the day of the charged incident, to argue that the "photos and her story do not match up." 10RP 36, 47. By focusing on the July 5, 2008 photographs and the alleged disparity between what they reflected and what Sally testified had happened, defense counsel discredited Sally's testimony about the July 5 incident as well as the charged incident. 10RP 47.

Defense counsel reasonably pursued the trial strategy of attacking the credibility of the State's key witnesses - Sally, the victim, and Cathy, the only witness present and old enough to testify. A limiting instruction would have essentially asked the jury to limit its consideration of Cathy's and Sally's testimony, contrary to defense counsel's legitimate trial strategy of using their inconsistent testimony about prior incidents to challenge their recollection of the charged incident. Defense counsel's failure to ask for a limiting instruction is reasonable in light of the witnesses' inconsistent testimony and counsel's approach to challenging credibility and arguing reasonable doubt. Counsel's failure to secure Cham's acquittal should not be used to condemn her legitimate trial strategy. Strickland, 466 U.S. at 689. Considering

all of the circumstances and the strong presumption in favor of counsel's performance, the Court should find that Cham's counsel's performance was not deficient.

Alternatively, if the Court finds that counsel provided deficient performance, then Cham cannot show that he was prejudiced. To prevail, Cham must show that "but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78. Cham does not even attempt to meet this burden and claims merely that the evidence admitted against him was "extremely prejudicial." *App. Br.* at 13.

Cham cannot show that but for a limiting instruction, he would have been acquitted. Any possible prejudicial effect that resulted from admitting the ER 404(b) evidence was eclipsed by the overwhelming weight of evidence against Cham in the charged incident. See Hendrickson, 129 Wn.2d at 80 (denying ineffective assistance claim, despite counsel's deficient performance, because "evidence in the record powerfully supports Hendrickson's guilt").

Sally testified that Cham kicked her in the eye, refused to let her leave, and threatened to beat her more if she tried to escape. 7RP 85-86. Sally feared that Cham would follow through on his threat. 7RP 85-86. Cathy further incriminated Cham, testifying that

he kicked Sally multiple times in the face, choked and punched her. 8RP 106-10. Five other witnesses (first responders and a social worker), confirmed that Sally and Cathy made similar statements immediately following the assault. 7RP 51; 8RP 17-18, 36-37, 41-42, 66; 9RP 30. Apartment manager Newquist testified that he unwittingly interrupted Cham's assault on Sally and caused Cham to flee by threatening to call police. 9RP 31. There is no suggestion that Sally inflicted her wounds herself, or that she received them from anyone else but Cham. Neither party disputed the existence of a valid no contact order prohibiting Cham from contacting Sally. 7RP 36. Given this overwhelming evidence, Cham cannot show that but for the lack of a limiting instruction he would have been acquitted. Cham has not carried his burden of demonstrating ineffective assistance of counsel.

**2. CHAM EXERCISED HIS RIGHT TO A JURY TRIAL BEFORE PROPERLY WAIVING HIS RIGHT ON THE RAPID RECIDIVISM AGGRAVATOR.**

Cham contends that his exceptional sentence should be reversed because he never "personally expressed" his desire to waive his right to a jury trial. Cham's argument fails because he exercised his right to a jury trial, *twice*. Cham's choice to have the

trial court, rather than the jury who convicted him, decide if an additional aggravating factor existed is analogous to a defendant stipulating to an element of a crime. Given the unique circumstances of this case, Cham cannot claim that his Sixth Amendment right to a jury trial was violated.

Cham's first jury trial started on January 28, 2010, and ended three days later in a mistrial. 1RP 2; 5RP 6. Cham's second jury trial lasted over a week. 2RP 98; 10RP 50. The jury convicted Cham as charged on all four felony counts and found that the aggravating factor of having committed the crimes in front of his minor children applied. CP 62-70. Following his conviction, Cham elected to have a bench trial on the second aggravating factor, rapid recidivism.<sup>6</sup> 11RP 2, 4-5. Cham's counsel indicated, with Cham present, "Mr. Cham, after consultation, has waived the presence of the jury for a decision on the aggravating factor of rapid recidivism." 11RP 4-5. Following counsel's representation, the trial court immediately started considering the evidence and did not question Cham about his decision. 11RP 5. Cham did not file a written waiver memorializing his decision to proceed to bench trial.

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<sup>6</sup> Prior to trial, Cham moved to bifurcate the trial on the aggravating factor of rapid recidivism. 1RP 24.

The trial court found beyond a reasonable doubt that Cham committed the underlying crimes with rapid recidivism and imposed an exceptional sentence totaling 74 months. 11RP 8; CP 76.

On appeal, Cham claims that his exceptional sentence must be reversed because he never "personally expressed" his desire to waive his right to a jury trial.<sup>7</sup> *App. Br.* at 15. Cham bases his argument on Washington case law holding that a defendant, rather than his counsel, must personally express the decision to waive the right to a jury trial. State v. Hos, 154 Wn. App. 238, 250, 225 P.3d 389, review denied, 169 Wn.2d 1008 (2010) (citing State v. Wicke, 91 Wn.2d 638, 591 P.2d 452 (1979)).

Yet, Cham, unlike the defendants in Hos, Wicke, and the other cases on which he relies, exercised his right to a jury trial. In Hos and Wicke, the defendants never received a jury trial. Defense counsel in both cases orally waived their client's right to a jury trial and then proceeded to a bench trial on the crime charged. Wicke, 91 Wn.2d at 641; Hos, 154 Wn. App. at 244. Cham, on the other hand, received two jury trials and then waived his right to a jury trial on the final aggravating factor. None of the Washington cases

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<sup>7</sup> Cham does not challenge the lack of a written waiver. *App. Br.* at 16, n.5.

addressing the right to jury trial considered the scenario presented here, where a defendant exercised his right to a jury trial and then, after being convicted by the jury, chose to have the judge decide if an additional aggravating factor applied.

The validity of a defendant's waiver of a constitutional right depends on the nature of the right waived and the consequences of the waiver. State v. Stegall, 124 Wn.2d 719, 725, 881 P.2d 979 (1994). For example, a guilty plea requires a colloquy on the record with the defendant demonstrating that the plea is knowing, voluntary, and intelligent because entering a guilty plea relieves the State of its burden of proof, eliminates the defendant's chance at acquittal, and precludes the defendant from offering a defense or appealing most issues. See id. (discussing guilty plea requirements). In contrast, waiving the right to a jury trial does not require the same colloquy or showing because the consequences are much less severe. Id. In a bench trial, the State still must prove beyond a reasonable doubt that the defendant committed the crime while the defendant can present a defense and possibly be acquitted.

Here, Cham's decision to have the judge, rather than the jury who convicted him, decide if an additional aggravating factor

existed, is more akin to stipulating to an element of a crime than waiving the right to a jury trial. An aggravating factor is the "functional equivalent" of an element whenever the factor is used to increase a sentence beyond the standard range. State v. Powell, 167 Wn.2d 672, 683, 223 P.3d 493 (2009) (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n.19, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

Defendants can stipulate to a single element, or every element of the crime charged, without triggering the same procedural protections as entering a guilty plea.<sup>8</sup> See State v. Johnson, 104 Wn.2d 338, 340-41, 705 P.2d 773 (1985) (holding a defendant does not need to be advised of his constitutional rights in a stipulated facts trial). Stipulating to an element and waiving the jury's determination of that element is not the same as waiving the right to an entire jury trial.

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<sup>8</sup> Federal courts have taken a similar view and held that when defense counsel stipulates to a crucial fact on the record in the defendant's presence, the trial court "may reasonably assume that the defendant is aware of the content of the stipulation and agrees to it," without inquiring further. United States v. Ferreboeuf, 632 F.2d 832, 836 (9th Cir. 1980), cert. denied, 450 U.S. 934 (1981); see also United States v. Mason, 85 F.3d 471, 472-73 (10th Cir. 1996) (defense counsel's stipulation to a factual element waives the defendant's right to jury trial on that element only).

Stipulating to an element does not require a written waiver of the right to jury trial, or a colloquy with the judge, because the trier of fact still must determine the defendant's guilt or innocence, the State still must prove the defendant guilty beyond a reasonable doubt, and the defendant still can present a defense. In re Det. of Moore, 167 Wn.2d 113, 120-21, 216 P.3d 1015 (2009) (citing Johnson, 104 Wn.2d at 342).

Here, Cham's choice to let the judge decide whether the final aggravating factor applied was the functional equivalent of stipulating to an element. Cham's election did not relieve the State of its burden of proof or prevent Cham's counsel from offering a defense. See 11RP 7 (defense counsel challenging State's evidence of rapid recidivism).

Unlike the defendants in Hos and Wicke who did not receive jury trials, Cham knew firsthand the value of a jury trial and received two jury trials before electing to have the trial court determine whether an additional aggravating factor applied. Cham's counsel indicated Cham's decision on the record with Cham present. 11RP 4-5. There is no indication in the record below or on appeal that defense counsel misrepresented Cham's

decision. Given these circumstances, the Court should find that Cham's Sixth Amendment right to a jury trial was not violated.

**3. THE TRIAL COURT'S FINDINGS OF FACT SUPPORT IMPOSING AN EXCEPTIONAL SENTENCE BASED ON CHAM'S RAPID RECIDIVISM.**

For the first time on appeal, Cham argues that the trial court's findings of fact are insufficient to support the imposition of an exceptional sentence based on rapid recidivism. Although the trial court's findings mirror the statutory language defining rapid recidivism, Cham claims that the trial court erred by failing to make additional, implied findings that Cham contends are required by case law. Cham's argument fails in light of the plain, unambiguous language of the statute, its legislative history, and the relevant case law.

To determine the meaning of a criminal statute, courts first look at the plain language of the statute. State v. Bunker, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). If the statutory language is clear and unambiguous, then the court will determine the statute's meaning by its language alone and will not consider the statute's

legislative history. C.J.C. v. Corp. of Catholic Bishop of Yakima,  
138 Wn.2d 699, 708, 985 P.2d 262 (1999).

Here, the plain language of the statute is clear and unambiguous. RCW 9.94A.535(3)(t) defines rapid recidivism as having "committed the current offense shortly after being released from incarceration." At trial, the court focused its inquiry on whether Cham committed the crimes charged "shortly after being released from incarceration" and found that "just a little over an hour" elapsed between Cham's release from jail and committing the crimes charged. 11RP 8. Considering the short time frame, the court posited that Cham "walked out of jail and went straight to the home of Ms. Thi." 11RP 8. Consequently, the court found beyond a reasonable doubt that Cham committed the offenses "shortly after being released from incarceration" and entered findings of fact to that effect.<sup>9</sup> 11RP 8; CP 96-97.

Seeking reversal of his exceptional sentence, Cham argues that the trial court erred by failing to find (1) "a pattern of similar offenses showing heightened culpability" and (2) "a greater

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<sup>9</sup> The trial court found that Cham was "released from incarceration at 6:59 a.m. on March 31, 2009" and committed the underlying crimes "after arriving at the victim's apartment at 8:00 a.m. the same morning." CP 96. The court concluded that Cham committed the crimes "shortly after being released from custody under RCW 9.94A.535(3)(t)." CP 97.

disregard or disdain for the law than would otherwise be the case." *App. Br.* at 21. Neither of these factors, however, is required by the plain and unambiguous language of the statute. Although the Court need not look beyond the plain language of the statute, an examination of the legislative history and relevant case law reveals that the additional, implied factors proposed by Cham are not required.

As Cham notes, the legislature codified the rapid recidivism factor in 2005 "without expanding or restricting existing statutory or common law aggravating circumstances."<sup>10</sup> Laws of 2005, ch. 68, § 1. At that time, only one published case addressed rapid recidivism, State v. Butler, 75 Wn. App. 47, 54, 876 P.2d 481 (1994), review denied, 125 Wn.2d 1021 (1995). In Butler, this Court affirmed the imposition of an exceptional sentence where the defendant committed robbery and attempted rape within 12 hours of his release from prison. Id. at 54.

The Court rejected Butler's argument that the trial court improperly considered his criminal history and held that rapid

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<sup>10</sup> The legislature codified several common law aggravating circumstances, including rapid recidivism, in response to 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). Laws of 2005, ch. 68, § 1.

recidivism is a valid aggravating circumstance as a matter of law, explaining:

The trial court's findings here are distinguishable from mere criminal history, however. In considering Butler's *rapid* recidivism, the trial court focused on the especially short time period between prior incarceration and reoffense, a factor not contemplated in setting the standard range. As explained in George, an exceptional sentence is justified if the circumstances of the crime indicate a greater disregard for the law than otherwise would be the case. 67 Wn. App. at 224, 834 P.2d 664. Here, Butler's immediate reoffense, within hours of his release, reflects a disdain for the law so flagrant as to render him particularly culpable in the commission of the current offense.

Id. This Court narrowly defined rapid recidivism, stating "**we hold that the commission of a crime shortly after release from incarceration on another offense** may properly be used to distinguish that crime from others in the same category." Id. (emphasis added). A decade later, the legislature relied on this exact language to define rapid recidivism. RCW 9.94A.535(3)(t) ("The defendant committed the current offense shortly after being released from incarceration.").

Cham contends that a factual finding of "greater disregard or disdain for the law" is required based on the above-cited dicta in Butler. Cham focuses on the Court's rationale for why rapid

recidivism qualifies as an aggravating circumstance, rather than focusing on the Court's actual holding, which only requires a showing that the defendant committed the crime "shortly after release from incarceration." 75 Wn. App. at 54. Based on the plain language of the statute, it is clear that the legislature did not interpret Butler as requiring any additional factual findings.

As further support for his argument that the Court should imply further factual findings, Cham relies on State v. Hughes, 154 Wn.2d 118, 140-42, 110 P.3d 192 (2005), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), and State v. Saltz, 137 Wn. App. 576, 154 P.3d 282 (2007). Hughes and Saltz are irrelevant, however, in discerning the legislature's intent because both decisions were issued *after* the legislature codified rapid recidivism.<sup>11</sup> The only common law that the legislature intended to codify was Butler.

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<sup>11</sup> The Senate passed the amendment codifying the rapid recidivism factor on March 15, 2005. Senate Bill Report, SB 5477 (2005). On April 12, 2005, the House passed the law as amended, and on April 14, 2005, the Senate concurred in the amendments. Id. The Washington Supreme Court issued Hughes on the same day, April 14, 2005. Hughes, 154 Wn.2d at 118. Division Three of the Court of Appeals issued Saltz nearly two years later on March 15, 2007. 137 Wn. App. at 576.

Nonetheless, neither Hughes nor Saltz supports ignoring the plain language of the statute and implying additional factors. In Hughes, the Washington Supreme Court considered whether the trial court violated the defendant's Sixth Amendment right to jury trial when it, rather than the jury, found the aggravating circumstance of rapid recidivism. 154 Wn.2d at 140-42. The court concluded that the trial court improperly made "new factual determinations" reserved for the jury, but did not purport to define rapid recidivism or imply new factors.

In Saltz, the defendant stipulated to committing the charged crime "shortly after being released from incarceration," but challenged the reasons stated by the trial court for his exceptional sentence. 137 Wn. App. at 584. Consequently, the court applied the "matter-of-law standard" and independently determined that sufficient reasons existed to impose the defendant's exceptional sentence, including the short, one-month time frame separating the current offense and the defendant's release from custody, and the similar nature and victim of the crime. Id. at 585. Given that Saltz did not stipulate to the factual findings that Cham argues are

necessary, Saltz cannot be read as requiring any additional factual findings beyond what is set forth in the statute.

Alternatively, if the Court adopts Cham's interpretation and requires additional, implied findings, then the Court should find that the trial court's oral and written findings justify imposing an exceptional sentence based on rapid recidivism. State v. Sonneland, 80 Wn.2d 343, 350, 494 P.2d 469 (1972) (recognizing a case should not be remanded solely to complete written findings where the court's reasons are evident from its oral opinion).

At trial on the rapid recidivism factor, the court found that Cham "walked out of jail and went straight to the home of Ms. Thi" a "little over an hour" after his release from custody. 11RP 8. Showing up at a prior assault victim's house, and assaulting that same victim an hour after being released from custody, illustrates the greater disregard for the law and pattern of similar offenses that Cham argues is required by the case law. As in Hughes and Saltz, the short time frame separating Cham's release and his commission of new crimes, combined with the similar nature of his offenses and victim, justified imposing an exceptional sentence

based on rapid recidivism.<sup>12</sup> Hughes, 154 Wn.2d at 141; Saltz, 137 Wn. App. at 585.

**4. CHAM'S BELATED CHALLENGE TO THE SPECIAL VERDICT INSTRUCTION SHOULD BE REJECTED.**

Relying on the Washington Supreme Court's recent decision in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), Cham argues that the trial court's special verdict instruction on the domestic violence aggravator improperly instructed the jury that it had to be unanimous to answer either "yes" or "no." Cham, however, has waived this issue on appeal because he did not object to this instruction below and the claimed error is not of constitutional magnitude. Assuming alternatively that the issue is not waived, then Bashaw does not apply because the statute governing aggravating circumstances expressly requires jury unanimity for a "no" finding.

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<sup>12</sup> If the Court finds that the trial court erred by failing to imply the additional factors alleged by Cham, then the Court could remand this case for entry of subsequent findings of fact and conclusions of law. State v. Alvarez, 128 Wn.2d 1, 19, 904 P.2d 754 (1995) (trial court's error in failing to enter findings and conclusions on "ultimate facts" remedied by trial court's subsequent entry of revised findings and conclusions).

The jury instructions included special verdict forms for the domestic violence aggravator of committing a crime in the presence of the victim's or the offender's minor children. The special verdict instruction states in relevant part:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

CP 79. This instruction is identical to WPIC 160.00. Cham did not object or take exception to this instruction. 9RP 94-95.

Cham waived the right to challenge the special verdict instruction by failing to object at trial. To claim error on appeal, an appellant challenging a jury instruction must first show that he took exception to that instruction in the trial court. State v. Salas, 127 Wn.2d 173, 181, 89 P.2d 1246 (1995). The purpose of requiring objections or exceptions is "to afford the trial court an opportunity to know and clearly understand the nature of the objection" so that "the trial court may have the opportunity to correct any error." City of Seattle v. Rainwater, 86 Wn.2d 567, 571, 546 P.2d 450 (1976). The objecting party must indicate the instruction objected to and the reasons for the objection. CrR 6.15(c). By failing to object to the

special verdict instruction at trial, Cham deprived the trial court of the opportunity to correct any alleged error and waived his right to challenge the instruction on appeal.

An instructional error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988) (failure to instruct on "knowledge" was not manifest error). Bashaw, however, makes clear that the instructional error alleged by Cham falls short of manifest constitutional error.

In Bashaw, the Washington Supreme Court held that the special verdict instruction contained an incorrect statement of law based on its earlier decision in State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003).<sup>13</sup> 169 Wn.2d at 145-47. The court specifically noted that its holding was "not compelled by constitutional protections against double jeopardy." Id. at 146, n.7. Cham does not acknowledge that he failed to object to the instruction below, nor does he explain how the issue raised amounts to manifest constitutional error. Cham has waived any challenge to the special verdict instruction.

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<sup>13</sup> The special verdict instruction in Bashaw stated, "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." 169 Wn.2d at 139.

Alternatively, if Cham has not waived the issue, then the Court should find that the special verdict instruction is a correct statement of law because the statute governing the aggravating circumstances expressly requires jury unanimity. RCW 9.94A.537(3) states in pertinent part, "The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory." By its plain language, RCW 9.94A.537(3) requires jury unanimity to return either a "yes" or a "no" special verdict on an aggravating factor.

In contrast, Bashaw and Goldberg involved sentencing enhancements arising from different statutes without this unanimity requirement. Bashaw concerned a school bus stop sentencing enhancement arising from RCW 69.50.435, while Goldberg involved an aggravated first degree murder case under RCW 10.95.020. Bashaw, 169 Wn.2d at 137; Goldberg, 149 Wn.2d at 893. Both statutes are silent on the issue of jury unanimity.

Moreover, the Court should defer to the legislature's policy judgment when it comes to exceptional sentence procedures and acknowledge that the policy rationale justifying the common law rule in Bashaw does not apply to aggravating circumstances. See

State v. Davis, 163 Wn.2d 606, 614, 184 P.3d 639 (2008) (deferring to the legislature to decide on sentencing procedures post-Blakely). In Bashaw, the court reasoned that the costs and burdens of conducting a second trial "strongly outweighed" the benefit of obtaining an additional penalty against a defendant who is already facing a penalty for the underlying substantive offense. 169 Wn.2d at 146-47.

This rationale falls short, however, in the context of aggravating circumstances where the legislature has expressly authorized the superior court to conduct a new jury trial when an exceptional sentence has been reversed. RCW 9.94A.537(2).<sup>14</sup> By creating this framework, the legislature has determined that the interest in imposing an appropriate exceptional sentence outweighs concerns of judicial economy and finality. This policy judgment is not surprising given that exceptional sentences are reserved for the worst offenders.

When the jury finds an aggravating circumstance, such as the presence of minor children, the trial court has the discretion to impose a sentence up to the statutory maximum. In contrast, the

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<sup>14</sup> If the Court reverses Cham's exceptional sentence based upon Bashaw, the State is entitled to seek an exceptional sentence at a new trial on the aggravating circumstance.

school bus stop sentencing enhancement at issue in Bashaw affords the trial court the discretion only to double the defendant's fine or prison time. RCW 69.50.430(1). Based on the express statutory language requiring unanimity for an aggravating circumstance, the Court should reject Cham's belated attempt to challenge the special verdict instruction.

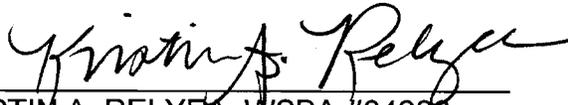
**D. CONCLUSION**

For the reasons stated above, the Court should affirm Cham's convictions and exceptional sentence.

DATED this 22<sup>nd</sup> day of November, 2010.

Respectfully submitted,

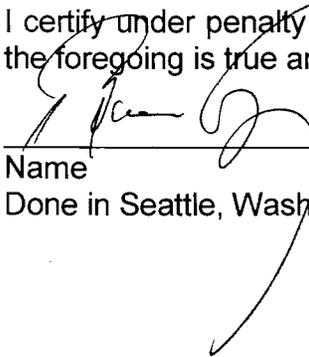
DANIEL T. SATTERBERG  
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By:   
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer J. Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. GHE CHAM, Cause No. 65071-8-I, 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

11-22-10  
Date