

No. 68958-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

STEVEN M. SOMMER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Bruce E. Heller

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 3

D. ARGUMENT 8

1. **The contents of two e-mails from Verizon Wireless were admitted in violation of the rule against hearsay, because the “Certification of Custodian of Records” did not comport with the specific statutory requirements for admission without live testimony from the custodian.** 8

 a. A document introduced as a business record without live testimony from the custodian of records is inadmissible hearsay, unless the record is accompanied by an affidavit, declaration, or certification by the custodian or other qualified person that attests to the mode of the record’s preparation. 8

 b. The “Certification of Custodian of Records” failed to include an attestation as to the mode of preparation of the attached documents, in violation of RCW 10.96.030(2)(6). 9

 c. This Court should reverse Mr. Sommer’s convictions. ... 11

2. **The documents attached to the two e-mails, “Explanation Form For Historical Records” and purported records of cellular telephone calls were admitted without an opportunity to cross-examine the person who created the document, in violation of Mr. Sommer’s constitutional right to confront witnesses against him.** 13

a.	<u>The Confrontation Clause guarantees the right of a defendant to cross-examine the declarant of any testimonial out-of-court statement offered against him in a criminal trial.</u>	13
b.	<u>The document captioned “Explanation Form For Historical Records,” as well as the cellular telephone records created specifically for use at trial, were testimonial and erroneously admitted when Mr. Sommer did not have the opportunity to cross-examine the person who created the documents.</u>	15
c.	<u>The error in admitting the documents in violation of Mr. Sommer’s constitutional right to confrontation requires reversal.</u>	17
3.	The trial court exceeded its authority when it imposed a term of community custody that, when added to the term of confinement, exceeded the statutory maximum sentence for the offenses.	18
a.	<u>The SRA requires a sentencing court to impose a sentence in which the combined terms of confinement and supervision do not exceed the statutory maximum sentence.</u>	18
b.	<u>The proper remedy is reversal.</u>	20
E.	<u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

United States Constitution

Amend. VI	2, 13
-----------------	-------

United States Supreme Court Decisions

<u>Bullcoming v. New Mexico</u> , ___ U.S. ___, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011)	14
<u>Chapman v. California</u> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)	17
<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)	13
<u>Davis v. Washington</u> , 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)	13
<u>Melendez-Diaz v. Massachusetts</u> , 557 U.S. 305, 129 S.Ct. 2527, 74 LEd.2d 314 (2009)	11, 13, 14, 16

Washington Supreme Court Decisions

<u>In re Pers. Restraint of Brooks</u> , 166 Wn.2d 664, 211 P.3d 1023 (2009) .	18
<u>In re Pers. Restraint of Carle</u> , 93 Wn.2d 31, 604 P.2d 1293 (1980)	18
<u>In re Postsentence Review of Leach</u> , 161 Wn.2d 180, 163 P.3d 782 (2007)	18
<u>State v. Boyd</u> , 174 Wn.2d 470, 275 P.3d 321 (2012)	20
<u>State v. C.J.</u> , 148 Wn.2d 672, 63 P.3d 772 (2003)	11
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 521 (1999)	18
<u>State v. Franklin</u> , 172 Wn.2d 831, 263 P.3d 585 (2011)	18
<u>State v. Jackman</u> , 113 Wn.2d 772, 783 P.2d 580 (1989)	12

<u>State v. Jasper</u> , 174 Wn.2d 96, 271 P.3d 876 (2012)	17
<u>State v. Koslowski</u> , 166 Wn.2d 409, 209 P.3d 479 (2009)	14
<u>State v. Kramer</u> , 167 Wn.2d 668, 940 P.2d 1239 (1997)	12
<u>State v. Mason</u> , 160 Wn.2d 910, 162 P.3d 396 (2007)	14
<u>State v. Miles</u> , 77 Wn.2d 593, 464 P.2d 723 (1970)	12
<u>State v. Shafer</u> , 156 Wn.2d 381, 128 P.3d 87 (2006)	17
<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971)	12
<u>Young v. Liddington</u> , 50 Wn.2d 78, 309 P.2d 781 (1957)	14

Washington Court of Appeals Decisions

<u>In re Welfare of J.M.</u> , 130 Wn. App. 912, 125 P.3d 245 (2005)	14
<u>State v. Ben-Neth</u> , 34 Wn. App. 600, 663 P.2d 156 (1983)	10
<u>State v. Fraser</u> , 170 Wn. App. 13, 282 P.3d 152 (2012)	10-11
<u>State v. Hurtado</u> , __ Wn. App. __, 294 P.3d 838 (2013)	14
<u>State v. Land</u> , 172 Wn. App. 593, 295 P.3d 783 (2013)	20
<u>State v. Lee</u> , 159 Wn. App. 795, 247 P.3d 470 (2011)	11
<u>State v. Malone</u> , 138 Wn. App. 587, 157 P.3d 909 (2007)	12

Rule and Statutes

ER 803	1, 8, 14
RCW 5.45.020	1, 8, 14
RCW 9.94A.441	19

RCW 9.94A.505	18-19
RCW 9.94A.535	6
RCW 9.94A.701	2, 19
RCW 9.94A.709	20
RCW 9A.20.021	19
RCW 9A.46.020	6
RCW 9A.48.090	6
RCW 10.96.005	9
RCW 10.96.030	1, 8-9, 10, 11, 14
RCW 10.99.020	6
RCW 26.50.110	6, 19

A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it admitted two e-mails from a telephone company, each of which included a “Certification of Custodian of Records,” which did not comply with the business records exception to the rule against hearsay.

2. The trial court violated Mr. Sommer’s right to confrontation when it admitted two e-mails from a telephone company, each of which included an “Explanation Form For Historical Records” and documents identified as cellular telephone records.

3. The trial court erroneously imposed a term of community custody that, when added to the term of confinement, exceeded the 60-month statutory maximum sentence for felony violation of a court order.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. ER 803(a)(6), RCW 5.45.020, and RCW 10.96.030 authorize admission of an alleged business record without the testimony of the custodian of the record, but only when the record is accompanied by an affidavit, certification, or declaration from the custodian or other qualified person that attests to, inter alia, the mode of the record’s preparation. Here, a custodian of records for a telephone company provided documents in response to a search warrant, but the accompanying certification did not attest to the mode of preparation of the records. Did the court err in

admitting the records in the absence of the mandatory attestation?

(Assignment of Error 1)

2. The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to confront a person who created a report specifically to prove a fact in a criminal trial. Was Mr. Sommer's right to confrontation violated when the court admitted two e-mails, each of which contained a document captioned "Explanation Form For Historical Records," as well as documents identified as cellular telephone calls, when Mr. Sommer had no opportunity to confront the person who created the documents? (Assignment of Error 2)

3. RCW 9.94A.701(9) requires a court reduce a term of community custody, where the combined term of confinement and term of community custody exceeds the statutory maximum sentence for the offense. Here, where the court imposed a 58-month term of confinement plus an additional 12-month term of community custody on each of three counts of a Class C felony with a 60-month statutory maximum sentence, must the court reduce the term of community custody to two months?

(Assignment of Error 3)

C. STATEMENT OF THE CASE

Steven M. Sommer and Krishna Lee began dating each other in 2006, and their daughter, C.L., was born in February 2009. 8RP 50-51.

Their relationship deteriorated. According to Ms. Lee, Mr. Sommer was verbally and physically abusive on three separate occasions between December 8, 2010 and May 2011. 8RP 52-53, 58-61, 65-66. In June 2011, Ms. Lee called the police to report that Mr. Sommer was threatening her. 8RP 71. Mr. Sommer was charged with a domestic violence offense and a pre-trial no-contact order was issued on June 10, 2011. Ex. 21. On July 21, 2011, Ms. Lee obtained a protection order that additionally restrained Mr. Sommer from contacting her and C.L. 8RP 68; Ex. 1. Even so, Ms. Lee continued to contact Mr. Sommer to visit C.L. 8RP 70-71.

In the morning of September 22, 2011, Mr. Sommer went to court where he pleaded guilty to violation of the pre-trial no-contact order, and he was again ordered to have no contact with Ms. Lee. 8RP 72; 10RP 20; Ex. 29. At Ms. Lee's suggestion, he came directly from court and met her at approximately 11 a.m. at a shopping mall for a visit with C.L. 8RP 72, 77-78. Ms. Lee parked in the mall parking lot and waited in her car as Mr. Sommer walked up to her. 8RP 79-80. Mr. Sommer was upset and blamed Ms. Lee for his legal problems. 8RP 81. He got into Ms. Lee's

car in the seat behind her, and said, “If I have to go back to jail I will fucking kill you.” 8RP 82, 83. Ms. Lee was afraid he would hurt her so she got out and went to get C.L. from her car seat in the back next to Mr. Sommer. 8RP 82. According to Ms. Lee, Mr. Sommer was “no longer normal,” and she “no longer recognized who he was.” 8RP 82, 84. Mr. Sommer followed her out of the car and Ms. Lee quickly got back in the car and locked the doors. 8RP 84. Mr. Sommer went to C.L.’s partially open window and said, “I’m going to break this fucking window.” 8RP 86. The window shattered, scattering safety glass over C.L. 8RP 86. Mr. Sommer disappeared. 8RP 86. After Ms. Lee made sure that C.L. was not cut, she called her father at work and asked him to meet her at home. 8RP 87-88, 151-53. She was afraid and felt Mr. Sommer “was capable of anything.” 8RP 88.

According to Ms. Lee, Mr. Sommer called her repeatedly as she drove home and said she ruined his life. 8RP 92. Mr. Sommer cried, he threatened to jump off a bridge, he was angry, and finally he threatened to come over to her house with his AK-47 and shoot everyone. 8RP 92-93, 95. When she got home, Ms. Lee locked the house doors and windows.

8RP 93. Her father arrived shortly thereafter and noticed the broken car window.¹ 8RP 154.

Although Ms. Lee knew that Mr. Sommer owned an AK-47 and she testified that she was extremely afraid for herself and her family, she did not call the police until around 3:45 p.m., and even then, she called the non-emergency telephone number and reported Mr. Sommer was potentially suicidal, rather than that she was concerned for her safety and the safety of her family. 8RP 94, 95, 98, 113-14, 119.

Officer Sarah Finkel responded to Ms. Lee's home and took her statement. 9RP 14-15. Based on Ms. Lee's statement, Officer Finkel took photographs of the screen of Ms. Lee's cellular telephone showing numerous telephone calls, both dialed and received, on September 22, 2011. 8RP 99, 20; Ex. 23. Many of the received calls originated from a "restricted" number. Officer Finkel obtained a search warrant for the telephone records for Mr. Sommer and Ms. Lee with Verizon Wireless. 9RP 33. In response to her search warrant, Officer Finkel received two e-mails, each of which contained a document captioned "Certification of Custodian of Records," apparently from a Verizon Wireless employee, a document captioned "Explanation Form For Historical Records," and documents identified as telephone records. 9RP 33; Ex. 34, 35.

¹ The cost to repair the window was \$250. 8RP 158.

Mr. Sommer was charged with one count of felony harassment, in violation of RCW 9A.46.020(1), .020(2)(b), three counts of felony violation of a court order, in violation of RCW 26.50.110(1), .110(5), and one count of malicious mischief in the third degree, in violation of RCW 9A.48.090(1)(a). CP 14-16. Each count was alleged to be a crime of domestic violence, as defined in RCW 10.99.020, and felony counts were alleged to involve the aggravating factor of an on-going pattern of psychological, physical, or emotional abuse, in violation of RCW 9.94A.535(3)(h)(ii). CP 21-24.

A jury trial was held from May 15-25, 2013.² Over defense objection on the basis of hearsay and confrontation, the trial court admitted the e-mails received by Officer Finkel identified as the telephone records for Mr. Sommer and Ms. Lee. 7RP 43-51; 9RP 35; Ex. 34, 35. Officer Finkel used the document captioned “Explanation Form For Historical Records” to create color-coded spreadsheets interpreting the records. Ex. 49, 50. She testified that the explanation form indicated that when “*67” is dialed before a telephone number, the caller’s telephone number is blocked and will not show up on the recipient’s caller identification. 9RP 68-69.

² A first jury trial was held from January 11-25, 2013, at the conclusion of which the jury deadlocked and the court declared a mistrial. CP 17-18; 5RP 79.

Mr. Sommer was convicted of all counts as charged. CP 75, 77, 79, 81, 83, 84-85. Following a separate hearing on aggravating circumstances, the jury returned special verdicts that the felonies were aggravated domestic violence offenses. CP 76, 78, 80, 82.

The standard sentencing range for each of the three counts of felony violation of a court order was 51 to 60 months, based on Mr. Sommer's offender score of '7,' and the maximum term was 60 months. CP 106. Rather than ask for an exceptional sentence, the State asked for the maximum sentence on each those three charges. 11RP 54. On the charge of felony harassment, the trial court imposed a standard range sentence of 43 months. On each of the three charges of felony violation of a court order, the court imposed a standard range sentence of 58 months. CP 108. On the charge of malicious mischief charge, the court imposed a sentence of 364 days, concurrent to the felony sentences. CP 102. In addition, the court imposed a 12-month term of community custody for the felonies, as well as a two-year period of probation for the misdemeanor. CP 102, 109.

D. ARGUMENT

1. The contents of two e-mails from Verizon Wireless were admitted in violation of the rule against hearsay, because the “Certification of Custodian of Records” did not comport with the specific statutory requirements for admission without live testimony from the custodian.

a. A document introduced as a business record without live testimony from the custodian of records is inadmissible hearsay, unless the record is accompanied by an affidavit, declaration, or certification by the custodian or other qualified person that attests to the mode of the record’s preparation.

Business records of regularly conducted activity are admissible as an exception to the rule against hearsay, but only pursuant the specific statutory procedures set forth in Chapter 5.45 RCW and RCW 10.96.030.

ER 803(a)(6). RCW 5.45.020 provides:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 10.96.030 provides, in relevant part:

(1) The requirements of RCW 5.45.020 regarding business records as evidence may be satisfied by an affidavit, declaration, or certification that complies with subsection (2) of this section, without the need for testimony from the custodian of records, ...

(2) To be admissible without testimony from the custodian of records, business records must be accompanied by an affidavit, declaration, or certification by its record custodian or other qualified person that includes contact information for the witness completing the document and attests to the following:

(a) The witness is the custodian of the record or sets forth evidence that the witness is qualified to testify about the record;

(b) The record was made at or near the time of the act, condition, or event set forth in the record by, or from information transmitted by, a person with knowledge of those matters;

(c) The record was made in the regular course of business;

(d) The identity of the record and the mode of its preparation; and

(e) Either the record is the original or that it is a duplicate that accurately reproduces the original.

(Emphasis added). The Legislature enacted RCW 10.96.030 to facilitate the production of records relevant to criminal prosecutions, especially when the records are maintained out-of-state. RCW 10.96.005.

- b. The “Certification of Custodian of Records” failed to include an attestation as to the mode of preparation of the attached documents, in violation of RCW 10.96.030(2)(d).

Officer Finkel testified that she obtained a search warrant for the cellular telephone records for Ms. Lee’s telephone and Mr. Sommer’s telephone from Verizon Wireless.³ 9RP 32-33. Officer Finkel stated, “I asked for a variety of things. I wanted incoming and outgoing phone calls,

³ The search warrant is not in the record.

I wanted who the phone belonged to, how long that person had had that phone number. I asked for cell tower designations – just a variety of different identifying information on the cell phone records.” 9RP 34-35. In response, she received two e-mails from Verizon Wireless, each of which included a document captioned “Certification of Custodian of Records” and documents purporting to represent the requested information. 9RP 34-35; Ex. 34, 35 (attached as Appendix A).

Computer records are treated the same as other business records, but the proponent must show that “the sources of information, method and time of preparation were such as to justify admission.” State v. Ben-Neth, 34 Wn. App. 600, 603, 663 P.2d 156 (1983). Here, the certification contained boilerplate language, but did not describe the mode of preparation of the attached documents, as required by RCW 10.96.030(2)(d). Rather, the certification merely provided, “Computer generated records are compiled by computer systems maintained by our company/organization.” Ex. 34 at 1; Ex. 35 at 1. There is no indication whether the attached documents were in fact computer generated, much less what action the custodian took to generate the records or how the records were compiled. Cf. State v. Fraser, 170 Wn. App. 13, 25, 282 P.3d 152 (2012) (“The [cellular telephone] records were introduced

through the testimony of a witness from the cell phone company who explained how the reports were generated from stored data.”).

At trial, the State incorrectly contended this issue was settled by State v. Lee, 159 Wn. App. 795, 247 P.3d 470 (2011). In Lee, the defendants argued an affidavit authenticating business records was itself “testimonial.” 159 Wn. App. at 816-18. Relying on Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), this Court disagreed, and noted the affidavit of authentication was not testimonial when it merely attested to the authenticity of the attached documents but did not otherwise provide evidence against the defendant. Id. Because the defendants did not argue the affidavit of authentication failed to comport with RCW 10.96.030, the State’s reliance on Lee was misplaced.

The certification did not comply with the strict, specific requirements for admission without testimony from the person who prepared a business record. Absent testimony from a qualified person regarding the mode of preparation, the attached documents were not properly authenticated and, therefore, inadmissible as hearsay.

c. This Court should reverse Mr. Sommer’s convictions.

Evidentiary rulings are reviewed for abuse of discretion. State v. C.J., 148 Wn.2d 672, 686, 63 P.3d 772 (2003). A court abuses its

discretion when the decision is manifestly unreasonable or is based on untenable grounds or reasons. State v. Kramer, 167 Wn.2d 668, 701, 940 P.2d 1239 (1997); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court also abuses its discretion when its decision is based on an erroneous interpretation of the law. State v. Malone, 138 Wn. App. 587, 592-93, 157 P.3d 909 (2007) (citing State v. Miles, 77 Wn.2d 593, 464 P.2d 723 (1970) and State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989)).

Here, the trial court abused its discretion when it accepted the certification without scrutinizing its sufficiency. As such, admission of the documents based on the deficient certification was based on untenable reasons and an erroneous assessment of the specific statutory requirements for authentication of a record.

The error was highly prejudicial. The prosecutor relied on the documents from Verizon Wireless to prove a violation of a court order based on telephone calls. 10RP 84. A significant portion of Officer Finkel's testimony concerned the documents, and she created two color-coded exhibits, admitted for demonstrative purposes, based on the records and the attached interpretive key. 9RP 32-37, 53-71; Ex. 49, 50. In closing argument, the prosecutor stressed that the documents from Verizon Wireless bolstered Ms. Lee's version of events. "More than anything in

this case, you have corroboration,” and stated, “Phone records don’t lie.”

10 RP 97, 98.

Reversal is required.

2. The documents attached to the two e-mails, “Explanation Form For Historical Records” and purported records of cellular telephone calls were admitted without an opportunity to cross-examine the person who created the document, in violation of Mr. Sommer’s constitutional right to confront witnesses against him.

a. The Confrontation Clause guarantees the right of a defendant to cross-examine the declarant of any testimonial out-of-court statement offered against him in a criminal trial.

The Confrontation Clause of the Sixth Amendment provides “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. VI. The Confrontation Clause “guarantees a defendant’s right to confront those ‘who bear testimony’ against him.” Melendez-Diaz, 557 U.S. at 309 (quoting Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)). The Confrontation Clause “bars ‘admission of testimonial statements of a witness who did not appear at trial unless [the declarant] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.’” Davis v. Washington, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (quoting Crawford, 541 U.S.

at 53-54). A Confrontation Clause challenge is reviewed de novo. State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007).

A business record is an out-of-court statement. ER 803(a)(6). Such a record is “testimonial” when it was created for the purpose of establishing or proving a fact at trial, rather than for the administration of the business’s internal affairs.⁴ Melendez-Diaz, 557 U.S. at 310. If the record was created for the purpose of establishing a fact at trial, the defendant must be afforded the opportunity to cross-examine the person who created the record to test the procedures and methodologies employed in the creation of the record. Bullcoming v. New Mexico, __ U.S. __, 131 S.Ct. 2705, 2713, 2715, 180 L.Ed.2d 610 (2011).

The State bears the burden of proving a statement is not testimonial. State v. Koslowski, 166 Wn.2d 409, 417 n.3, 209 P.3d 479 (2009); State v. Hurtado, __ Wn. App. __, 294 P.3d 838, 843 (2013).

⁴ See ER 803(a)(6); RCW 5.45.020; RCW 10.96.030. A business record that is non-testimonial may be admitted without triggering the protections of the Confrontation Clause. Melendez-Diaz, 557 U.S. at 324. A business record is non-testimonial when it is the “routine product of an efficient clerical system” such that cross-examination would be pointless. In re Welfare of J.M., 130 Wn. App. 912, 923, 125 P.3d 245 (2005) (quoting Young v. Liddington, 50 Wn.2d 78, 83, 309 P.2d 781 (1957)).

- b. The document captioned “Explanation Form For Historical Records,” as well as the cellular telephone records created specifically for use at trial, were testimonial and erroneously admitted when Mr. Sommer did not have the opportunity to cross-examine the person who created the documents.

The documents identified as the cellular telephone records of Ms. Lee and Mr. Sommer were produced in response to Office Finkel’s search warrant. The officer obtained the search warrant for the records specifically to establish Mr. Sommer made telephone calls to Ms. Lee on the date and at the times asserted. 9RP 34-35. Therefore, the records sent to the officer via e-mail did not represent the complete telephone records of Ms. Lee and Mr. Sommer maintained by Verizon Wireless, but, rather, the records were edited and the resulting documents were created specifically in response to the search warrant and to establish whether Mr. Sommer called Ms. Lee.

In addition, the e-mail included a document captioned “Explanation Form For Historical Records,” a key to interpret the other documents. Ex. 34 at 2; Ex. 35 at 2. However, the document does not specifically refer to the telephone records of Ms. Lee or Mr. Sommer. Because this document does not refer to any “act(s), condition(s), or event(s) set forth in the records,” it cannot have been made “at or near the

time of” such acts, conditions, or events, contrary to the attestation of the custodian of records. See Ex. 34 at 1; Ex. 35 at 1.

The key was clearly included by the custodian of records to provide an interpretation of the attached documents. Officer Finkel acknowledged, “Verizon also very kindly provided this key that explains the different – the different columns and what they mean.” 9RP 54. As noted in Melendez-Diaz, however, a custodian of records may not furnish his interpretation of what the records mean or certify to its substance or effect:

The dissent identifies a single class of evidence which, though prepared for use at trial, was traditionally admissible: a clerk’s certificate authenticating an official record – or a copy thereof – for use as evidence. But a clerk’s authority in that regard was narrowly circumscribed. He was permitted “to certify to the correctness of a copy of a record kept in his office,” but had “no authority to furnish, as evidence for a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect.”

557 U.S. at 322 (internal citations omitted).

Absent an opportunity to cross-examine the person who created the e-mail, admission of the e-mail from Verizon Wireless that included incomplete records and a key to interpret the records violated Mr. Sommer’s right to confrontation.

- c. The error in admitting the documents in violation of Mr. Sommer's constitutional right to confrontation requires reversal.

Constitutional error is presumed prejudicial. State v. Jasper, 174 Wn.2d 96, 117, 271 P.3d 876 (2012). A violation of the Confrontation Clause requires reversal unless the State can prove the violation was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Shafer, 156 Wn.2d 381, 395, 128 P.3d 87 (2006). "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Fahy v. State of Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963).

The State cannot meet its burden here. As discussed, the prosecutor relied heavily on the documents from Verizon Wireless, Officer Finkel testified at length about the documents and created two color-coded exhibits purporting to explain the documents based on the attached interpretive key. 9RP 32-37, 53-71; 10 RP 84; Ex. 49, 50. And in closing argument, the prosecutor stated, "Phone records don't lie." 10 RP 98.

In light of the emphasis placed by the State on the documents, the State cannot now establish the erroneous admission of the documents was harmless beyond a reasonable doubt. Reversal is required.

3. The trial court exceeded its authority when it imposed a term of community custody that, when added to the term of confinement, exceeded the statutory maximum sentence for the offenses.

- a. The SRA requires a sentencing court to impose a sentence in which the combined terms of confinement and supervision do not exceed the statutory maximum sentence.

An erroneous sentence may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 521 (1999). The legality of a sentence is reviewed de novo. State v. Franklin, 172 Wn.2d 831, 835, 263 P.3d 585 (2011); In re Pers. Restraint of Brooks, 166 Wn.2d 664, 667, 211 P.3d 1023 (2009).

“A trial court only possesses the power to impose sentences provided by law.” In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980); accord In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A court’s felony sentencing authority derives solely from the Sentencing Reform Act (SRA). RCW 9.94A.505(1).⁵

The statutory maximum for an offense sets the ceiling for punishment that may be imposed. RCW 9.94A.505(5) provides, in relevant part, “[A] court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory

⁵ RCW 9.94A.505(1) provides, “When a person is convicted of a felony, the court shall impose punishment as provided in this chapter.”

maximum for a crime as provided in chapter 9A.20 RCW.” The term of community custody, when added to the term of confinement, may not exceed the statutory maximum sentence for an offense. RCW

9.94A.701(9) provides:

The term of community custody specified by this section shall be reduced by the court whenever an offender’s standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

Mr. Sommer was convicted of, inter alia, three counts of felony violation of a court order, in violation of RCW 26.50.110(1), (4), a Class C felony and a crime against a person. RCW 9.94A.441(2); RCW 26.50.110(5) The statutory maximum sentence for a Class C felony is 60 months. RCW 9A.20.021(1). The statutory term of community custody for a crime against a person is 12 months. RCW 9.94A.701(3)(a). Although the jury found the offenses were aggravated domestic violence offenses, the State did not request, nor did the court impose, a sentence above the standard range. 11 RP 54. Rather, on each count, the trial court imposed a standard range sentence of 58 months of confinement, plus 12 months of community custody. CP 106, 108, 109. The combined terms total 70 months, 10 months above the statutory maximum. Because the total of these terms exceeds the statutory maximum, the sentence is erroneous.

b. The proper remedy is reversal.

The SRA limits the authority of the sentencing court in this case to a 60-month combined total term of confinement and term of community custody. RCW 9.94A.709(9) requires the sentencing court to reduce the term of community custody in excess of the statutory maximum term. Accordingly, this matter should be remanded to the sentencing court to reduce the term of community custody to no more than two months. See State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012); State v. Land, 172 Wn. App. 593, 295 P.3d 783, 786-87 (2013).

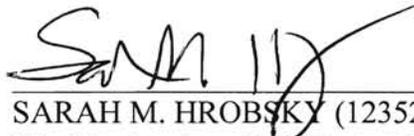
E. CONCLUSION

The “Certification of the Custodian of Records” was insufficient to self-authenticate the appended documents. Admission of documents identified as the cellular telephone records of Mr. Sommer and Ms. Lee were admitted without an opportunity to cross-examine the person who prepared the documents, in violation of the rule against hearsay, as well as in violation of Mr. Sommer’s right to confront witnesses against him. The trial court exceeded its statutory authority when it imposed a term of confinement and community custody that exceeded the statutory maximum for the offense. For the foregoing reasons, Mr. Sommer requests this Court reverse his convictions for felony harassment and felony violation of a court order based on alleged telephone calls. In the

alternative, Mr. Sommer requests this Court reverse and remand for sentencing within the statutory maximum on each count of felony violation of a court order.

DATED this 2nd day of April 2013.

Respectfully submitted,



SARAH M. HROBSKY (12352)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX

Certification of Custodian of Records

1. My name, job title, employer, mailing address, telephone number and email address are as follows:

Name: Grant Fields
Job Title: Card Order Analyst
Mailing Address: 180 Warkyton Valley Rd. Belmhor NJ 07921
Telephone number: 800-451-5242 email: _____

2. I am custodian of records for Verizon Wireless (company/organization). As part of my duties I have researched, made copies of, and am providing with this certification, records that are kept by this company/organization in the regular course of business, and that company/organization relies on these records for various company/organization related purposes.

3. As the custodian of records for this company/organization, I am aware that the records provided were made in the regular course of our business, at or near the time of the act(s), condition(s) or event(s) set forth in the records, by (or from information transmitted by (a person with knowledge of the matters that are contained in the records.

4. The records provided are either the originals, or a duplicate of the originals that accurately reproduces the originals. Computer generated records are compiled by computer systems maintained by our company/organization.

5. I have provided all the records identified by the request which is identified as (choose one) search warrant number 11-817 King County Superior Court.

I certify and declare under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct:

Signed this 25th day of January, 2012, at Bedminster/Somerset (City/County) in the State of New Jersey.

(signature)

YAJAIRA RIVERA
Commission # 22-18621
Notary Public, State of New Jersey
My Commission Expires
August 26, 2013



Explanation Form For Historical Records

<u>Network Element name</u>	<u>Mobile Directory Number</u>	<u>Dialed Digit Number</u>	<u>Call Direction</u>	<u>Seizure Dt Tm</u>	<u>Seizure Duration</u>	<u>First Serving Cell Site</u>	<u>Last Serving Cell Site</u>	<u>Calling Party Number</u>
This is the switching equipment that transacted the call. A switch is named by the basic geographic area it covers. Switches rout calls for hundreds of cell sites.	This is your target #	This is the number dialed to initiate the call. For inbound calls this number will be the same as the CUST ACCT column and for outbound calls this is the number your target dialed.	<p>This is the type of call, e.g. inbound, outbound, or voicemail.</p> <p>Inbound calls display the following numbers: 0 & 6. Calls to voicemail display the letter "F."</p> <p>Outbound calls display the following numbers: 1 & 3</p> <p>Mobile to Mobile calls do not capture cell sites and display the number 2. Any other letter or number is a routing or unknown call type and does not detail actual transactional data for a completed call.</p>	This is the exact date and time of the start of each call	This is the duration of the call in seconds	This is the cell site that the target phone was hitting off of when the call initiated.	This is the cell site that the target phone was hitting off of when the call terminated.	This is the calling party that initiated the call. If the call is outbound this column will be the same as the CUST ACCT number. If the call is inbound, this is the number that dialed your target.

Codes:

- *86 is voicemail retrieval
- #225 is checking account balance
- #646 is checking minutes
- #777 is data/web services
- #738 is prepaid voicemail retrieval
- #729 is adding minutes for prepaid
- *67 is used to block the mobile #
- *82 is used to unblock the mobile #

Network Element Name	Mobile Directory Number	Dialed Digit Number	Call Direction	Seizure Dt Tm	Seizure Duration	First Servng Cell Site	First Servng Cell Face	Last Servng Cell Site	Last Servng Cell Face	Calling Party Number
Tacoma3	2067998143	1.12221E+13 F		9/22/2011 1:19	6	0	0	0	0	2063075799
RedmondRidge	2067998143	1.12221E+13 F		9/22/2011 8:30	26	0	0	0	0	2063075799
RedmondRidge	2067998143	3075799	3	9/22/2011 9:19	125	328	2	328	2	2067998143
RedmondRidge	2067998143	*86	3	9/22/2011 9:37	42	328	2	328	2	2067998143
RedmondRidge	2067998143	1.12221E+13 F		9/22/2011 9:37	40	0	0	0	0	2067998143
RedmondRidge	2067998143	1.12221E+13 F		9/22/2011 9:43	4	328	2	328	2	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 9:47	526	328	2	328	2	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 9:56	93	328	2	328	2	2063075799
RedmondRidge	2067998143	3075799	3	9/22/2011 10:21	127	67	2	67	4	2067998143
RedmondRidge	2067998143	2067998143	6	9/22/2011 10:23	2	67	4	67	4	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 10:24	49	67	4	67	2	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 10:25	218	328	2	328	2	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 10:29	363	328	2	328	2	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 10:51	137	50	3	50	3	2063075799
RedmondRidge	2067998143	3075799	3	9/22/2011 10:54	58	50	3	50	3	2067998143
RedmondRidge	2067998143	2067998143	6	9/22/2011 11:29	47	70	3	328	3	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 11:30	40	328	3	67	4	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 11:31	30	67	4	67	4	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 11:32	30	67	4	67	4	2063075799
RedmondRidge	2067998143	4258646948	3	9/22/2011 11:33	94	328	3	328	2	2067998143
RedmondRidge	2067998143	1.12221E+13 F		9/22/2011 11:33	4	0	0	0	0	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 11:35	17	328	2	328	2	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 11:36	10	328	2	328	2	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 11:36	34	328	2	328	2	2063075799
RedmondRidge	2067998143	1.12221E+13 F		9/22/2011 11:37	4	328	2	328	2	2063075799
RedmondRidge	2067998143	1.12221E+13 F		9/22/2011 11:38	4	328	2	328	2	2063075799
RedmondRidge	2067998143	1.12221E+13 F		9/22/2011 11:39	3	328	2	328	2	2063075799
RedmondRidge	2067998143	1.12221E+13 F		9/22/2011 11:40	82	328	2	328	2	2063075799
RedmondRidge	2067998143	*86	3	9/22/2011 11:45	68	328	2	328	2	2067998143
RedmondRidge	2067998143	1.12221E+13 F		9/22/2011 11:45	66	0	0	0	0	2067998143
RedmondRidge	2067998143	2067998143	6	9/22/2011 11:46	147	328	2	328	2	2063075799
Tacoma3	2067998143	2067199845	5	9/22/2011 11:46	146	0	0	0	0	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 11:55	25	328	2	328	2	2063075799

RedmondRidge	2067998143	1.12221E+13 F		9/22/2011 13:28	87	0	0	0	0	2067998143
RedmondRidge	2067998143	4258646948	3	9/22/2011 13:36	303	328	2	328	2	2067998143
RedmondRidge	2067998143	4254526917	3	9/22/2011 13:47	26	328	2	328	2	2067998143
RedmondRidge	2067998143	4255775656	3	9/22/2011 13:48	598	328	2	328	2	2067998143
RedmondRidge	2067998143	4258646948	3	9/22/2011 14:07	50	328	2	328	2	2067998143
Seattle2	2067998143	2067199786	5	9/22/2011 14:08	21	0	0	0	0	4258646948
RedmondRidge	2067998143	2067998143	6	9/22/2011 14:08	17	328	2	328	2	4258646948
RedmondRidge	2067998143	4258646948	3	9/22/2011 14:34	190	328	2	328	2	2067998143
Tacoma3	2067998143	2067199871	5	9/22/2011 14:37	51	0	0	0	0	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 14:37	47	328	2	328	2	2063075799
RedmondRidge	2067998143	4258646948	3	9/22/2011 14:38	77	328	2	328	2	2067998143
Tacoma3	2067998143	1.12221E+13 F		9/22/2011 14:38	4	0	0	0	0	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 14:39	10	328	2	328	2	2063075799
Tacoma3	2067998143	2067199951	5	9/22/2011 14:39	182	0	0	0	0	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 14:40	160	328	2	328	2	2063075799
Tacoma3	2067998143	2067199961	5	9/22/2011 14:43	223	0	0	0	0	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 14:43	217	328	2	328	2	2063075799
Tacoma3	2067998143	2067199901	5	9/22/2011 14:46	157	0	0	0	0	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 14:47	152	328	2	37	4	2063075799
Tacoma3	2067998143	2067199814	5	9/22/2011 14:49	74	0	0	0	0	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 14:49	68	328	2	37	4	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 14:50	44	37	4	37	4	4258646948
Seattle2	2067998143	2067199689	5	9/22/2011 14:50	45	0	0	0	0	4258646948
Tacoma3	2067998143	2067199778	5	9/22/2011 14:51	1726	0	0	0	0	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 14:51	1724	37	4	328	2	2063075799
RedmondRidge	2067998143	4258646948	3	9/22/2011 15:21	40	328	2	328	2	2067998143
Seattle2	2067998143	2067199952	5	9/22/2011 15:58	75	0	0	0	0	4254523696
RedmondRidge	2067998143	2067998143	6	9/22/2011 15:58	73	328	2	328	2	4254523696
Tacoma3	2067998143	1.12221E+13 F		9/22/2011 22:06	7	0	0	0	0	2063075799
RedmondRidge	2067998143	2067998143	6	9/22/2011 22:12	17	328	2	328	2	2063075799
Tacoma3	2067998143	1.12221E+13 F		9/22/2011 22:12	4	0	0	0	0	2063075799

Search-Value	Account Number	Account Name	Status	Effective Period
2067998143	771988073-1	STEVEN SOMMER	S	07/09/2011-

Searched-Value	Other MTN	Stat. Code	Stat. Reas. Code	Stat-Reas. Eff. Date	Eff. Date	
2067998143	206-307-5798	C		45	7/9/2011	12/8/2010
2067998143	206-307-5799	B		35	11/14/2011	12/8/2010
2067998143	206-799-8143	S		21	10/14/2011	7/9/2011

35

Certification of Custodian of Records

1
2
3 1. My name, job title, employer, mailing address, telephone number and email address are as follows:

4 Name: David Pagan;
5 Job Title: Coordinator;
6 Mailing Address: 180 Washington Valley Rd Bedminster, NJ 07921;
7 Telephone number: 800-451-5242; email: _____.

8 2. I am custodian of records for Verizon Wireless (company/organization).
9 As part of my duties I have researched, made copies of, and am providing with this
10 certification, records that are kept by this company/organization in the regular course of
11 business, and that company/organization relies on these records for various
12 company/organization related purposes.

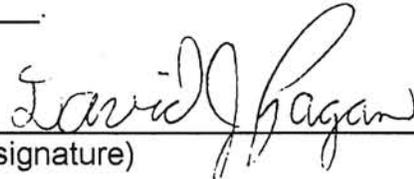
13 3. As the custodian of records for this company/organization, I am aware that the
14 records provided were made in the regular course of our business, at or near the time of
15 the act(s), condition(s) or event(s) set forth in the records, by (or from information
16 transmitted by (a person with knowledge of the matters that are contained in the
17 records.

18 4. The records provided are either the originals, or a duplicate of the originals that
19 accurately reproduces the originals. Computer generated records are compiled by
20 computer systems maintained by our company/organization.

21 5. I have provided all the records identified by the request which is identified as (choose
22 one) search warrant number 11-817 A King County Superior Court.

23 I certify and declare under penalty of perjury under the laws of the State of Washington
24 that the forgoing is true and correct:

25 Signed this 25th day of January, 2012, at Bedminster/Somerset (City/County)
26 in the State of New Jersey.

27

(signature)



Explanation Form For Historical Records

<u>Network Element name</u>	<u>Mobile Directory Number</u>	<u>Dialed Digit Number</u>	<u>Call Direction</u>	<u>Seizure Dt Tm</u>	<u>Seizure Duration</u>	<u>First Serving Cell Site</u>	<u>Last Serving Cell Site</u>	<u>Calling Party Number</u>
This is the switching equipment that transacted the call. A switch is named by the basic geographic area it covers. Switches rout calls for hundreds of cell sites.	This is your target #	This is the number dialed to initiate the call. For inbound calls this number will be the same as the CUST ACCT column and for outbound calls this is the number your target dialed.	This is the type of call, e.g. inbound, outbound, or voicemail. Inbound calls display the following numbers: 0 & 6. Calls to voicemail display the letter "F." Outbound calls display the following numbers: 1 & 3 Mobile to Mobile calls do not capture cell sites and display the number 2. Any other letter or number is a routing or unknown call type and does not detail actual transactional data for a completed call.	This is the exact date and time of the start of each call	This is the duration of the call in seconds	This is the cell site that the target phone was hitting off of when the call initiated.	This is the cell site that the target phone was hitting off of when the call terminated.	This is the calling party that initiated the call. If the call is outbound this column will be the same as the CUST ACCT number. If the call is inbound, this is the number that dialed your target.

Codes:

- *86 is voicemail retrieval
- #225 is checking account balance
- #646 is checking minutes
- #777 is data/web services
- #738 is prepaid voicemail retrieval
- #729 is adding minutes for prepaid
- *67 is used to block the mobile #
- *82 is used to unblock the mobile #

Mobile						
Network Element	Directory	Dialed Digit	Call	Seizure	Calling Party	
Name	Number	Number	Direction	Seizure Dt Tm	Duration	Number
Tacoma3	2063075799	2532290995	3	9/22/2011 1:19	2	2063075799
Tacoma3	2063075799	2067998143	3	9/22/2011 1:19	8	2063075799
Tacoma3	2063075799	2063075799	6	9/22/2011 5:29	203	2532543332
Tacoma3	2063075799	2063075799	6	9/22/2011 7:48	154	2537777909
Tacoma3	2063075799	2062059200	3	9/22/2011 8:14	183	2063075799
RedmondRidge	2063075799	2062059200	3	9/22/2011 8:26	67	2063075799
RedmondRidge	2063075799	2067998143	3	9/22/2011 8:30	27	2063075799
RedmondRidge	2063075799	2062059200	3	9/22/2011 8:32	91	2063075799
Tacoma3	2063075799	2067199717	5	9/22/2011 9:11	23	2537777909
RedmondRidge	2063075799	2063075799	6	9/22/2011 9:11	21	2537777909
RedmondRidge	2063075799	1.12221E+13 F		9/22/2011 9:20	90	2067998143
RedmondRidge	2063075799	2067998143	3	9/22/2011 9:43	38	2063075799
RedmondRidge	2063075799 *86		3	9/22/2011 9:44	77	2063075799
RedmondRidge	2063075799	1.12221E+13 F		9/22/2011 9:44	77	2063075799
RedmondRidge	2063075799 *672067998143		3	9/22/2011 9:46	534	2063075799
RedmondRidge	2063075799 *672067998143		3	9/22/2011 9:56	100	2063075799
RedmondRidge	2063075799	2532543332	3	9/22/2011 10:08	2	2063075799
RedmondRidge	2063075799	2537777909	3	9/22/2011 10:08	40	2063075799
RedmondRidge	2063075799	2535769612	3	9/22/2011 10:09	725	2063075799
RedmondRidge	2063075799	2063075799	6	9/22/2011 10:21	128	2067998143
RedmondRidge	2063075799	2067998143	3	9/22/2011 10:23	3	2063075799
RedmondRidge	2063075799 *672067998143		3	9/22/2011 10:24	57	2063075799
RedmondRidge	2063075799 *672067998143		3	9/22/2011 10:25	222	2063075799
RedmondRidge	2063075799 *672067998143		3	9/22/2011 10:29	368	2063075799
RedmondRidge	2063075799	2534600108	3	9/22/2011 10:38	46	2063075799
RedmondRidge	2063075799	3604808304	3	9/22/2011 10:40	63	2063075799
RedmondRidge	2063075799	2063075799	6	9/22/2011 10:41	478	2534686340

RedmondRidge	2063075799 *672067998143		3	9/22/2011 11:33	6	2063075799
RedmondRidge	2063075799 *672067998143		3	9/22/2011 11:35	22	2063075799
RedmondRidge	2063075799 *672067998143		3	9/22/2011 11:36	17	2063075799
RedmondRidge	2063075799 *672067998143		3	9/22/2011 11:36	43	2063075799
RedmondRidge	2063075799 *672067998143		3	9/22/2011 11:37	34	2063075799
RedmondRidge	2063075799 *672067998143		3	9/22/2011 11:38	34	2063075799
RedmondRidge	2063075799 *672067998143		3	9/22/2011 11:38	33	2063075799
RedmondRidge	2063075799 *672067998143		3	9/22/2011 11:39	116	2063075799
Tacoma3	2063075799 2067199952		5	9/22/2011 11:40	314	3604808304
RedmondRidge	2063075799 2063075799		6	9/22/2011 11:41	247	3604808304
Tacoma3	2063075799 *672067998143		3	9/22/2011 11:46	147	2063075799
Tacoma3	2063075799 *672067998143		3	9/22/2011 11:55	117	2063075799
Tacoma3	2063075799 *672067998143		3	9/22/2011 12:07	35	2063075799
Tacoma3	2063075799 3604808304		3	9/22/2011 12:10	90	2063075799
Tacoma3	2063075799 *86		3	9/22/2011 12:12	168	2063075799
Tacoma3	2063075799 1.12221E+13 F			9/22/2011 12:12	167	2063075799
RedmondRidge	2063075799 1.12221E+13 F			9/22/2011 12:32	14	2067998143
RedmondRidge	2063075799 1.12221E+13 F			9/22/2011 12:38	6	2067998143
Tacoma3	2063075799 2535769612		3	9/22/2011 12:41	32	2063075799
RedmondRidge	2063075799 1.12221E+13 F			9/22/2011 12:45	9	2067998143
Tacoma3	2063075799 2063075799		6	9/22/2011 13:48	30	2537777909
Tacoma3	2063075799 2063075799		6	9/22/2011 13:59	25	2535769612
RedmondRidge	2063075799 1.12221E+13 F			9/22/2011 13:59	7	2535769612
Tacoma3	2063075799 2535769612		3	9/22/2011 14:02	64	2063075799
Tacoma3	2063075799 2535769612		3	9/22/2011 14:35	53	2063075799
Tacoma3	2063075799 *672067998143		3	9/22/2011 14:37	54	2063075799
Tacoma3	2063075799 *672067998143		3	9/22/2011 14:38	6	2063075799
Tacoma3	2063075799 *672067998143		3	9/22/2011 14:39	185	2063075799
Tacoma3	2063075799 *672067998143		3	9/22/2011 14:42	227	2063075799
Tacoma3	2063075799 *672067998143		3	9/22/2011 14:46	160	2063075799

Tacoma3	2063075799	2537777909	3	9/22/2011 15:53	27	2063075799
Tacoma3	2063075799	2534593948	3	9/22/2011 20:09	160	2063075799
RedmondRidge	2063075799	2532785118	5	9/22/2011 20:10	129	3605614155
Tacoma3	2063075799	2063075799	6	9/22/2011 20:10	130	3605614155
RedmondRidge	2063075799	2532785057	5	9/22/2011 20:19	149	3605614155
Tacoma3	2063075799	2063075799	6	9/22/2011 20:19	145	3605614155
RedmondRidge	2063075799	2532784958	5	9/22/2011 20:23	65	3605614155
Tacoma3	2063075799	2063075799	6	9/22/2011 20:24	61	3605614155
Tacoma3	2063075799	2063075799	6	9/22/2011 21:34	25	3602593203
RedmondRidge	2063075799	1.12221E+13 F		9/22/2011 21:35	6	3602593203
RedmondRidge	2063075799	2532785129	5	9/22/2011 21:35	30	3602593203
Tacoma3	2063075799	2063075799	6	9/22/2011 21:35	25	3602593203
Tacoma3	2063075799	3602593203	3	9/22/2011 21:36	40	2063075799
RedmondRidge	2063075799	2532784918	5	9/22/2011 21:37	507	2532290995
Tacoma3	2063075799	2063075799	6	9/22/2011 21:37	507	2532290995
Tacoma3	2063075799	2536788728	3	9/22/2011 21:46	543	2063075799
Tacoma3	2063075799 *672067998143		3	9/22/2011 22:06	8	2063075799
Tacoma3	2063075799 *672067998143		3	9/22/2011 22:12	30	2063075799
Tacoma3	2063075799	3602593203	3	9/22/2011 22:16	36	2063075799
RedmondRidge	2063075799	2532784906	5	9/22/2011 22:16	177	3602593203
Tacoma3	2063075799	2063075799	6	9/22/2011 22:17	171	3602593203
Tacoma3	2063075799	2532543332	3	9/22/2011 22:23	74	2063075799
RedmondRidge	2063075799	2532784909	5	9/22/2011 22:45	111	2532290995
Tacoma3	2063075799	2063075799	6	9/22/2011 22:45	107	2532290995
Tacoma3	2063075799	2537777909	3	9/22/2011 22:51	425	2063075799
Tacoma3	2063075799	2534593948	3	9/22/2011 23:33	31	2063075799

Search-Value	Account Number	Account Name	Status	Effective Period
2063075799	771988073-1	STEVEN SOMMER	B	12/08/2010-

Searched-Value	Other MTN	Stat. Code	Stat. Reas. Code	Stat-Reas. Eff. Date	Eff. Date
2063075799	206-307-5798	C		7/9/2011	12/8/2010
2063075799	206-307-5799	B		11/14/2011	12/8/2010
2063075799	206-799-8143	S		10/14/2011	7/9/2011

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68958-4-I
v.)	
)	
STEVEN SOMMER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF APRIL, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> STEVEN SOMMER 358734 WASHINGTON STATE PENITENTIARY 1313 N 13 TH AVE WALLA WALLA, WA 99362	(X) () ()	U.S. MAIL HAND DELIVERY _____

2013 APR 26 PM 4:52
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF APRIL, 2013.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710